

No. 08-15927

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.

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

REPLY BRIEF OF APPELLANT DONGXIAO YUE

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I. INTRODUCTION

Plaintiff-Appellant Dongxiao Yue authored the “YUE PWRPC” software (Reg. No. TXu 1-576-987)¹ before he founded Netbula. As a derivative work of YUE PWRPC, the “1996 Copyright” litigated in *Netbula-Sun* only protects the additional code that Netbula added from July 1996 to September 1996. Yue is entitled to bring infringement claims on his own copyrights.

The key question in this appeal is whether Yue and his copyrights were adequately represented in the *Netbula-Sun* action. The answer is no. At the district court, Defendants asserted that Yue and Netbula had conflicting claims on the copyrights. This conflict alone precludes a privity relationship between the two. In addition, the *Netbula-Sun* court specifically excluded Yue and explicitly excluded the YUE PWRPC, “00-SDK” and “2K4” copyrights. Therefore, Yue, a non-party to *Netbula-Sun*, was not represented in *Netbula-Sun* as to his copyright claims.

The *Adams* case the district court relied on dealt with the situation where a party filed a second suit. In this case, Yue is a non-party to *Netbula-Sun*. Non-party preclusion by virtual representation has been recently disapproved by the Supreme Court.

The rest of Sun’s arguments will be also addressed in more detail below.

¹ Registered November 27, 2007

II. SUN'S SHAM ARGUMENTS

In Defendants' Answer Brief ("DAB"), Sun claims that Netbula assigned the copyrights to Yue "after the close of discovery" in *Netbula-Sun*. DAB 2. This is false. The "00-SDK" and "2K4" copyrights were assigned to Yue on September 26, 2007. ER.3:17-20. Netbula deposed Sun's FRCP 30(b) (6) witness Michael Abramovitz on October 23, 2007. ER.31:27-28; See also, Exhibits to Appellees' Supplemental Request for Judicial Notice, SRJN071. There had been very little discovery in *Netbula-Sun*². On January 10, 2008, the *Netbula-Sun* court ordered that the "[d]iscovery issues shall be discussed at next status conference hearing" set for January 22, 2008. See, Civil Minutes (Document 136), Exhibit E to Appellant's Request for Judicial Notice ("RFJN").

Defendants also contend that Yue's action was a "parallel lawsuit to circumvent" the *Netbula-Sun* summary judgment order. This is false. Yue filed this lawsuit on November 19, 2007. The *Netbula-Sun* court issued its summary judge order on January 18, 2008. Yue could not have predicted the outcome of *Yue-Sun* when he filed the suit. In fact, the *Yue-Sun* complaint was directly derived from the Yue's October 22, 2007 motion to intervene and join *Netbula-Sun*. That motion was before Sun's motion for summary

² The attorneys were planning for a jury trial in the *Netbula v. BindView* case scheduled for October 2007.

judgment in *Netbula-Sun*.

Falsus in uno, falsus in omnibus. The above are just two examples.

III. ARGUMENT

1. The Standard of Review Should be De Novo

Sun contends that the Court should follow *Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684 (9th Cir. 2007) and apply abuse of discretion standard on dismissing duplicative actions. As stated in Appellant's Opening Brief ("AOB"), the *Adams* case is inapplicable to this lawsuit. In *Adams*, the same party-plaintiff filed a second suit against the same defendants. In this lawsuit, a **non-party** to *Netbula-Sun* filed the second case. The controlling authority for the instant situation should be the copyright case *Kourtis v. Cameron*, 419 F.3d 989 (9th Cir. 2005) (no privity relationship between an employer and an employee who filed successive copyright lawsuits against the same defendant). This appeal has mixed questions of law and fact. *De novo* review is the proper standard on the dismissal order.

2. Yue is Entitled to His Copyright Claims

Copyright in a work "vests initially in the author or authors" of a work. 17 U.S.C. § 201(a). Yue authored the "YUE PWRPC" software from 1994 to July 1996, he has always been the owner of the YUE PWRPC.

Netbula, LLC was founded in July 1996. Its PowerRPC software was a derivative work of YUE PWRPC. First Amended Complaint of *Yue-Sun*

(“FAC”) at ¶ 15; ER.3:14-17. The 1996 version of PowerRPC has Registration No. TX 6-211-063 (the “1996 Copyright”). Netbula also registered other versions of PowerRPC, including the “00-SDK” (Reg. No. TX 6-437-847) and “2K4” (Reg. No TX 6-491-697) copyrights.

“ The copyright in a . . . derivative work extends *only* to the material contributed by the author of such work.” 17 U.S.C. § 103(b) (emphasis added). Elements drawn from a pre-existing work remain the property of the owner of the pre-existing work and “[i]t is irrelevant whether the pre-existing work is inseparably intertwined with the derivative work.” *Stewart v. Abend*, 495 U.S. 207, 223 (1990).

In *Oddo v. Ries*, 743 F.2d 630 (9th Cir. 1984), Oddo and Ries formed a partnership to create a book partially based on magazine articles Oddo previously wrote. Dissatisfied with Oddo’s progress, Ries hired another writer to complete the manuscript Oddo was writing and published the finished book. The Ninth Circuit found that Ries did not infringe the partnership’s copyright in the manuscript but infringed Oddo’s copyrights in the magazine articles. Here, like *Oddo*, Yue retained the copyrights in the YUE PWRPC software, from which PowerRPC was derived.

Defendants point out that Yue granted Netbula an “oral license” for creating derivative work. DAB 40. This fact shows that Yue retained the ownership of YUE PWRPC copyrights, because an exclusive copyright

license or transfer of copyright ownership must be in writing. *Konigsberg Intern. Inc. v. Rice*, 16 F.3d 355, 356–57 (9th Cir.1994). See also *Effects Assocs. Inc. v. Cohen*, 352 908 F.2d 555, 557–58 (9th Cir.1990).

3. Yue and Netbula Are Different Persons

Yue is a natural person; Netbula is an artificial entity founded in July 1996. Netbula never owned the YUE PWRPC copyright and never had standing to bring suit based on Yue’s 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) (individual cannot sue on copyrights owned by a company). See also, *Triple Tee Golf, Inc. v. Nike, Inc.*, NO. 4:04-CV-302-A. (N.D.Tex. 8-10-2007) (the corporation had no standing to sue on copyrights owned by its founder).

4. Yue has an Independent Interest in Pursuing Copyright Claims Based on the Yue PWRPC Copyright

YUE PWRPC was registered on November 27, 2007 with Registration Number TXu 1-576-987. Yue timely informed this Court and the court below about the status of registration³ in July 2008.

Sun claims that the “pre-July 1996” YUE PWRPC copyright protected the same thing: “the right to control copying of PowerRPC software”. DAB

³ “[I]n early September 2007, Netbula submitted a Form CA to the Copyright Office, stating that the 1996 Copyright was a derivative work of unpublished work written by [Yue] before July 1996.” ER.52:13-15.

36. This is incorrect. The “Netbula registrations” only cover the software code added by Netbula in those particular versions. The pre-Netbula elements Yue authored remain the property of Yue. Only Yue can assert copyrights claims based on his copyrights⁴. See, *Silvers*.

Under the copyright law, Yue is entitled to recover damages and defendants’ profits attributed to the infringement of Yue’s copyrights; and Netbula is entitled to recover damages and profits attributed to the infringement of Netbula’s copyrights. “Actual damages are usually determined by the loss in the fair market value of the copyright.” *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 708-09 (9th Cir.2004). In determining the damages, the features and functionality of the software are factors to be considered. See *Montgomery v. Noga*, 168 F.3d 1282, 1291-92 (11th Cir. 1999) (discussing the software features, speed, percentage of source code changes in the context of assessing damages). With respect to Defendants’ profits, the factors such as software features and even number of lines of code may be used as apportionment measures. For instance, in the *Netbula v. BindView* case, defense counsel Laurence Pulgram and Jedediah Wakefield attempted to use the lines of code to determine the apportionment of BindView’s profits.

⁴ The FAC alleges that Defendants had **no licenses** for those unauthorized copies. See Counts I-X of the FAC.

Defendants contend that “Netbula claimed to hold *all* such exclusive rights in the PowerRPC product.” DAB 34-35 (emphasis added). Defendants add the word “*all*” themselves. In *Netbula-Sun*, Netbula alleged *exclusive rights under the Copyright Act* with respect to “the only copyright at issue” -- the 1996 Copyright – in that case. Netbula had no exclusive rights with respect to the pre-Netbula YUE PWRPC code. Yue has the exclusive rights in the pre-Netbula software he wrote.

5. Defendants Asserted that Yue and Netbula had Conflicting Claims on the 1996 Copyright

As discussed at AOB 20, Defense counsel Laurence Pulgram wrote in one of the motions below:

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. The word “or” in the “whether ... or” construct leads to the question: does Yue hold the copyrights, or does Netbula hold the copyrights? Defendants elaborated their point further: for each part of the software, they would question who owns the copyrights of that part. Basically, they would pit Yue against Netbula in terms of copyright ownership. Two persons claiming the same copyrights are making conflicting claims.

Defendants’ game plan was fully revealed in the related litigation. See, ER.52:7-18, Declaration of Yue at ¶¶5-6 (“Laurence Pulgram pointed out

that [Yue] owned the copyright”). This gambit prompted Netbula to assign its “1996 Copyright” to Yue, in an effort to streamline the litigation. Netbula also assigned the other copyrights, including the “00-SDK” and “2K4” copyrights to Yue.

6. The District Court’s Erroneously Characterized the Assignment of the 1996 Copyright as “a bit of a shell game”

Because of the transfer of the 1996 Copyright, Netbula filed a motion to substitute Yue as the plaintiff as to the copyright claim in *Netbula-Sun*. The following was an exchange between Netbula’s former counsel Vonnah M. Brillet and former presiding judge on the reason of the assignment:

Ms. Brillet: Because of the fact that there are two portions of the code that have been involved. One set is the set that was created before the advent of Netbula, and the other set is after. So by making him a party in this action now, there would just be one owner.

THE COURT: *It’s a bit of a shell game, isn’t it? Isn’t that what it is? They are one in the same...* The only thing that’s accomplished there is that he gets to stand before the Court and makes arguments.

Transcript of the November 20, 2007 hearing of Netbula’s Motion to Substitute Party as to the Copyright Claim, pp.11:23-12:15; ER.39; SRNJ016-17 (emphasis added).

The former judge’s characterization of the transfer as “a shell game” was unfounded. “An author or proprietor of a literary work or manuscript [or other work protected by the Copyright Act] possesses such a right of sale as

fully and to the same extent as does the owner of any other piece of personal property. It is an incident of ownership.” *Davis v. Blige*, 505 F.3d 90, 98 (2nd Cir. 2007). See also, 17 U.S.C. § 201(d)(1). As the owner of the “1996”, “00-SDK” and “2K4” copyrights, Netbula had every right to transfer them to whoever it liked.

Defendants’ allegation that Netbula transferred the copyright *for the purpose* of allowing Yue to act *pro se* is unfounded. Yue always owned the YUE PWRPC copyright, he did not need additional copyrights to bring his action, *pro se* or not.

7. Yue Made Timely Requests to Join *Netbula-Sun*

On October 22, 2007, Yue filed a motion to intervene and join *Netbula-Sun*. For the timeliness of the intervention, Yue argued:

The parties are still engaged in discovery of the first phase of the case. There has been no dispositive motion filed. Therefore, Dr. Yue’s application to intervene is timely.

SRJN207 (emphasis added).

Defendants characterize Yue’s effort to join *Netbula-Sun* as “untimely motion to intervene.” DAB 48. The *Netbula-Sun* court made no findings on the timeliness of Yue’s motion; it simply granted Sun’s motion to vacate Yue’s motion in an *ex parte* proceeding.

The *Netbula-Sun* court set discovery cut-off for the “license/contract” issues of August 31, 2007. But, the parties agreed to extend the discovery

period. Sun took the deposition of Yue on September 12, 2007. Netbula deposed Sun's first witness Michael Melnick on September 19, 2007. One month later, on October 23, 2007⁵, Netbula deposed Sun's "30(b)(6)" witness -- Mr. Michael Abramovitz. See SRJN071 for the dates of the depositions.

The timing of *Netbula-Sun* discovery explains why Yue filed the motion to intervene and for injunctive relief in October 2007. At the December 6, 2006 TRO hearing, Magistrate Judge Bernard Zimmerman stated that

⁵ Mr. Abramovitz answered "I don't know" to basic questions in his deposition.

Q What kind of -- well, was there any kind of control in terms of the inside copying? Was there some kind of a list that was maintained at StorageTek of who actually made a copy of the program for their computer?

A I don't know.

Q Who would know that?

A I don't know.

...

Q Did ISVs have the right to further distribute the LibAttach programs to their customers?

A I don't know.

...

Q Okay. Who were the StorageTek people responsible for monitoring and accounting for LibAttach licenses?

A I don't know.

See, SRJN097-99 (Netbula's opposition to summary judgment motion).

plaintiff could come back for a preliminary injunction at “any time” after it had more evidence. SRJN285. Since Sun and StorageTek did not produce any witness for deposition until September 19, 2007, Yue’s October 22, 2007 motion to intervene and for injunctive relief was made without delay.

Yue recognized that it was far more efficient for him to join *Netbula-Sun* than to file a separate lawsuit. On October 25, 2007, he wrote to Sun’s defense counsel to seek a stipulation that would allow him to join *Netbula-Sun*. ER.54:13-17. Yue also informed the *Netbula-Sun* court that he needed to assert additional claims. Yue delayed his lawsuit to make additional effort to work out a reasonable stipulation with Sun. Sun refused to stipulate to Yue’s participation in *Netbula-Sun*. ER.55-56.

8. The *Yue-Sun* Complaint was Based on Yue’s October 22, 2007 Motion to Intervene

After the *Netbula-Sun* court vacated the hearing of Yue’s motion to intervene-join and after Sun refused to stipulate to Yue’s participation in *Netbula-Sun*, Yue filed the instant *Yue-Sun* case.

The *Yue-Sun* complaint was directly based on Yue’s October 22, 2007 motion to intervene and for injunctive relief. One can compare the October 22, 2007 motion (SRJN191-216) and the FAC of *Yue-Sun* and see that they are very similar. For instance, in the October 22, 2007 motion, Yue stated that “StorageTek had no licenses after it was acquired by SUN in August

2005” and any distribution after the acquisition “is infringement.” SRJN212. This claim based on the termination of the agreement was not in the *Netbula-Sun* complaint; it was first introduced in Yue’s October 22, 2007 motion.

FRCP 24(c) requires that a motion to intervene “be accompanied by a pleading that sets out the claim or defense.” The motion for injunctive relief also requires a showing of likelihood of success on the merits of the copyright claims. The *Yue-Sun* complaint was a continuation of the October 22, 2007 motion.

9. The *Netbula-Sun* Court Specifically Excluded Yue and the 00-SDK, 2K4 and YUE PWRPC Copyrights from *Netbula-Sun*

In the October 31, 2007 *ex parte* hearing⁶, the *Netbula-Sun* court vacated Yue’s FRCP 24(a) motion to intervene and join *Netbula-Sun*, upon Sun’s motion for administrative relief. So, the FRCP 24(a) route for Yue to join *Netbula-Sun* had been closed.

On November 20, 2007, the *Netbula-Sun* court heard Netbula’s motion to substitute Yue as the copyright plaintiff as to the 1996 Copyright. Netbula’s former counsel, Ms. Brillat, was to argue this motion. The judge started out like this (quoting from transcript, see SRJN008):

⁶ Defendants claim that “the hearing was not ‘ex parte,’ as Netbula’s counsel did participate, and raised no objection when the hearing was vacated.” DAB 47. But, Yue did not hire Netbula’s counsel to represent him on his copyright claims.

THE COURT: OKAY. SO WE HAVE TWO MATTERS ON THIS MORNING. ONE IS THE ... REQUEST TO SUBSTITUTE MR. YUE AS A PARTY IN THIS MATTER, DR. YUE, RATHER.

The judge then asked Dr. Yue: “Are you Mr. Yue?” After confirming that Dr. Yue was Mr. Yue, the judge told Yue to “listen and hear me clearly” and then stated that Yue “should cease and desist” from filing papers. And even if the district court would grant Netbula’s motion to replace Yue as the copyright plaintiff, “it still would not give [Yue] authority to do so...” ER.40; SRJN009.

The subsequent exchange was the following:

MR. YUE: WHAT'S THE COURT'S LEGAL RATIONALE FOR THAT?

THE COURT: THAT IS THE RATIONALE, AND THAT'S THE STATEMENT.

MR. YUE: FOLLOWING RULES OF CIVIL PROCEDURE --

THE COURT: MR. YUE, I AM GOING TO HAVE YOU TAKEN OUT IF YOU DON'T BE QUIET.

Id. The *Netbula-Sun* court was unambiguous: it would not allow Yue to file pleadings, one way or the other.

The *Netbula-Sun* court understood that there was a question about copyright ownership, and that Yue wanted to join *Netbula-Sun* to amend the complaint based on Yue PWRPC copyrights.

THE COURT: I KNOW SOMETHING TRANSPIRED IN THE COURSE OF A DEPOSITION AND ***THERE WAS SOME QUESTION ABOUT OWNERSHIP***. I CAN READ THIS RECORD, AND IT SAYS FAIRLY CLEARLY THAT ***NETBULA WAS CREATED IN JULY OF 1996...***

THE COURT: BUT WHAT I UNDERSTAND IS THE ***SOFTWARE AT ISSUE*** MIGHT BE ITERATIONS DOWNSTREAM OF ***THE PWRPC AND THE ONC RPC DEVELOPED IN THE '94/'95 TIMEFRAME***.

THE COURT: DOWNSTREAM HE [Yue] WANTS TO FILE A MOTION TO AMEND.

2007/11/20, Tr. pages 5 and 7; SRJN010, SRJN012 (emphasis added).

At that point of the hearing, Defense counsel presented the 1996

Copyright certificate to the *Netbula-Sun* court:

MR. PULGRAM: WOULD IT BE HELPFUL TO LOOK AT THE COPYRIGHT REGISTRATION?

THE COURT: OF COURSE.

MR. PULGRAM: YOUR HONOR, THERE IS ONE COPYRIGHT THAT'S SUBJECT TO THIS CLAIM. IT IS IN THE NAME OF THE AUTHOR --

THE COURT: THAT'S SUBJECT TO?

MR. PULGRAM: EXCUSE ME?

THE COURT: SUBJECT TO?

MR. PULGRAM: THAT IS SUBJECT TO A CLAIM HERE. AS YOU KNOW, ANY COPYRIGHT REQUIRES ACTION, REQUIRE IT BE BROUGHT ON A REGISTERED COPYRIGHT. ***THERE'S ONE REGISTRATION. THIS IS IT...*** MR. YUE IS

NOT LISTED ON THIS COPYRIGHT ANYWHERE. THE CLAIMANT ON THE COPYRIGHT IS NETBULA, LLC. THE COPYRIGHT HAS BEEN PURSUED BY NETBULA, LLC IN THIS ACTION FOR 10 MONTHS.

THE COURT: LET ME JUST STOP YOU.

MR. PULGRAM: YES, YOUR HONOR.

THE COURT: *IS THIS THE ONLY COPYRIGHT AT ISSUE --*

MR. PULGRAM: *YES.*

Tr. pp.8:10-9:6; SRJN013-14. By specifically constraining the *Netbula-Sun* action to the 1996 Copyright, the *Netbula-Sun* court and Sun excluded the other copyrights and Yue's participation. The *Netbula-Sun* court's effort to exclude Yue was also evident from the following exchange in that hearing:

THE COURT: BUT YOU DON'T ARGUE THAT THE ASSIGNMENT IS NOT VALID, RIGHT?

MR. PULGRAM: EXCUSE ME?

THE COURT: YOU DON'T ARGUE THE ASSIGNMENT IS NOT VALID?

MR. PULGRAM: THERE IS SOME LAW TO THAT EFFECT, YOUR HONOR.

THE COURT: BUT IT'S NOT BEFORE ME. I HAVEN'T SEEN THAT IN YOUR PAPERS.

MR. PULGRAM: I BELIEVE THERE'S A PARAGRAPH, THE LAST PARAGRAPH OF OUR ARGUMENT. BUT I DON'T THINK YOU HAVE TO REACH THAT.

THE COURT: THAT'S WHAT I AM SUGGESTING TO YOU. SO TO DENY THE MOTION MEANS THAT HE'S NOT SUBSTITUTED IN AS A PARTY?

Tr. p.15:5-19; ER.58; SRJN020. Based on the above, Yue alleged that the *Netbula-Sun* court coached defense counsel Pulgram.

Defendants disagree. In their answer brief, they say the following:

There is similarly no merit to Yue's assertion... What the district court "suggested" was that, in ruling on the motion to substitute, *it need not reach the question whether the assignment was valid*. SRJN 20,11/20/07 Transcript at 15:5-17..

DAB 47, fn.9 (emphasis original). Essentially, Defendants think that the word “THAT” in “THAT’S WHAT I AM SUGGESTING TO YOU” was referring to Pulgram’s “BUT I DON’T THINK YOU HAVE TO REACH THAT.”

Defendants now claim that “Netbula had the right to continue pursuing the [*Netbula-Sun*] case even after the alleged assignment, and could have timely sought leave to amend to identify its other alleged copyrights.” DAB 45. But, Netbula could only continue its action on the copyright originally pled in the complaint – the 1996 Copyright. After the assignment, Yue became the sole owner of the 00-SDK and 2K4 Copyrights. Under *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 886 (9th Cir. 2005), only Yue had the standing to bring suit on these two copyrights.

10. The *Yue-Sun* Case Had Different Nucleus of Facts

Defendants allege that “Yue fixates on a comment by Judge Jenkins that the [Netbula-Sun] case was not ‘completely overlapping’ with [Yue-Sun]” in his nonparty preclusion analysis. DAB 28. This is untrue. Yue only mentioned the “not overlapping” statement when discussing the retroactive disqualification of the judge. See page 42 of Yue’s opening brief.

Instead, Issues 1-4 of Yue’s appeal ask a very simple question: whether non-party Yue had had his day in court to vindicate his copyright claims on the merits. The answer to that question is undeniably no.

Defendants claim that “Yue has alleged infringement of different registrations allegedly protecting the same software.” DAB 30. This statement confuses the issues. Yue alleged that defendants infringed his YUE PWRPC, 00-SDK and 2K4 copyrights. A specific copyright protects the specific work[s] of authorship fixed in a tangible medium of expression. These three copyrights are distinct intellectual property rights, each protecting specific and distinct software code -- statements of instructions written in computer programming languages. Therefore, *Yue-Sun* involves intellectual property rights that are disjoint from what is at issue in *Netbula-Sun*.

Defendants claim that the facts concerning defendant Abramovitz “were all identified as a basis for the infringement claims in [*Netbula-Sun*].”

However, “Abramovitz” did not appear in the *Netbula-Sun* complaint and Yue only learnt about Abramovitz’s activities in October 2007. Similarly, Yue only came to know about Lisa K. Rady around October 2007 and learnt that she participated in the unlimited licensing of PowerRPC to third parties even after she wrote in her email that “we have exceeded the 1,000 distributions that we had right to”... Yue wanted to join *Netbula-Sun* and pursue these claims, but he was rejected.

The district court’s half-page analysis of the transactional nucleus of facts focused on the “transactions” in which StorageTek bought the licenses, and led to the following conclusion:

It is clear, therefore, that the two actions arise out of the same transactional nucleus of facts - Defendants’ license agreements with Netbula and Defendants’ use of Netbula’s PowerRPC software.

ER.46:3-12. Defendants are now essentially repeating the same. But the most relevant facts are the ones that give rise to a claim of infringement, not the purchase transaction that provided defendant a copy.

The district court noted 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. Notwithstanding the fact that the *Yue-Sun* complaint was based on the October 22, 2007 motion, one simply cannot state a claim in a

declaration that only states facts. The *Netbula-Sun* court's legal standard was clear: "a plaintiff may not amend its complaint through argument in a brief opposing summary judgment, the Court will not address Plaintiff's new claim." *Netbula, Llc v. Bindview Development Corporation*, 516 F. Supp.2d 1137 (N.D.Cal. 9-10-2007) (Jenkins, J.). Therefore, even assuming that a plaintiff can add new claims in an opposition to a summary judgment, Judge Jenkins would not allow it, and he certainly did not.

In the January 18, 2008 summary judgment order in *Netbula-Sun*, Judge Jenkins decided the following three issues on the merits:

(1) The User Count for the SDK license

The SDK agreement stated one user "for each of the licenses purchased" may "use the PowerRPC SDK Product under Windows NT and 95/98 platforms; each user can only use the software on one computer...." On this issue, Judge Jenkins wrote:

both the 2000 and 2004 Agreements state that one user may use each of the licenses purchased. This provision does not limit how the software may be used... the limitation on the number of users ... does not limit or condition the use of the license. Therefore, because this provision is not a limitation on the scope of the license, Plaintiff is not entitled to a copyright infringement claim on this issue.

The *Netbula-Sun* court didn't cite any authority which held that a "one user on one computer" restriction "does not limit or condition the use of the license." Even so, its holding was a narrow one.

The *Yue-Sun* action, filed two months **before** that order, alleged different infringing activities with respect to the SDK, such as exceeding both the number of users and the number of computers. Counts I, II, III, V and VII of the FAC.

(2) The Excess Distribution of PowerRPC

The 2000 agreement stated that StorageTek “shall pay Netbula ...for the right to distribute up to 1000 units of software containing the Supporting Programs.” The *Netbula-Sun* court admitted that the agreement was a “prepayment” agreement. The licenses were countable. Mr. Melnick wrote in an internal email: “We have only made 2 purchases for the rights to distribute a total of 2000 licenses.”

On exceeding the number of licenses, the *Netbula-Sun* court again concluded that the “prepayment” term is merely a contract covenant.

Yue-Sun involved claims that are different, such as distributing infringing derivative works, issuing floating licenses, fail to comply with the limited distribution clause, inducing infringement by others... See Counts IV, V, VIII and IX of the FAC.

(3) The Termination of the Netbula-StorageTek Agreement

The Netbula-StorageTek agreement was allegedly terminated upon Sun’s acquisition of StorageTek. The *Netbula-Sun* court held that “this [termination] provision does not limit the scope of the license.” The

Yue-Sun action filed in 2007 alleged that whatever license ceased to exist because it was terminated. This case was about the existence of the license, not the scope. See Count X of the FAC.

In summary, the January 18, 2008 *Netbula-Sun* order only resolved three narrow issues. The *Yue-Sun* case filed in 2007 had 10 counts of infringement against seven defendants that were different from the claims in *Netbula-Sun*.

11. The Catch-22 Scheme is Impermissible

Defendants also say “[a]ny alleged infringement of the ‘additional copyrights’ could have and should have been brought, if at all, in the [*Netbula-Sun*] litigation.” DAB 35. See also, DAB 27-28, 35, 47 and 59.

Because Defendants made the judicial admission that Netbula and Yue had conflicting claims on the copyrights, “[t]he onus therefore rested with [defendant] to join the [plaintiff] to the [first] litigation. The [plaintiff] themselves were under no obligation to intervene...” *Kourtis v. Cameron*, 419 F.3d 989, 999 (9th Cir.2005).

But, Yue did make every effort to join Netbula-Sun. In addition to his October 22, 2007 motion to intervene and join *Netbula-Sun*, Yue also wrote to Sun’s defense counsel on October 26, 2007:

I am about to assert additional claims against StorageTek... *For judicial economy*, I think it’s far efficient for you to stipulate to the substitution of party by replacing Dongxiao Yue as the

copyright plaintiff in the C06-07391-MJJ case.

ER.54:14-19; SRJN128-129 (emphasis added). Sun's response was outright refusal. Sun's counsel also authored the following court order:

Defendants' Motion for Administrative Relief to Vacate Hearing on *Non-Party Dongxiao Yue's* Request for Injunctive Relief and Impoundment [Docket Nos. 80-81] is hereby GRANTED.

SRJN132 (Doc. No. 94, *Netbula-Sun*) (emphasis added).

On November 19, 2007, as he had previously informed Sun and the *Netbula-Sun* court, Yue filed the *Yue-Sun* action. At the hearing next day, the *Netbula-Sun* court considered allowing Yue to join that case as co-plaintiff⁷, the following was the exchange:

THE COURT: [ALLOWING YUE] COMING IN AS A PARTY BUT RETAINING NETBULA AND THE REQUIREMENT THAT NETBULA BE REPRESENTED BY COUNSEL, HOW DOES THAT UPSET THE HEARING OF THOSE MOTIONS?

MR. PULGRAM: WELL, YOUR HONOR, IT'S NOT CLEAR TO ME WHAT... WOULD BE THE BENEFIT OF ALLOWING HIM TO APPEAR ON THOSE MOTIONS.

Tr. p.14:6-12; SRJN019. Again, Sun succeeded in excluding Yue from *Netbula-Sun*.

So, Defense counsel is playing this game: when Yue requests to join *Netbula-Sun*, they say no; when Yue files a separate lawsuit, they say Yue should have joined *Netbula-Sun*. This scheme is similar to a classic trap called Catch-22.

⁷ Yue never attempted to represent Netbula on the state law claims in *Netbula-Sun*, and the *Netbula-Sun* court "recognized that." SRJN021.

There was only one catch and that was Catch-22 ... Orr would be crazy to fly more missions and sane if he didn't, but if he was sane he had to fly them. If he flew them he was crazy and didn't have to; but if he didn't want to he was sane and had to. Yossarian was moved very deeply by the absolute simplicity of this clause of Catch-22 and let out a respectful whistle.

"That's some catch, that Catch-22," he observed.

"It's the best there is," Doc Daneeka agreed.

Rhodes v. Robinson, 380 F.3d 1123, 1129 (9th Cir. 2004) (quoting Joseph Heller, *Catch-22*, at 47 (6th ed. 1976)). No matter what he does, Yue can not have his day in court to litigate his copyright claims on the merits. Such scheme is impermissible, and must fail as a matter of law.

12. Yue was Even Prohibited to Speak about His *Pro Se* Yue-Sun Case

Defendants filed a motion to relate *Yue-Sun* to *Netbula-Sun*, which would cause *Yue-Sun* to be assigned to Martin J. Jenkins. Under Local Rule 3-12 (b) of the Northern District of California, the parties in *Yue-Sun* must file “related cases” motion papers in the *Netbula-Sun* case. Because the *Netbula-Sun* court had prohibited Yue from filing papers, Yue could not file any response⁸. Instead, Yue wrote letters to the court to seek clarification. Yue stated that if permitted he would file a response⁹. But the *Netbula-Sun*

⁸ Defendants state that “Netbula did not oppose or otherwise respond to that [related cases] motion.” DAB 17. But, under the Local Rule of court below, it was Yue – a party in the newer case who should oppose or respond to that motion. See Pulgram’s email to Yue on this issue. ER.59:17-23.

⁹ Plaintiff-Appellant never stated that he would file an opposition to the

court did not grant Yue the permission to respond.

On December 14, 2007, *Netbula-Sun* court held a hearing on Sun's motion for summary judgment. At the end of the hearing, Jedediah Wakefield, a defense attorney of the *Netbula-Sun* case, said to Judge Jenkins: "We propose some scheduling --". ER.26:2-3. When Yue, the *pro se* Plaintiff in *Yue-Sun*, tried to seek clarification, Jenkins forbade Yue to speak. Jenkins then stated that Defendants could delay answering the *Yue-Sun* complaint.

On February 8, 2008, Jenkins stated the following in an order:

During the November 20, 2007 hearing, the Court instructed Yue that he could not file motions, notice hearing dates, or speak in court unless he had leave of court or *until he was given permission to represent himself*. During the December 14, 2007 hearing, the Court again admonished Yue for attempting to speak without leave of Court.

ER.62:11-14; SRJN004 (emphasis added).

13. Virtual Representation Theory Had Been Disapproved

The district court reasoned that because "*four of the five* provided declarations in support of summary judgment in the *Netbula-Sun* case," all *five* defendants were "virtually represented" in *Netbula-Sun*. As for plaintiff Yue, the district court stated that "Yue is the founder and president of Netbula, LLC and thus *may* be seen as virtually represented in the *Netbula-Sun* action." ER.47-48 (emphasis added). The district court's

motion to relate the cases.

“analysis” was conclusory as it failed to apply the five-factor test.

The district court’s dismissal of the *Yue-Sun* action was based on the so called “virtual representation” doctrine stated in *Adams v. Cal. Dep’t of Health Servs.*, 487 F.3d 684 (9th Cir. 2007). *Adams* is inapplicable to this case, because this case deals with non-party preclusion. Even if *Adams* applies, the “virtual representation” theory relied by *Adams* has been disapproved in *Taylor v. Sturgell*, 128 S. Ct. 2161 (June 12, 2008)¹⁰.

In *Taylor v. Sturgell*, Greg Herrick asked his friend and “close associate” Brent Taylor to help restore a vintage airplane. Herrick filed an FOIA lawsuit to obtain technical documents for the airplane. Herrick and Taylor shared documents obtained in the discovery of Herrick’s suit. After Herrick lost the lawsuit, Taylor hired Herrick’s lawyer and filed a second FOIA lawsuit seeking exactly the same documents. Applying a five-factor test for “virtual representation”, the D.C. Circuit affirmed a dismissal by claim preclusion. The Supreme Court disapproved “virtual representation” and vacated the judgment of the D.C. Circuit.

Defendants now claim that Yue had assumed control of the *Netbula-Sun* litigation and Yue wholly owned 100% of Netbula. There is nothing in the record to support their assertions. Moreover, Netbula cannot, as a matter of

¹⁰ The Supreme Court noted that “[t]he Ninth Circuit applies a five-factor test similar to the D. C. Circuit’s.” *Taylor v. Sturgell*, 128 S. Ct. 2161, fn.3.

law, sue on Yue's copyrights.

14. The Privity Argument was Circular Logic

In *Kourtis v. Cameron*, the Court explained the concept of "privity":

Privity "is a legal conclusion designating a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved."

Kourtis v. Cameron, 419 F.3d at 996 (emphasis added). Under federal law, "concepts summarized by the term privity are looked to as a means of determining whether the interests of the party against whom claim preclusion is asserted were represented in prior litigation." *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 346 (2nd Cir. 1995).

Since privity is just a word to express a legal conclusion of preclusion, using privity as basis of preclusion is prone to circular logic, which is a false form of reasoning of putting the conclusion into the premises. Thus, if in any part of the preclusion analysis, the word privity is used in the argument, the result is a logical fallacy of circular argument. Indeed, courts have noted that "privity has shown itself to be an elusive and manipulable concept" and should be only used as "a convenient means of expressing conclusions that are supported by independent analysis." *Meza v. General Battery Corp.*, 908 F.2d 1262 (5th Cir. 1990). "Privity may exist for the purpose of determining one legal question but not another depending on the circumstances and legal

doctrines at issue.” *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 346 (2nd Cir. 1995) (finding the transferee of a building not in privity with the prior owner in successive lawsuits on the same damages to the building). “[D]ue process considerations make *adequacy* of representation a prerequisite to privity.” *Kourtis*, 419 F.3d at 996 (emphasis added).

The district court’s privity analysis, in its entirety, was the following:

In addition, Netbula assigned all of its copyrights prior to January 1, 2007 to Yue. Therefore, Yue is an assignee and is in privity with Netbula. Yue and Netbula are, therefore, in privity.

ER.48:18-22 (internal citations omitted).

First, the district court ignored the pre-Netbula YUE PWRPC copyright that Yue always owned; there was no assignment with respect to that copyright. Second, the 00-SDK and 2K4 Copyrights were not represented in *Netbula-Sun*. The *Netbula-Sun* court excluded the YUE PWRPC, 00-SDK and 2K4 copyrights from *Netbula-Sun*. There was no privity between Netbula and Yue with respect to the claims associated with these copyrights.

Also, like the *Chase Manhattan Bank* case, the *Yue-Sun* and *Netbula-Sun* cases were before the same judge. Instead of consolidating the cases as Yue had proposed back in October 2007¹¹, the district court dismissed *Yue-Sun* **with prejudice**. “Given that the two cases were in the same court and

¹¹ See, ER.54:15-17 (quoting Yue’s October 26, 2007 email to Pulgram suggesting relate/consolidate prospective new action). See also, SRJN119.

assigned to the same judge, the use of *res judicata* was something of an ambush.” *Id.* at 347. There had been no final judgment in *Netbula-Sun*, yet the district court precluded Yue and dismissed the case with prejudice.

15. Judge Jenkins Had No Jurisdiction to Grant Wakefield’s Oral Motion for Enlargement of Time in *Yue-Sun*

Yue’s December 17, 2007 letter to Judge Jenkins (copied to Judge Illston) clearly stated that the *Yue-Sun* case was then presided by Judge Illston, indicating that Judge Jenkins lacked jurisdiction to grant the extension. The letter also noted the lack of due process¹² in the proceedings. ER.23-24. Thus, the letter put Defendants on notice that there was no lawful court order granting them extension in answering the complaint. The Executive Committee of the Northern District of California (acting as the Assignment Committee) did not reassign the case to Jenkins until January 10, 2008. The denial of entry of default was based on the false assumption that there was a valid court order granting Defendants enlargement of time. Since “the clerk must enter the party’s default,” FRCP 55(a), the judge had no discretion to deny the request for entry of default, and the order denying entry of default judgment was also null and invalid.

Defendants, represented by a large law firm, have conducted all sorts of

¹² Defendants point out that the grant of extension was done in open court. DAB 55. That only means Jenkins denied Yue’s due process rights in open court.

tactical maneuvers in order to avoid liability under the copyright law, but the facts against them are undeniable. Congress has set rigorous time limits for answering a complaint, default judgment against Sun is proper.

16. Defense Counsel's Misconduct Had Been a Major Issue Throughout the Litigations Below

Since October 2007, Yue had complained about Defense counsel's unprofessional conduct. See, ER.55:3-5 ("I ... asked the Court to disqualify Pulgram for his unprofessional conduct."). See also, ER.60:19.

Defendants now claim that Yue failed to preserve the issue for appeal. DAB 55-56. However, Yue did put Defendants on notice about Defense counsel's unethical conduct. The fact that Defendants used those communications in their motion to dismiss is plainly on the record. Whether Defendants prejudicially utilized those direct communications against Yue is thus a pure question of law and is not waived.

Pulgram communicated with Yue on Netbula matters. For instance, in an October 31, 2007 email to Yue, Pulgram stated that "Netbula is represented by counsel." Then he proceeded to discuss Netbula's prior settlement negotiations with Sun. See, SRJN117.

Defendants cited Yue's emails to Pulgram to support their key argument in their motion to dismiss. ER.33, 35-37. But for Pulgram's prior

communications¹³ to Yue on Netbula matters, Defendants would not have had the opportunity to use these communications to Yue's detriment.

Yue planned to make the attorney misconduct argument at the motion to dismiss hearing scheduled for March 4, 2008. However, the district court vacated the hearing on March 3, 2008, and dismissed the case with prejudice on March 4, 2008.

17. Jenkins was Disqualified

Yue filed judicial misconduct complaints against Jenkins at the Ninth Circuit. Jenkins received the first complaint in December 2007. Yue's December 17, 2007 letter to the judge re-stated the basis of the complaint: Jenkins might have retaliated against Yue due a blog article Yue wrote.

The facts alleged in Yue's allegation were fully capable of proof by discovery. In the complaint Yue filed against Jenkins, Yue gave the names of the magistrate judge and the attorneys who heard the story of Jenkins's retaliatory intent. Jenkins's denial in his ruling was not evidence. In evaluating the allegation of bias, "the judge must assume that the factual averments . . . are true, even if he knows them to be false." *United States v. Balistrieri*, 779 F.2d 1191, 1199 (7th Cir. 1985).

¹³ See, SRJN104, Pulgram's initiating email to Yue on substantive issues. See also, SRJN108-130, for over twenty pages of emails between Pulgram and Yue.

Jenkins would not even allow Yue to speak about his *pro se* case. “[N]o procedure firmly rooted in the practices of our people can be so ‘fundamentally unfair’ as to deny due process of law.” *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991) (concurring opinion by Justice Scalia). The bias was total.

When Yue tried to make an argument against the “cease and desist” order, Jenkins’s reaction was: “Mr. Yue, I am going to have you taken out if you don’t be quiet.” This is not a situation where judicial temperament occasionally turns into judicial temper. “Arrogance and bullying by individual judges expose the judicial branch to the citizens’ justifiable contempt.” *McBryde v. COMM. TO REV. CIR. COUNCIL CONDUCT*, 264 F.3d 52, 66 (D.C. Cir. 2001). When a federal judge threatens force instead of resorting to reasoning in a civil litigation involving due process concerns, he fails to maintain the appearance of justice and his judgment is inherently flawed.

Sun is a large corporation. In the district court, it spares no effort emphasizing that Yue is just one-man. That may have been a factor in the decision below. However, comparing to the interest of United States and its rule of law, Sun and its CEO are negligible and utterly insignificant. The Court must reverse the district court’s erroneous ruling poisoned by apparent personal animus to restore justice and fundamental fairness in federal district

court.

IV. CONCLUSION

For the reasons stated in Plaintiff-Appellant's opening brief and this reply brief, Yue never had his day in court to vindicate his copyrights on the merits. Plaintiff-Appellant asks the Court to vacate the district court's March 4, 2008 order of dismissal with prejudice, enter default judgment against Sun and StorageTek on the issue of liability and remand the case for further proceedings.

Respectfully submitted,

DATED: October 3, 2008

 /S/

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**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 7,000 words (including footnotes).

Dated: October 3, 2008

/S/

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 October 3, 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.

Defense counsel will also receive notification of the filing from the ECF system.

/S/

Dongxiao Yue