

No. \_\_\_\_\_

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In the Supreme Court of the United States

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DONGXIAO YUE,

Applicant,

v.

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

Respondents.

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ON APPLICATION FOR STAY FROM THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT  
(Ninth Circuit Appeal Nos. 08-15927 and 08-17034)  
(District Case No. 5:07-CV-05850-JW (N.D. Cal))

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**EXHIBITS TO APPLICATION FOR STAY**

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Dr. DONGXIAO YUE  
2777 ALVARADO ST., SUITE C  
SAN LEANDRO, CA 94577  
Telephone: (510) 396-0012  
Facsimile: (510) 291-2237  
E-Mail: [dx Yue@yahoo.com](mailto:dx Yue@yahoo.com)  
In *Pro Se*

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# Certificate of Registration



This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

*Marybeth Peters*

Register of Copyrights, United States of America



\*\*

Registration Number:

TXu 1-576-987

Effective date of registration:

November 27, 2007

## Title

Title of Work: YUE PWRPC  
Previous or Alternative Title: YRPC

## Completion/Publication

Year of Completion: 1996

## Author

Author: DONGXIAO YUE  
Author Created: COMPUTER PROGRAM  
Work made for hire: No  
Domiciled in: United States  
Year Born: 1968  
Anonymous: No Pseudonymous: No

## Copyright claimant

Copyright Claimant: DONGXIAO YUE  
2777 ALVARADO STREET, SUITE C, SAN LEANDRO, CA, 94577

## Limitation of copyright claim

Material excluded from this claim: RPC SRC 4.0  
Previously registered: No  
New material included in claim: New computer program text, revisions and additional text of computer program

## Certification

Name: DONGXIAO YUE  
Date: November 15, 2007

1 Dr. DONGXIAO YUE  
 2 2777 ALVARADO ST., SUITE C  
 3 SAN LEANDRO, CA 94577  
 4 Telephone: (510) 396-0012  
 5 Facsimile: (510) 291-2237  
 6 E-Mail: ydx@netbula.com

7 *Pro Se*

8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA

10 NETBULA, LLC., a Delaware limited liability  
 11 company,  
 12  
 13 Plaintiff,  
 14  
 15 v.  
 16 STORAGE TECHNOLOGY  
 17 CORPORATION, et al.,  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25  
 26  
 27  
 28 Defendants.

Case No. Case No. C06-07391-MJJ

**DONGXIAO YUE’S NOTICE AND  
 MOTION (1) TO INTERVENE AND JOIN  
 AS PLAINTIFF; (2) FOR INJUNCTIVE  
 RELIEF; (3) FOR COPYRIGHT  
 IMPOUNDMENT**

Date: November 27, 2007  
 Time: 9:30 a.m.  
 Dept: Courtroom 11  
 Judge: The Honorable Martin J. Jenkins

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25

26

27

28

**Christine Tocalino**

---

**From:** Rady, Lisa K  
**Sent:** Tuesday, March 02, 2004 10:06 AM  
**To:** Melnick, Michael R  
**Subject:** LibAttach/Netbula - IXOS arch1 341 KB

Hi Mike,

I have found out a bit more about LibAttach and Netbula. Below is a report from SMD on the number of LibAttach software we have sold. As you can see, we have exceeded the 1000 distributions that we had right to, with Netbula. I JUST inherited this program...so don't shoot the messenger. I think it is obvious that engineering has not and did not monitor the distributions on this product. Now that I own this product, I do not want engineering responsible for monitoring the distributions. We need to come up with some process where SMD may be able to provide reports (similar to that below) on how may LibAttach software's are being sold.

Now, for my actual request. Could you please contact Netbula and get a current quote for the rights to distribute another 1000 runtimes? Since all of our information is years old, I guess we need to start by getting a current quote from them.

Please let me know if you need more information.

Thanks,

Lisa Rady  
Automated Tape Solutions  
Software Program Management  
Phone: 303.661.5848  
FAX: 303.673.6837  
Pager: 303.461.9576  
**StorageTek**  
INFORMATION *made* POWERFUL

-----Original Message-----

**From:** Wagner, Holly M  
**Sent:** Tuesday, March 02, 2004 8:32 AM  
**To:** Rady, Lisa K; McGovern, David L  
**Subject:** RE: LibAttach, number of copies sold??

placeholder.tmp

Here is a copy of the Lib Attach report. The total number is 1365.

*Holly Wagner*  
*Software Product Planner*  
303-661-7389

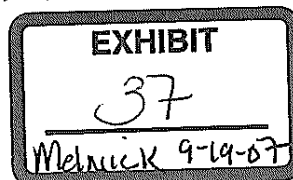
**StorageTek Information made Powerful**

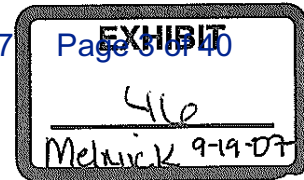
-----Original Message-----

**From:** Rady, Lisa K  
**Sent:** Monday, March 01, 2004 4:38 PM  
**To:** Wagner, Holly M  
**Subject:** LibAttach, number of copies sold??

Hi Holly,

Do you know, or do you know who I could ask to find out how many copies of the LibAttach software has been





**From:** McGonigle, Jeffrey L  
**Sent:** Wednesday, March 17, 2004 11:21 AM  
**To:** Melnick, Michael R <melnimr@stortek.com>  
**Cc:** Murray, Thomas J <murratj@stortek.com>  
**Subject:** RE: LibAttach Update

---

Mike,

Replied to you this a.m. but it must have been lost in the void.

Approved by Finance Please use project R-0397, GL # 630130, Dept 15107

Jeff

-----Original Message-----

**From:** Melnick, Michael R  
**Sent:** Wednesday, March 17, 2004 10:31 AM  
**To:** McGonigle, Jeffrey L  
**Cc:** Kennedy, Russell P (Russ); Murray, Thomas J  
**Subject:** RE: LibAttach Update

Jeff,

Left you a message about the costs. Just need an e-mail form you with your approval and the correct gl and cost center.

Thanks,  
mm

-----Original Message-----

**From:** Murray, Thomas J  
**Sent:** Monday, March 15, 2004 10:42 AM  
**To:** McGonigle, Jeffrey L  
**Cc:** Melnick, Michael R; Murray, Thomas J; Rady, Lisa K; Kennedy, Russell P (Russ)  
**Subject:** RE: LibAttach Update  
**Importance:** High

Hi Jeff,

Please approve this P.O and provide the gl account as Mike has requested (this is for ACSLS development, cost center 15107.) We either need to increase the Netbula license or put a stop-ship on the LibAttach product, because we have shipped LibAttach copies up to the limit of the current Netbula license (Netbula is embedded in our LibAttach product.)

Thanks,

-Tom

-----Original Message-----

**From:** Melnick, Michael R  
**Sent:** Monday, March 15, 2004 10:21 AM  
**To:** Murray, Thomas J  
**Cc:** McGonigle, Jeffrey L  
**Subject:** RE: LibAttach Update

Thanks Tom,

I do need some help. Jeff McGonigle never signed it and I just need an e-mail form him approving it and giving me the gl account and cost center numbers.

mm

-----Original Message-----

**From:** Murray, Thomas J  
**Sent:** Monday, March 15, 2004 9:14 AM  
**To:** Melnick, Michael R

STK00000558



**From:** Murray, Thomas J <thomas\_murray@storagetek.com>  
**Sent:** Tuesday, June 28, 2005 4:13 PM  
**To:** Melnick, Michael R <melnimr@stortek.com>  
**Cc:** Williams, Michael P <willimp@stortek.com>; Rady, Lisa K <radylk@stortek.com>; Murray, Thomas J <murratj@stortek.com>  
**Subject:** RE: Netbula

---

Thanks, Mike. Mike Williams, the ACSLS development manager who has the budget to purchase more licenses, is out this week. Can this wait until next week when he returns?

-Tom

---

**From:** Melnick, Michael R  
**Sent:** Tuesday, June 28, 2005 12:58 PM  
**To:** Abramovitz, Michael P; Rady, Lisa K; Williams, Michael P; Murray, Thomas J  
**Cc:** Wagner, Holly M  
**Subject:** RE: Netbula

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.

You will need to order additional distribution rights or we will be in breach of the agreement. As our pricing is based on cumulative purchases I will need to know how many additional licenses you wish to order so I can get you pricing.

Regards,  
 Mike Melnick  
 Contract Administrator, Senior Consultant  
 OEM Systems  
 StorageTek  
 One StorageTek Drive  
 Louisville, Colorado 80028  
 MS 5236  
 303-673-2914 (v)  
 303-673-4945 (f)  
 Melnimr@Louisville.Stortek.Com

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---

**From:** Wagner, Holly M  
**Sent:** Monday, June 20, 2005 9:08 AM  
**To:** Melnick, Michael R; Abramovitz, Michael P; Rady, Lisa K; Williams, Michael P  
**Subject:** RE: Netbula

The SAP query I ran this morning shows 2,386 models shipped. This number is low due to the fact that the query does not have the capability of pulling the client feature quantities that were released in November of last year.

**Holly Wagner**  
 Software Product Planner  
 303-661-7389

---

**From:** Melnick, Michael R

STK00000540

copy.

3/11/04 Terry and Janet are still working on getting a copy of Visual C++ for a stand alone PC so that they have a build environment that is not attached to Terry's PC.

3/4/04 The new LibAttach code will temporarily be maintained in Per Force (due to time constraints). Once the code is complete, Julie Dotson will work with Chip to move the code into Continuous.

3/4/04 Lisa to work with Tom on CMM reporting on LibAttach.

3/11/04 The issue of lack of testing between LibAttach and Library Station came up. There are problems with LibAttach 1.2 working with LibStation. This configuration was never tested when LibAttach 1.2 was released. Lisa to work with Ernie Sandoval and Phil Rizzuto to determine a process to get Library Station validated with the new release of LibAttach.

3/12/04 Lisa spoke with both Ernie and Phil. Lisa to set up a meeting to discuss how we can get Library Station and LibAttach testing complete by our June 30 FRS date.

3/11/04 The LibAttach Controlled Field Test (CFT) can begin as soon as the documentation is ready (Doc. Possibly ready as soon as Monday). Julie Dotson has approximately five candidates for LibAttach CFT. Janet and Lisa suggested that we limit the CFT to two customers. Bank of America and Allstate were suggested. Engineering will select and manage the CFT sites.

#### Marketing

2/19/04 LibAttach sells for approximately \$695. Maintenance on the product is optional. There is no license key in the product, and it is apparent that the software has been copied, uncontrolled, for several years.

3/11/04 Tom Balue is looking into making a price change for LibAttach.

3/11/04 The team agreed to release the enhancements to LibAttach as a point release. The release number will be LibAttach 1.2.1.

#### Global Learning Solutions

3/4/04 The team has been unable to locate the source documents for three of the five documents on LibAttach. Veda has proposed to her management that we may have to convert the files from PDF to Word and then possibly to frame. This will be time consuming and a resource to do this work may not be available until April. We do have the installation guide and release notes source, which we can update as the code changes are being made. Veda to continue to work the documentation issue.

3/11/04 Dan Tesone has assigned a resource to convert the LibAttach PDF documents to an editable source. This work is planned to be complete by end of April.

3/12/04 Veda has completed the first draft of the online help and Install book for the LibAttach CFT.

#### ISV

3/4/04 Bruce asked when the new version of LibAttach would be available for the ISV's to validate. An estimate of mid to late April was given.

3/4/04 Bruce asked whether Library Station was going to be tested with the new version of LibAttach. Lisa to follow up with the Library Station team.

3/11/04 Lisa working the LibAttach / LibStation validation issue.

**Report Date Codes - T (target) A (actual) CL (closed) GREEN (open action item) Replan (Purple)**

#### LibAttach Action Items

Date Opened	Open Issue	Owner	Status	Report Due Date
02/19/04	Learn more about the Integrator's kit for LibAttach	PMT	In Process	03/01/04 T
02/26/04	Figure out how the LibAttach work should be managed in regards to CMM and the Senior Management Reviews.	Lisa Rady / Tom Murray	In Process	03/11/04 T

1 The Court convened a telephonic conference on October 31, 2007 at 2:00 P.M. Plaintiff  
2 Netbula, LLC was represented by Vonnah Brilllet. Defendants Storage Technology Corp., Sun  
3 Microsystems, Inc., Darden Restaurants, Inc. and EMC Corporation (“Defendants”) were  
4 represented by Laurence Pulgram and Jedediah Wakefield. The Court having considered the  
5 pleadings filed by the parties and the argument of counsel, and good cause appearing therefor,

6 IT IS HEREBY ORDERED:

7 1. Defendants’ Motion for Summary Judgment or Summary Adjudication of  
8 Issues Relating to License Defense [Docket Nos. 63-67] is hereby rescheduled for hearing on  
9 December 13, 2007 at 3:00 P.M. Plaintiff’s Opposition shall be filed and served no later than  
10 November 13, 2007, and Defendants’ Reply shall be filed and served no later than November 20,  
11 2007. Defendants’ Motion for Administrative Relief for Consideration of Declaration [Docket  
12 No. 78] is moot, as the declaration at issue was filed more than 35 days before the rescheduled  
13 hearing date.

14 2. Defendants’ Motion for Administrative Relief to Vacate Hearing on Non-  
15 Party Dongxiao Yue’s Request for Injunctive Relief and Impoundment [Docket Nos. 80-81] is  
16 hereby GRANTED. The Motion of DongxiaoYue to Intervene and Join as Plaintiff; for  
17 Injunctive Relief; and for Copyright Impoundment [Docket Nos. 68-72] will be taken off  
18 calendar. The Court will decide the appropriate schedule for considering this motion after the  
19 hearing on Netbula’s Motion for Substitution of Party as to the Copyright Infringement Claim  
20 [Docket Nos. 56-58], which remains scheduled for hearing November 20, 2007.

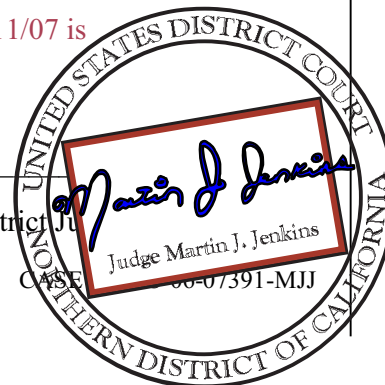
21 4. Ms. Brilllet’s Motion to Withdraw as Counsel for Netbula [Docket Nos. 59-  
22 61] will be taken off calendar for November 20, 2007, and will be decided after the Court’s ruling  
23 granting or denying Defendants’ Motion for Summary Judgment or Summary Adjudication of  
24 Issues Relating to License Defense. Ms. Brilllet will continue as counsel for Netbula in the  
25 interim, pending the Court’s ruling.

The status conference on 12/11/07 is  
VACATED.

26 SO ORDERED.

27 Dated: 11/01/07

28 United States District Judge



2777 Alvarado Street  
Suite C  
San Leandro, CA 94577

December 6, 2007

Honorable Martin J. Jenkins  
U.S. District Court, Northern District of California  
450 Golden Gate Avenue  
San Francisco, CA 94102

Re: SUN's administrative motion to relate cases (C06-07391, C0705850)

Dear Judge Jenkins,

SUN defendants filed an administrative motion to relate the C07-05850-SI case to the C06-07391-MJI case. Since Your Honor has ordered that I cannot file anything before the Court, I am writing this letter to express my position on this issue.

During a hearing before Judge Chen in June 07, Mr. Laurence Pulgram stated that the Netbula copyright only covers the code written between July 1996 and September 1996, in support of his position that the copyright was invalid.

In July 2007, SUN's counsel, the same Fenwick lawyers, again raised the issue that I wrote large portion of code of the software in dispute before I founded Netbula. The Fenwick lawyers indicated that I am the owner of the copyrights of those codes, not Netbula.

In October 2007, I informed SUN defendants that I have to assert additional claims against them. And I sought their stipulation to allow me to substitute or join as copyright plaintiff in the C06-07391-MJJ case for judicial economy, as the alternative would be forcing me to file a separate action. Netbula and I fully informed the Court about this situation in court filings. See Document No. 91, p.4:10-18 (filed on October 30, 2007); Document No. 98, p.3:11-19 and Document No. 99, pp.4:23-5-18 (filed on November 5, 2007).

On November 19, 2007, I filed the *Yue v. Storage Technology Corporation* action, which was assigned to Honorable Judge Susan Illston with case number C07-05850-SI. The next day, November 20, 2007, the hearing for Netbula's motion to substitute me as the copyright plaintiff was held before Your Honor. The Fenwick lawyers opposed that motion vehemently. The following was an exchange at the hearing after Mr. Laurence Pulgram provided the Court the copyright registration in question in the C06-07391-MJJ case.

THE COURT: Is this the only copyright at issue –  
MR. PULGRAM: Yes.

The Court also made the following statement after Netbula's counsel, Ms. Brillet, presented her argument.

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.

Tr., Nov 20, 2007, pp.11:23-12:15.

At the hearing, the Court ordered that I cannot file anything until authorized to do so. The Court further stated that even if the Court granted the motion to substitute party, it still would not give me the right to file papers. See page 4 of the transcript (attached). The Court denied Netbula's motion to substitute or join me as a party.

Now, knowing that I cannot file anything on the C06-07391-MJJ docket, the Fenwick lawyers filed this motion to relate cases.

I request that the Court delay the consideration of SUN's motion to relate cases until my right to file documents is clarified. Once I am allowed to do so, I will file a response to SUN's motion to relate cases on the C06-07391 docket.

Sincerely,

A handwritten signature in black ink, appearing to read 'Dongxiao Yue', written in a cursive style.

Dongxiao Yue

cc: Honorable Judge Susan Illston  
Mr. Laurence Pulgram, Mr. Jed Wakefield, Mr. David Eiseman, Ms. Vonnah Brillet.

UNITED STATES DISTRICT COURT  
Northern District of California  
450 Golden Gate Avenue  
San Francisco, California 94102

[www.cand.uscourts.gov](http://www.cand.uscourts.gov)

Richard W. Wieking  
Clerk

General Court Number  
415.522.2000

January 10, 2008

**CASE NUMBER: CV 07-05850 SI**  
**CASE TITLE: DONGXIAO YUE-v-STORAGE TECHNOLOGY CORPORATION**  
**REASSIGNMENT ORDER**

GOOD CAUSE APPEARING THEREFOR,

IT IS ORDERED that this case is reassigned to the **San Francisco** division.

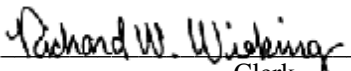
**Honorable MARTIN J. JENKINS** for all further proceedings.

Counsel are instructed that all future filings shall bear the initials **MJJ** immediately after the case number.

ALL MATTERS PRESENTLY SCHEDULED FOR HEARING ARE VACATED AND SHOULD BE RENOTICED FOR HEARING BEFORE THE JUDGE TO WHOM THE CASE HAS BEEN REASSIGNED.

Date: 1/10/08

FOR THE EXECUTIVE COMMITTEE:

  
Clerk

NEW CASE FILE CLERK:

Copies to: Courtroom Deputies  
Log Book Noted

Special Projects  
Entered in Computer 1/10/08AS

CASE SYSTEMS ADMINISTRATOR:  
Copies to: All Counsel

Transferor CSA

1 “September 2007, Plaintiff acquired all exclusive copyrights in the versions of PowerRPC created  
 2 before January 1, 2007 by written assignment, along with all accrued and prospective claims  
 3 arising from infringement of these copyrights.” See *StorageTek II* Docket No. 9 [Amended  
 4 Complaint] ¶ 3; see also *Chordiant* Docket No. 1 [Complaint] ¶ 13. Thus, in each action Yue  
 5 alleges that he is now the sole holder of the copyrights for the RPC software at issue. In each  
 6 action Yue purports to sue the defendant’s CEO, in-house counsel, and software managers as  
 7 individuals, based solely on their alleged involvement in the defendant’s distribution of its  
 8 software products.

9 Both *StorageTek II* and *Chordiant* involve licenses granted to the PowerRPC software by  
 10 Netbula, Yue’s corporation. In each case, the software comprises a software developer’s kit  
 11 (SDK) that assists customers in developing their own software applications, and runtime files that  
 12 customers distribute with those software applications. In the *Chordiant* action, Yue alleges that  
 13 Netbula sold an SDK license and 1000 runtime licenses to Chordiant Software Int’l Ltd., an  
 14 affiliate of defendant Chordiant Software, Inc. *Chordiant* Complaint ¶¶ 19-21. In each action,  
 15 Yue alleges, *inter alia*, that the defendants reproduced the SDK, created derivative works from the  
 16 SDK, and reproduced and distributed unauthorized runtime files, and used the Netbula software  
 17 on unlicensed platforms. See *id.* ¶¶ 15, 42-43, 56, 61, 65, 67-68, 70, 78-79. *StorageTek II*  
 18 Amended Complaint ¶¶ 18, 72, 85-86, 88-91, 95, 98, 103-106, 108-109, 111-114, 118-120, 123-  
 19 124, 126-129.

20 **B. Both the *StorageTek II* action and the *Chordiant* action involve identical issues of**  
 21 **copyright assignment and ownership.**

22 Since the same RPC software is at issue in both *StorageTek II* and *Chordiant*, both cases  
 23 present the same issues regarding the ownership and assignment of the alleged copyrights. As to  
 24 Yue’s allegation that he began developing the software at issue before he established Netbula in  
 25 1996, there is a common question of whether Yue or Netbula holds the copyrights in the software,  
 26 and what parts are owned by each. See *Chordiant* Complaint ¶ 1; *StorageTek II* Amended  
 27 Complaint ¶ 1. In addition, while Yue purports to have assigned the copyrights in suit to himself  
 28 from Netbula as of September 2007, whether such assignment was legitimate or effective, or a

1 19. On October 31, 2007, Judge Jenkins held a telephonic hearing on defendants'  
2 "administrative motions". I was not given any notice about this hearing and was not allowed to  
3 participate. Following the hearing, on November 2, 2007, Judge Jenkins signed an order which  
4 stated the following:

5  
6 Defendants' Motion for Administrative Relief to Vacate Hearing on Non-  
7 Party Dongxiao Yue's Request for Injunctive Relief and Impoundment  
8 [Docket Nos. 80-81] is hereby GRANTED. The Motion of Dongxiao Yue  
9 to Intervene and Join as Plaintiff; for Injunctive Relief; and for Copyright  
10 Impoundment [Docket Nos. 68-72] will be taken off calendar.

11 20. I then mailed a request for a tape recording of the telephonic hearing and was told by  
12 the clerk of the court that no court reporter was present and no audio recording was made.

13 21. I was later informed that Mr. Pulgram suggested to Judge Jenkins that I should be  
14 excluded from the October 31, 2007 telephonic hearing.

15 22. Both Netbula and I fully informed Judge Jenkins about my intention to file a separate  
16 action the *Netbula v. SUN* complaint in court filings. See Document No. 91, p.4:10-18 (filed on  
17 October 30, 2007); Document No. 98, p.3:11-19 and Document No. 99, pp.4:23-5-18 (filed on  
18 November 5, 2007) of the *Netbula v. SUN* case (C06-07391-MJJ). I also filed with the Court the  
19 emails communications between Mr. Pulgram and me.

20 23. Originally, I promised to Mr. Pulgram that I would file my action against  
21 SUN/StorageTek in the first week of November 2007. Because of Mr. Pulgram's email about the  
22 possibility of reaching a stipulation and his legal advice, I delayed the filing of my case against  
23 SUN/StorageTek. SUN later declined to stipulate to the substitution of party.

24  
25 24. On November 19, 2007, as I previously informed SUN/StorageTek and Judge Jenkins  
26 what I would have to do, I filed a separate case against SUN, alleging 10 counts of infringement of

1 three copyrights I personally owned. The *Yue v. SUN* (Case No. C07-05850) case was assigned to  
2 another judge.

3 25. On November 20, 2007, Netbula's former counsel and I went to the court for the  
4 hearings scheduled that day. The first hearing was about Netbula's motion to substitute party.  
5 Netbula's former counsel, Ms. Brillet, was arguing for Netbula. I wasn't saying anything. Then  
6 Judge Jenkins asked me: "Are you Mr. Yue?" I said "Yes". Then Judge Jenkins told me that I  
7 "should cease and desist" from filing papers before the court. Judge Jenkins further stated that  
8 even if I became a party in the *Netbula v. SUN* case, "it still would not give [Yue] authority to do  
9 so, to file pleadings in the matter." The following was the exchange (from the hearing transcript).  
10

11 THE COURT: ... AND I WILL ALSO SAY MR. YUE DOES NOT  
12 PRESENTLY HAVE ANY RIGHT TO FILE ANYTHING BEFORE  
13 THE COURT. YOU DON'T. ARE YOU MR. YUE?

14 MR. YUE: YES.

15 THE COURT: ...-- LISTEN AND HEAR ME CLEARLY. YOU  
16 SHOULD CEASE AND DESIST FROM DOING SUCH UNTIL YOU  
17 ARE AUTHORIZED TO DO SO... AND EVEN IF I WERE TO  
18 GRANT THIS MOTION, IT STILL WOULD NOT GIVE YOU  
19 AUTHORITY TO DO SO, TO FILE PLEADINGS IN THE MATTER...  
20 YOU WILL REMAIN.

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

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

25 MR. YUE: FOLLOWING RULES OF CIVIL PROCEDURE –

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

28 26. Also at the November 20, 2007 hearing, Judge Jenkins coached SUN's lawyer to attack  
29 my ownership of the assigned copyrights. The following is from the transcript:

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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.

...

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?

27. Judge Jenkins denied Netbula's request to substitute or join me as a copyright plaintiff in the *Netbula v. SUN* case, thus prevented me from protecting my copyrights in that case.

28. At the November 20, 2007 hearing of SUN's motion to intervene and modify BindView protective order, Judge Jenkins forbade me to argue about my opposition, and refused to hear my motions. The following is the exchange at the end of the hearing:

MR. YUE: YOUR HONOR, MAY I, FOR THE RECORD? AM I UNDERSTANDING CORRECTLY THAT MY MOTION TO INTERVENE AND –

THE COURT: NOT ON TODAY.

MR. YUE: -- HOLDING COUNSEL IN CONTEMPT --

THE COURT: LET ME SUGGEST, IT'S NOT ON TODAY BECAUSE YOU CAN'T MAKE SUCH A MOTION YET. SO IT'S NOT ON TODAY.

MR. YUE: I WAS MOVING AS A THIRD PARTY, JUST AS SUN DEFENSE COUNSEL.

THE COURT: RIGHT.

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MR. YUE: BUT I WAS A PRO SE.

2

3

THE COURT: IT WASN'T ON TODAY.

4

MR. YUE: WAS THE REASON VACATING MY MOTION  
BECAUSE I AM A PRO SE LITIGANT?

5

6

THE COURT: NO, IT JUST WASN'T -- IT DIDN'T HIT MY  
CALENDAR TODAY. THAT'S IT.

7

8

29. Also on November 20, 2007, Judge Jenkins and SUN defense counsel made it clear that

9

the *Netbula v. SUN* case **only** deals with **one** copyright that was alleged in the complaint (quoting

10 transcript):

11

THE COURT: IS THIS THE ONLY COPYRIGHT AT ISSUE –

12

13

MR. PULGRAM: YES.

14

Thus, the intellectual properties in the *Yue v. SUN* case were never part of the *Netbula v.*

15

*SUN* case. In fact, they were precluded from the *Netbula v. SUN* case.

16

17

30. On December 5, 2007, Mr. Pulgram emailed me on the *Yue v. SUN* case. Mr. Pulgram

18

suggested that I should have ignored Judge Jenkins's "cease and desist" order and filed a related

19

case motion on the C06-07391-MJJ docket. Mr. Pulgram stated the following about Judge

20

Jenkins's "cease and desist" order:

21

I do not know why it would be assumed, without more, that this order  
precludes filings that specifically relate to claims as to which Dr. Yue  
actually is a party.

22

23

31. Attached Exhibit A is the print out of email messages referenced above.

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32. On December 14, 2007, the hearing of SUN's motion for summary judgment in the

26

*Netbula v. SUN* case was held before Judge Jenkins. At the end of the hearing, SUN's attorney

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1 made an oral request to delay answering my lawsuit in the *Yue v. SUN* case, which was presided  
2 over by a different judge. Judge Jenkins immediately granted SUN's motion and asked the parties  
3 to stipulate to a new date. When I, the *pro se* plaintiff in the *Yue v. SUN* case, attempted to raise  
4 objections, Judge Jenkins forbade me to speak. Later, when Judge Jenkins came back into the  
5 court and learnt that I refused to stipulate to a change of date, he said that he would just order that  
6 SUN's motion to be granted.  
7

8 33. On December 17, 2007, I sent a letter to Judge Jenkins, stating that the circumstances and  
9 apparent bias require that Judge Jenkins disqualify himself from the cases I am a party.

10 34. In November 2007, I mailed a complaint against Judge Jenkins to the Ninth Circuit,  
11 alleging, *inter alia*, that Judge Jenkins retaliated against me due to the blog article I wrote and  
12 persisted in his retaliation. My complaint described in detail the events surrounding the blog and  
13 how he came to know that there was retaliation. I complained about Judge Jenkins's failure to  
14 recuse himself from the *Netbula v. Symantec and Netbula v. SUN* case. I also complained about  
15 Judge Jenkins's not-to-file order which I alleged was a violation of my due process. I further  
16 complained that Judge Jenkins issued an *ex parte* order in favor of defendants, threatened to have  
17 me taken out for attempting to make a legal argument, coached Mr. Laurence Pulgram to make  
18 argument against me and ignored Mr. Laurence Pulgram's unethical conduct.  
19

20 35. In the exhibits to my complaint about Judge Jenkins, I attached a letter to former Chief  
21 Circuit Judge Schroeder. In that letter, as the assigner of the copyrights, referring to the case in  
22 425 F.3d 1179 (9th Cir. 2005) (suggesting "an order that the district judge compensate the Trust  
23 for the damage it suffered"), I wrote: "Who do I ask for compensation for the lost copyright  
24 license revenue for my software?" I believe whoever who caused Netbula to lose the license  
25  
26

1 revenue should be liable for the loss. A copy of my complaint was sent to Judge Jenkins on  
2 December 17, 2007. Ninth Circuit rules prohibited disclosure of more information regarding the  
3 type of complaint I filed. If necessary, I can request the Ninth Circuit to grant me permission to  
4 publish all communications I have received regarding the complaint.

5  
6 36. On January 18, 2008, in the *Netbula v. SUN* case, Judge Jenkins granted SUN's motion for  
7 summary judgment on the copyright claim. In his order, Judge Jenkins ignored crucial facts,  
8 including but not limited to SUN defendants' admissions that they exceeded the license and the  
9 license agreement would be terminated upon SUN's acquisition of StorageTek.

10 37. On February 8, 2008, Judge Jenkins entered an Order denying request for disqualification  
11 (Docket No. 142 of the *Netbula v. SUN* case). This Order stated the following in the "FACTUAL  
12 BACKGROUND" portion:  
13

14 The Court set a dispositive motions deadline in the 2006 case of  
15 November 27, 2007. Accordingly, in October 2007 Defendants filed a  
16 motion for summary judgment to be heard on that day. Around the same  
17 time, the parties filed a flurry of documents with the Court. As is relevant  
18 here, Plaintiff sought an order substituting Yue for Plaintiff Netbula,  
19 Plaintiff's counsel sought to withdraw as counsel of record and Yue filed  
20 his own motion and briefing regarding various matters.

21 In an October 31, 2007 telephonic conference in which Plaintiff was  
22 represented by counsel, the Court, inter alia, rescheduled the Motion for  
23 Summary Judgment hearing to December 13, 2007, vacated the hearing  
24 noticed by non-party Yue, left Plaintiff's motion to substitute parties on  
25 calendar for November 20, 2007 and continued Plaintiff's counsel's  
26 motion to withdraw as counsel until after the Court's resolution of the  
27 summary judgment motion. Defendants prepared an order reflecting the  
28 Court's rulings and the Court signed the order.

On November 20, 2007, the Court held a hearing on Plaintiff's motion to  
substitute parties. The Court denied the motion on the record and, when  
Yue attempted to intervene in the proceedings, reminded Yue that he was  
not yet a party to the action and could not file documents, calendar  
hearings or speak in court without leave of the Court.

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Unbeknownst to the Court, one day prior, Yue, proceeding *pro se*, filed a separate action (the "2007 case") against StorageTek and Sun. In the 2007 case Plaintiff alleges ten claims of copyright infringement. (See Amended Complaint, Docket No. 9.) The 2007 case was originally assigned to Judge Illston who, on December 3, 2007, issued an Order of Referral for the Court to determine if the 2006 and 2007 cases were related.

38. In the ANALYSIS portion of the February 8, 2008 order, Judge Jenkins stated:

Yue alleges that his postings on an internet blog were known by the Court and influenced the Court's ultimate rulings on this matter. Yue's allegations consist solely of conclusions and are not sufficiently definite and particular to convince a reasonable person that bias exists. See Sykes, 7 F.3d at 1338. There is also no factual support for this assertion in the record or in the Court's own experience.

...

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. Insofar as Yue's rights as a Plaintiff in the 2007 case were concerned, the Court granted Yue leave to participate appropriately. Furthermore, Yue does not allege, nor could a reasonable person find, that the Court admonished Yue because of bias toward him, rather than because of the panoply of legal rules, precedent and relevant case management concerns governing the myriad issues raised by Yue's conduct.

39. In the November 20, 2007 hearing, Netbula's former counsel had the following exchange with Judge Jenkins (quoting from transcript):

MS. BRILLET: YOUR HONOR, MR. YUE IS NOT TRYING TO ASSERT THE RIGHTS OF NETBULA.

THE COURT: I RECOGNIZE THAT.

40. At the December 14, 2007 hearing of the *Netbula v. SUN* case, Judge Jenkins stated the following about the *Yue v. SUN* case (p.65:3-7 of the transcript):

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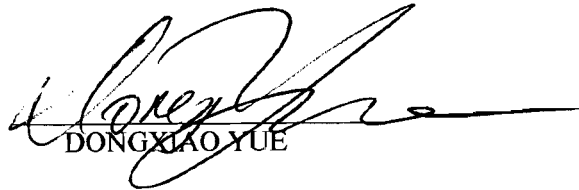
Now, there is a related case, and it does strike me that it is related. And this may be -- it's not completely overlapping with the present claim.

41. On January 29, 2008, SUN filed a motion to dismiss the *Yue v. SUN* case on the ground that that case is duplicative of the *Netbula v. SUN* case. On March 4, 2008, Judge Jenkins dismissed the *Yue v. SUN* case and entered final judgment against Yue without a hearing. The final judgment was entered before the all the defendants were served. Against his previous statement that the *Yue v. SUN* case "is not completely overlapping" with the *Netbula v. SUN* claim, Judge Jenkins simply repeated defense counsel Mr. Pulgram's argument that the *Yue v. SUN* case is duplicative of the *Netbula v. SUN* case, even though I had been precluded from participating in the *Netbula v. SUN* case to protect my personal rights. In the dismissal order, Judge Jenkins states:

Yue-Sun presents the same claims as Netbula-Sun and is effectively Plaintiff's attempt to re-litigate issues that have already been presented, and determined, by the Court. In addition, given the tactics that Plaintiff has pursued, which have ranged from duplicative to nearly vexatious, the Court finds that dismissing the action with prejudice is appropriate.

42. I have not served the four individual defendants mentioned in the Order granting Motion to Dismiss.

I declare under penalty of perjury of the laws of the State of California and the federal laws that forgoing declaration is true and correct to the best of my knowledge. This declaration was executed in San Leandro, California, on March 26, 2008.

  
DONGXIAO YUE

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

YUE,

Plaintiff,

v.

STORAGE TECHNOLOGY CORPORATION,  
et al.,

Defendants.

No. C-07-05850 JW (EDL)

**REPORT AND RECOMMENDATION  
REGARDING ATTORNEY’S FEES**

**I. BACKGROUND**

Plaintiff Dangxiao Yue filed this lawsuit on November 19, 2007, alleging that Defendants Storage Technology Corporation and Sun Microsystems, Inc. infringed two copyrights that had been assigned to him by his company Netbula. On December 10, 2007, Plaintiff filed an amended complaint to add various employees and officers of Defendants including Sun’s CEO and Assistant General Counsel. On December 14, 2007, the Court ordered that no responsive pleadings would be due until such time as the Court set a date at the upcoming status conference. Despite this order, Plaintiff filed a motion for default judgment, which the Court denied. See Docket No. 41.

The Court dismissed the case with prejudice on the ground that it was duplicative of an earlier filed lawsuit initiated by Netbula, and entered judgment on March 4, 2008. See Docket No. 51 (March 4, 2008 Order). Specifically, the District Court noted that Plaintiff, on his own and through Netbula, had filed multiple actions to vindicate his rights. In an earlier case, Netbula v. Sun,

1 06-07391 MJJ (“Netbula-Sun”)<sup>1</sup>, Netbula alleged copyright infringement, intentional fraud, breach  
2 of contract, unfair competition under California state law, and equitable accounting and imposition  
3 of a constructive trust. Id. at 2. In that case, the Court granted Defendants’ motion for summary  
4 judgment based on its determination that Defendants’ use of Netbula’s software was within the  
5 scope of the 2000 and 2004 license agreements between Netbula and StorageTek.

6 In determining that this action was duplicative of Netbula-Sun, the District Court found that  
7 this case presented the same claims already asserted. In fact, many of the allegations in the  
8 complaint that Plaintiff claimed constituted additional facts in this case were a verbatim restatement  
9 of Yue’s declaration presented in opposition to the Netbula-Sun defendants’ motion for summary  
10 judgment. Id. at 4. In addition, the Court granted summary judgment on the merits of claims in  
11 Netbula-Sun that were now presented in this case. Finally, the Court found that the two actions  
12 involved infringement of the same rights. Even though Plaintiff claimed that Defendants’ use of  
13 software impacted additional copyrights, Netbula should have asserted violations of those copyrights  
14 in Netbula-Sun, rather than filing this subsequent lawsuit. Id. at 5.

15 The Court also found that there was privity among the successive parties, as StorageTek and  
16 Sun were both Defendants in the original action, and the five individuals named were employees of  
17 those entities. Id. at 5-6. In addition, because Yue is the founder and president of Netbula, and  
18 Netbula assigned all of its copyrights to Yue, Yue was an assignee in privity with Netbula. Id. at 6.  
19 The Court further found that Plaintiff entered into this assignment at least in part due to his desire to  
20 bring Netbula’s then pending copyright claims in his own name, on a pro se basis. See Netbula-Sun  
21 Docket No. 139 at 10-11, 16-17 (Nov. 20, 2007 Tr.). In dismissing the action, the Court noted that  
22 Plaintiff’s tactics “have ranged from duplicative to nearly vexatious.” March 4, 2008 Order at 7.  
23 On April 1, 2008, Plaintiff filed an appeal of the March 4, 2008 Order and judgment to the Ninth  
24 Circuit Court of Appeals. See Docket No. 72.

25 In March 2008, Defendants moved for attorney’s fees. That motion was referred to this  
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27 <sup>1</sup> Netbula also filed an action entitled Netbula LLC v. Bindview Development Corp., No. 06-711  
28 MJJ (“Netbula-Bindview”) against Bindview, an entity that is not a Defendant in this action. Netbula  
v. Greenwich Capital Markets, Inc., 06-7143 and Yue v. Chordiant Software, Inc., 08-0019, are also  
related to this action.

1 Court for a report and recommendation.<sup>2</sup> After Defendants moved for fees, Plaintiff moved for relief  
2 from judgment and to disqualify defense counsel. See Docket Nos. 53, 63, 65. Plaintiff also moved  
3 to disqualify the Honorable Martin Jenkins post judgment. Docket No. 58. This was not the first  
4 time Plaintiff attempted to avoid Judge Jenkins in this case, as he also sought leave to oppose Sun's  
5 earlier motion to relate this case to Netbula-Sun. Judge Jenkins related the two suits on December  
6 14, 2007. See Docket No. 19. Plaintiff wrote another letter to Judge Jenkins in this case, noting that  
7 he had complained to the Ninth Circuit and to Congress about the Judge's bias against him. See  
8 Docket No. 11. He also filed an emergency motion to disqualify Judge Jenkins and to have a new  
9 judge appointed in the Netbula-Sun case, and wrote to Judge Jenkins accusing him of bias. See  
10 Netbula-Sun Docket Nos. 129, 142. Judge Jenkins denied that request on February 8, 2008. Docket  
11 No. 142.

12 On April 9, 2008, after Judge Jenkins left the federal bench to join the California Court of  
13 Appeal, the case was reassigned to Judge Ware. See Docket No. 76. On June 16, 2008, Plaintiff  
14 moved to strike Defendants' Motion for Attorney Fees and Costs for failure to comply with Civil  
15 Local Rule 54-6 which requires counsel for the respective parties to meet and confer for the purpose  
16 of resolving all disputed issues related to attorney fees prior to making a motion for award of  
17 attorney fees. On July 24, 2008, Judge Ware denied Plaintiff's motion for relief from judgment,  
18 denied Plaintiff's motion to disqualify counsel, and denied Plaintiff's motion for disqualification of  
19 the assigned judge.

## 20 **II. DISCUSSION**

### 21 **A. Legal Standard**

22 The Copyright Act provides for an award of reasonable attorney's fees to the prevailing party  
23 as part of costs. 17 U.S.C. § 505. "An award of attorney's fees to a prevailing defendant that  
24 furthers the underlying purposes of the Copyright Act is reposed in the sound discretion of district  
25 courts," and this discretion is not "cabined by a requirement of culpability on the part of the losing  
26 party." Entm't Research Group v. Genesis Creative Group, 122 F.3d 1211, 1228-29 (9th Cir. 1997)

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27  
28 <sup>2</sup> While the hearing was originally scheduled for April 22, 2008, the parties stipulated to  
continue the hearing until after the pending motions for relief from judgment and disqualification were  
heard.

1 (citation omitted). Courts have wide latitude to exercise this discretion, and are guided by several  
2 non-exclusive factors: “(1) the degree of success obtained; (2) frivolousness; (3) motivation; (4) the  
3 objective unreasonableness of the losing party’s factual and legal arguments; and (5) the need, in  
4 particular circumstances, to advance considerations of compensation and deterrence.” *Id.* at 1229.  
5 These factors are “not exclusive and need not all be met;” awards to prevailing defendants are within  
6 a court’s discretion if they further the purposes of the Copyright Act. *Robinson v. Lopez*, 2003 U.S.  
7 Dist. LEXIS 24382 (C.D. Cal. 2003) (quoting *Fantasy, Inc. v. Fogerty*, 94 F.3d 553, 558 (9th Cir.  
8 1996)).

9 Generally, in determining an appropriate fee, the court begins by calculating “the number of  
10 hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Hensley v.*  
11 *Eckerhart*, 461 U.S. 424, 433 (1980). The party seeking attorney’s fees bears the burden of  
12 producing evidence supporting the hours worked and a reasonable rate; the district court may reduce  
13 the award accordingly if insufficient evidence is produced. *Id.* The district court may also exclude  
14 compensation for time that was “not reasonably expended” in the case. *Id.* at 434 (court may deny  
15 compensation for “hours that are excessive, redundant, or otherwise unnecessary”). In copyright  
16 cases, the moving party bears “the burden of showing the time spent and that it was reasonably  
17 necessary to the successful prosecution of their copyright claims.” *Frank Music Corp. v.*  
18 *Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989).

## 19 **B. Motion for Fees**

### 20 **1. Whether the Ninth Circuit Factors Support An Award of Attorney’s Fees**

21 Awarding fees here is consistent with purposes of the Copyright Act, as such an award  
22 protects Defendants from wasting resources on duplicative actions. *See Riviera Distribs. v. Jones*,  
23 517 F.3d 926, 929 (7th Cir. 2008) (“This case turns out to be an especially good candidate for fee  
24 shifting under § 505, because it was filed in the teeth of an agreement not to sue. Riviera and  
25 Midwest have been at each others’ throats for years, and this is the second suit based on  
26 fundamentally the same claim of infringement. Eventually the first suit was settled.”). In addition,  
27 Plaintiff’s complaint did not raise a novel issue of law or fact or an objectively reasonable claim, as  
28 the same basic claims had already been previously rejected by the District Court.

1 Furthermore, Defendants are the prevailing parties. They obtained a dismissal of the entire  
2 action with prejudice and an entry of judgment thereon. The District Court also denied Plaintiff's  
3 motion for relief from judgment. Defendants' degree of success in the action was total, as they  
4 established that Plaintiff could not assert new copyrights against Defendants for their use of  
5 Netbula's software pursuant to licenses, the subject of the prior suit. This factor supports an award  
6 of fees.

7 Plaintiff's lawsuit was also objectively unreasonable. In granting the motion to dismiss, the  
8 District Court recognized that the caselaw clearly prevented a party or those in privity from bringing  
9 a separate action involving the same subject matter against the same defendants in a different action.  
10 See March 4, 2008 Order at 3-6 (quoting relevant case law including Adams v. Cal. Dep't of Health  
11 Servs., 487 F.3d 684 (9th Cir. 2007)). As discussed above, the Court found that the cases presented  
12 the same claims and involved infringement of the same rights. The Court found that Plaintiff and  
13 Netbula were in privity on two separate and independent grounds: that Plaintiff was an assignee;  
14 and that Plaintiff was virtually represented in Netbula's case as a result of his intertwined  
15 relationship with Netbula. See id. at 6.<sup>3</sup>

16 In addition, the District Court's previous order in Netbula-Sun granting Defendants' motion  
17 for summary judgment established that Defendants' use of Netbula's PowerRPC software was  
18 licensed and did not constitute infringement. See Jan. 18, 2008 Summary Judgment Order. The  
19 Court had already determined as a matter of law that the license between Netbula and StorageTek  
20 foreclosed a claim of copyright infringement. In addition, defense counsel warned Plaintiff that  
21 before filing an entirely new and separate infringement action, he should meet and confer with  
22 counsel because the action was duplicative, advising that Sun would seek to recover attorney's fees.  
23 See Wakefield Decl. Ex. A.

24  
25 <sup>3</sup> While the Supreme Court recently disapproved of the doctrine of preclusion by virtual  
26 representation, see Taylor v. Sturgell, 128 S. Ct. 2161, 2173 (June 12, 2008), it noted that non-parties  
27 to the prior litigation may be precluded under certain recognized exceptions, including substantive legal  
28 relationships such as that of assignee and assignor, and the assumption of control over the earlier  
litigation. Here, the District Court found privity based on assignment. In addition, Yue appears to have  
assumed control over the earlier litigation.

1 As to factual reasonableness, Plaintiff alleged claims against Sun's officers based on  
2 communications between them and Plaintiff in 2006. However, Plaintiff knew from the factual  
3 record in Netbula-Sun that the allegedly infringing acts stopped in late 2005. For example, he was  
4 present at the deposition where Sun's Rule 30(b)(6) witness testified that it removed the allegedly  
5 infringing Netbula software in late 2005. See Netbula-Sun Docket No. 107, Ex. 44 at 3. While Yue  
6 argues that the evidence shows ongoing infringement as recently as 2007, he does not state how the  
7 individual defendants are connected to such alleged ongoing infringement. While Yue attacks  
8 Abramovitz's credibility, he does not offer any factual basis for naming the particular two high level  
9 officers in this action, revealing that the allegations against them are speculative.

10 As to motivation and harassment, it is difficult to discern Plaintiff's motive, but the number  
11 of motions and appeals filed in his various cases, coupled with the fact that this case was duplicative  
12 and the District Court noted that his conduct is "nearly vexatious," favors awarding fees. In  
13 particular, the number of unsuccessful motions for recusal and for relief from judgment indicates  
14 that Plaintiff filed repetitive motions that lacked merit, which only served to increase fees.

15 In addition, Plaintiff's pro se status does not warrant leniency here, where Plaintiff has  
16 received much education throughout the multiple cases that he and Netbula have litigated. He also  
17 has had counsel at times in this litigation and Netbula is still represented by counsel in Netbula-Sun.  
18 As to Plaintiff's allegations of bias on the part of Judge Jenkins, Yue sets forth no factual basis for  
19 them. See Opp. at 27.

20 Finally, Plaintiff also argues that attorney's fees should not be awarded because the alleged  
21 infringement commenced before the effective date of copyright registration. Opp. at 28. Plaintiff  
22 cites no support for this argument, and the authority is to the contrary. In fact, one treatise author  
23 has explained that: "Very infrequently, the argument is advanced by a losing plaintiff that defendant  
24 cannot be awarded its attorney's fees because the work was not registered within three months from  
25 the date of first publication. This profoundly ignorant argument should be met with Rule 11  
26 sanctions. . . . Both of the circuits to have had the misfortune to have the argument presented have  
27 correctly rejected it." William F. Patry, Patry on Copyright § 22:204 (2008); see also O'Well  
28 Novelty Co. v. Offenbacher, Inc., No. 99-1949, 2000 WL 1055108, at \*7 (4th Cir. 2000) ("it simply

1 defies logic to conclude that an unsuccessful plaintiff's additional failure timely to register its  
2 copyright serves to bar a court from awarding attorney fees to the prevailing defendant"). If the  
3 court makes a finding of noninfringement, "there appears to be no requirement that the work be  
4 registered in order to award attorney's fees to a prevailing defendant." Melville B. Nimmer and  
5 David Nimmer, Nimmer on Copyright, 14.10[A] n.3, Matthew Bender, 2007; see also, Robinson v.  
6 Lopez, 2003 U.S. Dist. LEXIS 24382, at \*11-12, 69 U.S.P.Q.2D (BNA) 1241 (C.D. Cal. 2003)  
7 (awarding defendant attorney's fees under Section 505 even though plaintiff did not register the  
8 work at issue with the Copyright Office). For the above reasons, an award of fees is proper.

## 9 2. Reasonableness of Fees

10 Defendants seek fees and costs in excess of \$92,000 as of their opening brief, and over  
11 \$134,000 as of the reply brief. On July 24, 2008, Defendants submitted a supplemental declaration  
12 stating that over \$87,000 in additional fees had been incurred since April 8, 2008, when the reply  
13 brief was filed. See Supplem. Wakefield Decl. ¶ 2.

14 The first amended complaint in this case lists ten claims, all for copyright infringement.  
15 Therefore, there is no need to apportion copyright versus non-copyright claims. The hourly rates  
16 charged by Fenwick range from \$245 per hour to \$690 per hour. These rates are comparable to  
17 other full service Bay Area law firms, Wakefield Decl. ¶ 4, and are reasonable.

18 The expenses include time reviewing the two complaints, participating in case management  
19 activities, assessing issues pertaining to service, reviewing the motion for default, researching and  
20 analyzing and drafting the motion to dismiss and reply, working on plaintiff's motion to strike,  
21 communication with clients and Mr. Yue and opposing counsel, and work on the fees motion. It  
22 does not include time spent preparing the motion for sanctions. The time outlined in the April 8,  
23 2008 declaration in support of the reply brief includes time spent opposing Plaintiff's motion for  
24 disqualification of counsel and motion for relief from judgment, as well as the fees reply. The time  
25 outlined in the latest declaration includes, but is not limited to, time spent meeting and conferring  
26 and preparing a joint case management statement, attending a case management conference,  
27 preparing a supplemental brief regarding Plaintiff's motion for disqualification of counsel, opposing  
28 Plaintiff's motion to take counsel's depositions, attending the June 30, 2008 hearing, opposing

1 Plaintiff's motion to strike Defendants' motion for attorney's fees, and attending the hearing on the  
2 motion for fees. The Court finds that the above fees are reasonable. However, the Court notes that a  
3 few of the tasks performed by Jedediah Wakefield, a partner at Fenwick – such as reviewing  
4 standing orders and conducting legal research – could have been performed by an associate at a  
5 lower billing rate. However, such tasks only comprise a minor part of the billing activities.  
6 Accordingly, the Court finds that the fees should be reduced by \$3000.

7 On occasion, some courts have considered reducing the amount of attorney's fees awarded  
8 against a plaintiff of limited financial resources. See, e.g., Chivalry Film Productions v. NBC  
9 Universal, Inc., 2007 WL 4190793, \*3-4 (S.D.N.Y. Nov. 27, 2007) (finding that although plaintiff's  
10 pro se status does not preclude an award of fees against him, his financial resources are not  
11 altogether irrelevant); see also Rasmussen v. General Growth Properties, Inc., 2005 WL 3334752, \*6  
12 (D. Utah Dec. 7, 2005) (limiting the amount of recoverable attorney's fees to \$1,000 because  
13 although fees were warranted, plaintiff proceeded pro se and was of admittedly limited resources).  
14 However, all the other factors in this case strongly favor awarding fees here and Plaintiff did not  
15 make the argument in his papers or provide specific information when the Court asked about his  
16 financial resources at the hearing. Accordingly, the Court does not find that a reduction on this basis  
17 is warranted.

### 18 3. Other Costs

19 The prevailing party in a copyright infringement action is also entitled to recover out of  
20 pocket expenses incurred by the attorney and passed on to the client. Twentieth Century Fox Film  
21 Corp. v. Entm't Distrib., 429 F.3d 869, 885 (9th Cir. 2005) (holding “that district courts may award  
22 otherwise non-taxable costs, including those that lie outside the scope of § 1920, under § 505”). The  
23 costs listed in the spreadsheet of \$4853.30 (including legal research and courier fees), which are  
24 included in the above totals, are recoverable.

### 25 C. Motion to Strike

26 Plaintiff has filed a motion to strike Defendants' Motion for Attorney Fees and Costs for  
27 failure to comply with Civil Local Rule 54-6(b), which requires that “counsel for the respective  
28 parties must meet and confer for the purpose of resolving all disputed issues relating to attorney's

1 fees before making a motion for award of attorney fees.” See Docket No. 113. Plaintiff argues that  
2 Defendants’ non-compliance with the rule resulted in severe prejudice to him because he lost the  
3 opportunity to contest the fees request in a live conference, and that the just remedy for Defendants’  
4 non-compliance is to strike their motion for attorney’s fees. Plaintiff’s argument lacks merit for  
5 several reasons.

6 District courts within the Ninth Circuit have granted attorney’s fees to plaintiffs despite a  
7 plaintiff’s failure to comply with Local Rule 54-6 meet and confer requirement. See May v.  
8 Metropolitan Life Ins. Co., No. C 03-5056CW, 2005 WL 839291, at \*1 (N.D. Cal., April 7, 2005)  
9 (granting plaintiff’s motion for attorney’s fees where the defendant opposed the plaintiff’s motion  
10 for attorney fees and costs on the basis the plaintiff’s motion failed to comply with L. R. 54-6, but  
11 where the plaintiff’s counsel had expected the meet-and-confer process to take place at a later date  
12 within the deadline and where surreply suggested that complying with meet and confer requirement  
13 would be futile). Where parties have failed to comply with a requirement to meet and confer  
14 pursuant to other local rules, courts have held that this failure should not serve as a basis to deny a  
15 motion and have considered whether resolution is possible in determining whether to order the  
16 parties to meet and confer. See, e.g., Thomas v. Baca, 231 F.R.D. 397, 404 (C.D. Cal. 2005) (where  
17 defense counsel argued that plaintiffs’ counsel failed to meet and confer prior to the filing of motion  
18 for class certification as required by local rule, the court noted that it “is not persuaded that this fact,  
19 if true, should serve as a basis to deny the motion,” noting that it did not appear “that any informal  
20 resolution of this motion is possible”). Here, ordering the parties to meet and confer would similarly  
21 be futile. After Defendants filed their motion for fees, during a call with Defense counsel, Plaintiff  
22 stated that he would have disputed the fees from the outset (Wakefield Decl. at 2 ¶ 3) and protested  
23 that he was not given the chance to dispute them within the statutory time limit. Defendants also  
24 note that Plaintiff generally refused to discuss what issues might be resolved at a meet and confer.  
25 See Wakefield Decl. at 1-2 (Wakefield to Yue: “I asked whether there were any particular items  
26 about which you believed a meet and confer to resolve disputed issues would be appropriate. You  
27 refused to discuss the subject”). In addition, Yue discussed fees with defense counsel in an April 24,  
28 2008 phone call, albeit one that took place after the motion for fees was filed.

United States District Court  
For the Northern District of California

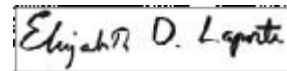
1 The language of Local Rule 54-6 is somewhat ambiguous as to its application to pro se  
 2 litigants. Defendants argue that they need not comply since that rule only refers to counsel and does  
 3 not specify pro se litigants, in contrast to Civil Local Rules that make it clear when counsel or pro se  
 4 parties are to confer. See Civil L.R. 30-1 (“the noticing party must confer about the scheduling of  
 5 the deposition with opposing counsel or, if the party is pro se, the party”). Given both the ambiguity  
 6 of the rule and the futility of a meet and confer conference, striking Defendants’ motion for fees is  
 7 not warranted.

8 **III. CONCLUSION**

9 Accordingly, the Court recommends that the District Court award the Defendants fees and  
 10 costs in the amount of \$219,949.90 (total fees requested less \$3000). Any party may serve and file  
 11 specific written objections to this recommendation within ten (10) business days after being served  
 12 with a copy. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); Civil Local Rule 72-3. Failure to file  
 13 objections within the specified time may waive the right to appeal the District Court's order.

14 **IT IS SO RECOMMENDED.**

15 Dated: August 6, 2008




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ELIZABETH D. LAPORTE  
 United States Magistrate Judge

1 DONGXIAO YUE  
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7 *Pro Se*

8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA

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DONGXIAO YUE,  
 Plaintiff,  
 v.  
 STORAGE TECHNOLOGY  
 CORPORATION, a Delaware corporation;  
 SUN MICROSYSTEMS Inc., a Delaware  
 corporation; Michael Melnick, an individual;  
 Julie DeCecco, an individual; Michael P.  
 Abramovitz, an individual; Lisa K. Rady, an  
 individual; Jonathan Schwartz, an individual;  
 and DOES 1-1000, inclusive,  
 Defendants.

Case Nos. C07-05850-JW

**PLAINTIFF’S OBJECTIONS TO THE  
 RECOMMENDATION OF THE  
 MAGISTRATE JUDGE ON PLAINTIFF’S  
 MOTION TO STRIKE DEFENDANTS’  
 MOTION FOR ATTORNEY’S FEES FOR  
 FAILURE TO COMPLY WITH CIVIL  
 LOCAL RULE 54-6**

**AND**

**NOTICE OF MOTION AND MOTION  
 FOR DE NOVO DETERMINATION OF  
 PLAINTIFF’S MOTION TO STRIKE  
 [DOCKET NO. 113]**

Time: 9:00 AM  
 Date: November 3, 2008  
 Dept: 8, 4<sup>th</sup> Floor  
 Judge: The Honorable James Ware

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7 Self-Represented

8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA

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DONGXIAO YUE,  
 Plaintiff,  
 v.  
 STORAGE TECHNOLOGY  
 CORPORATION, a Delaware corporation;  
 SUN MICROSYSTEMS Inc., a Delaware  
 corporation; Michael Melnick, an individual;  
 Julie DeCecco, an individual; Michael P.  
 Abramovitz, an individual; Lisa K. Rady, an  
 individual; Jonathan Schwartz, an individual;  
 and DOES 1-1000, inclusive,  
 Defendants.

Case Nos. C07-05850-JW-EDL

**NOTICE OF MOTION AND MOTION FOR DE NOVO DETERMINATION OF DEFENDANTS' MOTION FOR ATTORNEY'S FEES**

**AND**

**OBJECTIONS TO THE RECOMMENDATION AND REPORT OF THE MAGISTRATE JUDGE ON THE AWARD OF ATTORNEY'S FEES AND COSTS**

Time: 9:00 AM  
 Date: November 3, 2008  
 Dept: 8, 4<sup>th</sup> Floor  
 Judge: The Honorable James Ware



**TABLE OF AUTHORITIES**

Cases

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21 *Hensley v. Eckerhart*,  
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23 *Hewitt v. Helms*,  
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24 *Identity Arts v. Best Buy Enterprise Services Inc.*,  
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1 NOTICE OF MOTION & MOTION FOR *DE NOVO* DETERMINATION & OBJECTIONS

2 TO ALL PARTIES AND THEIR COUNSEL:

3 Please take notice that at 9:00AM, on November 3, 2008 before U.S. District Judge the  
4 Honorable James Ware at the San Jose Division of the Northern District of California, pursuant to  
5 FRCP 72(b), 28 U.S.C. 636(b)(1), Civ. L.R. 72-3 and Civ. L.R. 7-2, copyright owner, *pro se*  
6 plaintiff Dongxiao Yue (“Dr. Yue” or “Yue”), will move the Court for *de novo* determination of  
7 Defendants’ motion for attorneys’ fees and costs [Docket No. 53], which the court referred to  
8 Magistrate Judge Laporte. Plaintiff respectfully objects to the Magistrate Judge’s Report and  
9 Recommendation to award \$219,949.90 to copyright Defendants Sun Microsystems, Inc. and  
10 StorageTek et al. under Section 505 of the Copyright Act [Docket No. 142]. Yue’s motion for *de*  
11 *novo* determination of Defendants’ motion for attorneys’ fees and costs is based upon the this  
12 notice, the 29 objections presented below, the Court’s record and the Declaration of Dongxiao  
13 Yue (“Yue Decl.”), filed concurrently.

14 **FACTUAL BACKGROUND**

15 Since 1994, Yue, a Chinese software developer, had been developing software named  
16 “PowerRPC.” In July 1996, Yue founded the company “Netbula, LLC” (“Netbula”). This case  
17 involves the copyright of the code Yue wrote before Netbula came to exist, with U.S. registration  
18 number TXu 1-576-987 (“the `987 Copyright”).<sup>1</sup> Yue always owned this copyright<sup>2</sup>.

19 In 2000, StorageTek purchased eight (8) PowerRPC SDK licenses and 1000 runtime licenses.  
20 Yue delivered PowerRPC to StorageTek on a CD with license information printed on it: “8

21 \_\_\_\_\_  
22 <sup>1</sup> This copyright has effective date of November 27, 2007. Yue Decl. at ¶12, Ex.D. However, when Yue filed the First  
Amended Complaint (“FAC”) on December 10, 2007, he had not yet received the certificate of registration.

23 <sup>2</sup> The other two copyrights litigated in this case were assigned to Yue in September 2007, with registration numbers  
24 TX 6-437-847 (the “`847 Copyright”) and TX 6-491-697 (the “`697 Copyright”). None of the `987, `847 and `697  
25 copyrights was involved in related *Netbula-Sun* case (Case No. C06-07391), where “the only copyright at issue” was  
the one with Registration No. TX 6-211-063 (the “`063 Copyright”). Defendants question whether Yue or Netbula  
owns the rights of the `063 Copyright.

1 Developers 1000 runtime”. This information was also embedded in the software and would be  
2 displayed on the computer screen when a user ran the software.

3       Soon afterward, StorageTek falsely claimed that it stopped using or distributing PowerRPC. In  
4 fact, it developed many products with PowerRPC and far exceeded the number of licenses. One  
5 StorageTek product that incorporated PowerRPC is the “LibAttach” software. Lisa K. Rady, the  
6 StorageTek program manager for the LibAttach software, wrote in an internal email:

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

10 In the responding email, Michael Melnick, another StorageTek manager, wrote:

11                   The agreement is specific to platform (Win NT and 95/98 platforms)  
12                   types of Netbula software (PowerRPC SDK). This concerns me  
13                   greatly...

14       At the time of these emails, StorageTek already developed LibAttach by using PowerRPC  
15 on Windows 2000 – an unlicensed platform. StorageTek also sold unlimited licenses which  
16 allowed StorageTek customers to make unlimited copies of PowerRPC for unlimited concurrent  
17 use. StorageTek also granted its customers “floating” licenses, which limited the number of  
18 concurrent users but permitted unlimited number of copies of PowerRPC. StorageTek only  
19 purchased eight (8) SDK licenses in 2000. But more than eight users had used PowerRPC SDK on  
20 multiple computers. See, Counts I-V of the First Amended Complaint (“FAC”).

21       In 2004, StorageTek decided to upgrade PowerRPC. Concealing the fact that it had  
22 exceeded the licenses, StorageTek purchased one (1) PowerRPC SDK license and 1000 runtime  
23 licenses for a newer version of PowerRPC. Again, StorageTek distributed more than 1000 copies  
24 of the newer version of the PowerRPC, sold unlimited licenses and “floating” licenses. See,  
25 Counts V-IX of the FAC.

26                   -2-

1 In mid 2005, Yue started to suspect that StorageTek might have made unauthorized  
2 copying of PowerRPC. In mid 2005, right before it was acquired by Sun, StorageTek finally  
3 admitted that it had distributed at least 7455 copies of PowerRPC. Yue later discovered evidence  
4 of infringement on a far larger scale and continuing infringement as recent as late 2007.

5 In December 2006, Netbula filed a civil action against StorageTek and Sun, alleging  
6 infringement of the '063 Copyright, fraud, breach of contract and unfair competition (Case No. C-  
7 06-07391, N.D. Cal, the "*Netbula-Sun*" case). Sun counter-claimed Yue personally for allegedly  
8 infringing the Java trademark.

### 9 RELEVANT PROCEDURAL BACKGROUND

10 On October 22, 2007, acting *pro se*, Yue filed a FRCP 24(a) motion to intervene and join as a  
11 party in *Netbula-Sun*, requesting injunctive relief due to ongoing infringement of Yue's personally  
12 owned copyrights. *Netbula-Sun* was then presided over by Judge Jenkins and no dispositive  
13 motion was pending. Yue's motion was set for hearing on November 27, 2007.

14 The next day, on October 23, 2007, Netbula deposed Michael Abramovitz, a FRCP 30(b)(6)  
15 witness offered by Sun. After the deposition, Sun filed a motion for summary judgment.

16 Netbula and Yue informed the District Court that Yue would have to assert his own claims  
17 against Sun, multiple times<sup>3</sup>. They suggested that the most efficient approach was for Yue to join  
18 *Netbula-Sun*; the alternative would be for him to file a separate action.

19 Yue sought a stipulation from Sun for him to join *Netbula-Sun*. Sun refused. Instead, Sun filed  
20 an "administrative" request to vacate the hearing of Yue's rule 24(a) motion to join *Netbula-Sun*  
21 and Yue's motion for injunctive relief. On October 31, 2007, in a hearing without Yue's  
22 participation, Judge Jenkins granted Sun's request and vacated the hearing of "Non-Party  
23 Dongxiao Yue's" motions. After his effort to join *Netbula-Sun* blocked, on November 19, 2007,

24 \_\_\_\_\_  
25 <sup>3</sup> See, e.g., Document No. 91, p.4:10-18 (filed on October 30, 2007); Document No. 98, p.3:11-19 and  
Document No. 99, pp.4:23-5-18 (filed on November 5, 2007) of *Netbula-Sun*.

1 Yue filed the instant *Yue v. Sun* case (“*Yue-Sun*” or “*Yue*”, Case No. C07-05850), alleging ten (10)  
2 counts of willful copyright infringement. The case was assigned to District Judge the Honorable  
3 Susan Illston.

4 The following day, November 20, 2007, at a hearing in *Netbula-Sun*, Judge Jenkins ordered  
5 Yue to “cease and desist” from filing pleadings or speaking in court. The Judge and the parties  
6 also made it clear that “the only copyright at issue” in *Netbula-Sun* was the `063 copyright. Judge  
7 Jenkins also suggested Sun to question the validity of the assignment of the `063 copyright, so “he  
8 is not substituted in as a party” in *Netbula-Sun*. See Doc. No. 64. Sun then filed a motion to relate  
9 *Yue-Sun* to *Netbula-Sun*<sup>4</sup>. Because motion papers for relating the cases must be filed in the earlier  
10 case ---*Netbula-Sun*, Yue did not file any response to Sun’s motion to relate the cases in light of  
11 the “cease and desist” order. On December 10, 2007, Yue filed the First Amended Complaint  
12 (“FAC”), alleging willful direct and/or secondary infringement by five individual defendants.

13 Sun’s motion for summary judgment in the *Netbula-Sun* case was heard on December 14,  
14 2007. At the hearing, Judge Jenkins re-iterated that Yue – the *pro se* plaintiff in *Yue-Sun* -- may  
15 not speak to him. As to *Yue-Sun*, the Judge stated that “it’s not completely overlapping with the  
16 present [*Netbula-Sun*] claim.” As to Netbula’s copyright claim in *Netbula-Sun*, Judge Jenkins  
17 stated: “this claim may survive.” See, Exhibit B to the Declaration of Yue (transcript).

18 On December 17, 2007, Yue wrote a letter to Judge Jenkins, again seeking clarification on  
19 whether he was allowed to file papers before the Judge. Yue wrote, if permitted, he would file a  
20 “response” to Sun’s motion to relate *Yue-Sun* to *Netbula-Sun*.

21 On January 2, 2008, Yue moved before Judge Illston for default judgment against Sun and  
22 StorageTek. Sun filed an opposition. Yue filed a reply brief on January 8, 2008. The next day, on  
23 January 9, 2008, a backdated order was entered to relate *Yue-Sun* to *Netbula-Sun*. On January 10,

24 \_\_\_\_\_  
25 <sup>4</sup> Sun’s counsel asked Yue to file a motion in *Netbula-Sun* to relate the cases. Yue declined to do so because of the  
26 “cease and desist” order.

1 2008, the Executive Committee of the Court reassigned *Yue-Sun* to Judge Jenkins. On January 18,  
2 2008, Judge Jenkins granted Sun's motion for summary judgment as to the copyright claim in  
3 *Netbula-Sun*.

4 On January 28, 2008, attorney Elena Rivkin noticed her appearance as counsel for Yue in  
5 *Yue-Sun*. On February 21, 2008, Yue filed a motion to proceed as a *pro se* plaintiff again.

6 On March 4, 2008, Judge Jenkins dismissed the instant case with prejudice and entered final  
7 judgment against Yue. Judge Jenkins also denied Yue's request to proceed *pro se*.

8 On March 10, 2008, Yue filed a motion to disqualify Fenwick & West, LLP ("Fenwick") in  
9 the related *Yue v. CSI* case (Case No. C08-0019-JW). Yue had complained about Fenwick's  
10 apparent conflict of interest and unprofessional conduct since 2007. This disqualification motion  
11 was later consolidated with a motion to disqualify Fenwick in *Yue-Sun*.

12 On March 18, 2008, Yue filed a motion in the *Yue v. CSI* case and *Yue-Sun* to disqualify  
13 Judge Jenkins under 28 U.S.C. §144 etc. Pursuant to Civ. L.R. 3-15, Yue requested the Clerk to  
14 refer the motion to a randomly assigned judge for determination. On the same day, Sun filed a  
15 motion for attorney's fees, seeking \$92,000 in fees and costs. On March 21, 2008, Judge Jenkins  
16 referred the attorney's fees motion to Magistrate Judge Elizabeth D. Laporte.

17 On March 26, 2008, Yue filed a motion for relief from judgment under FRCP 60(b). On April  
18 1, 2008, Yue filed an opposition to Sun's motion for attorney's fees and a notice of appeal. On  
19 April 8, 2008, Sun filed a reply brief to Yue's opposition to the motion for attorney's fees, seeking  
20 \$134,000 in fees and costs.

21 On April 9, 2008, this case was reassigned to U.S. District Judge the Honorable James Ware.

22 On June 16, 2008, Yue filed a motion to strike Sun's motion for attorney's fees for its  
23 counsel's failure to comply with Civil Local Rule 54-6, which states that Counsel must meet and  
24 confer to resolve fee disputes. Sun never attempted to discuss its fee demand with Yue before  
25 filing the motion.

1 On July 22, 2008, the hearing of Sun’s fee motion and Yue’s motion to strike was held before  
2 Judge Laporte. Yue argued the motions himself. On July 23, 2008, the Court signed an order that  
3 “allows Elena Rivkin Franz to withdraw as counsel of record” for Yue and “[s]ubstituting  
4 Dongxiao Yue as new counsel of record, *in propria persona*” in this case. Doc. No. 136.

5 On July 23, 2008, Sun filed a declaration stating that an additional \$87,000 in fees had been  
6 incurred. On July 24, 2008, Judge Ware denied the motion to disqualify Judge Jenkins as moot;  
7 denied the rule 60(b) motion for lack of jurisdiction; denied the motion to disqualify Fenwick.

8 On August 6, 2008, Magistrate Judge Laporte recommended that Sun be awarded  
9 \$219,949.90 in attorney’s fees and costs under §505 of the Copyright Act.

10 **OBJECTIONS TO THE MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION**

11 For the following reasons, Plaintiff respectfully objects to the Magistrate Judge’s report and  
12 recommendation.

13 **GENERAL OBJECTIONS**

14 **Objection 1: Catch-22 is Impermissible**

15 To protect his copyrights, Yue first attempted to join *Netbula-Sun*; Sun opposed Yue’s  
16 joinder request and the Court vacated Yue’s request to join; since he could not join *Netbula-Sun*,  
17 Yue filed a separate action; then Sun alleged that Yue was virtually represented in *Netbula-Sun*,  
18 therefore *Yue-Sun* was duplicative and must be dismissed. No matter what he did, Yue could not  
19 have his day in court to protect his copyrights. This is a classic trap:

20 There was only one catch and that was Catch-22, which specified that a  
21 concern for one's own safety in the face of dangers that were real and  
22 immediate was the process of a rational mind. Orr was crazy and could  
23 be grounded. All he had to do was ask; and as soon as he did, he would  
24 no longer be crazy and would have to fly more missions. Orr would be  
25 crazy to fly more missions and sane if he didn't, but if he was sane he had  
26 to fly them. If he flew them he was crazy and didn't have to; but if he  
27 didn't want to he was sane and had to. Yossarian was moved very deeply  
28 by the absolute simplicity of this clause of Catch-22 and let out a

1 respectful whistle.

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

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

4 *Rhodes v. Robinson*, 380 F.3d 1123, 1129 (9th Cir. 2004) (quoting Joseph Heller, *Catch-22*, at 47  
5 (6th ed. 1976)). *Catch-22* is a trap with no way out. In this case, Yue could not have his day in  
6 court to litigate the merits of his copyright claims no matter what he did. Such *Catch-22* scheme is  
7 impermissible, and Sun's tactics must fail.

8 **Objection 2: Defendants are not Prevailing Parties for the Purpose of Section 505 of the  
9 Copyright Act**

9 A defendant may be deemed the "prevailing party" under the Copyright Act when it  
10 successfully defends against the significant claims "actually litigated" in the action. *Screenlife  
11 Establishment v. Tower Video, Inc.*, 868 F. Supp. 47, 50 (S.D.N.Y. 1994). See also, *Torres-Negrón  
12 v. J & N Records*, 504 F.3d 151, 164 (1st Cir. 2007) ("We have made no ruling on [plaintiff's]  
13 claims of infringement. Therefore, [defendant] has not prevailed on the merits of the copyright  
14 infringement allegations and is not entitled to a fee award under the statute."). See also,  
15 *Buckhannon Bd. & Care Home, Inc. v. W. Vir. Dep't of Health & Human Res.*, 532 U.S. 598, 603-  
16 04 (2001) ("Our '[r]espect for ordinary language requires that a plaintiff receive at least some  
17 relief on the merits of his claim before he can be said to prevail.'" (citing *Hewitt v. Helms*, 482  
18 U.S. 755, 760 (1987))).

19 This makes sense. Without a ruling on the merits of the copyright claims, it would be  
20 impossible to apply the *Fogerty* factors (such as frivolousness and objective unreasonableness)  
21 and to determine whether awarding fees would be faithful to the purpose of the Copyright Act. See,  
22 *Perfect 10 v. Ccbill LLC.*, 488 F.3d 1102 (9th Cir. 2007) (denying attorney's fees and costs  
23 because "Perfect 10's legal claims are not frivolous or objectively unreasonable.").

24 Defendants obtained final judgment in their favor solely on "virtual representation"  
25 theories that were recently disapproved by the U.S. Supreme Court in *Taylor v. Sturgell*. In this

1 case and the related *Netbula-Sun* case, Sun and StorageTek have not obtained *final judgment on*  
2 *the merits* of any of the copyright claims. The factual allegations and merits of the ten (10) claims  
3 in the instant *Yue-Sun* case were not analyzed in the dismissal order. Therefore, Defendants were  
4 not prevailing parties *for the purpose of Section 505 of the Copyright Act*.

5 **Objection 3: The Magistrate Judge Did Not Consider the Pivotal Criterion Required by the**  
6 **Ninth Circuit for Awarding Fees under the Copyright Act**

7 In *Berkla v. Corel Corp.*, 302 F.3d 909 (9th Cir. 2002), Corel Corp successfully defended a  
8 copyright infringement claim. On whether Corel should be awarded attorney's fees under the  
9 Copyright Act, the Ninth Circuit held:

10 courts *may not* rely on the Lieb factors if they are not 'faithful to the  
11 purposes of the Copyright Act.' Faithfulness to the purposes of the  
12 Copyright Act is, therefore, the pivotal criterion." *Fantasy, Inc. v.*  
13 *Fogerty*, 94 F.3d 553, 558 (9th Cir. 1996).

14 *Berkla*, 302 F.3d at 922-923. In denying fees award to the prevailing defendant, the Ninth Circuit  
15 held that while the defendant did not technically infringe copyright, its conduct "nevertheless  
16 constituted a highly questionable business practice" and "[i]t would be inconsistent with the  
17 Copyright Act's purposes to endorse [defendant's] improper appropriation of [plaintiff's] product  
18 by awarding fees." *Berkla*, 302 F.3d at 923 (emphasis added).

19 *Berkla* is unambiguous in holding that awarding fees to a prevailing defendant who  
20 engaged in questionable business practice would be inconsistent with the purpose of the Copyright  
21 Act. The facts alleged in the FAC include deceptive, fraudulent and oppressive conduct,  
22 destruction of evidence and misappropriation of Plaintiff's software. Awarding fees to Defendants  
23 would thus be endorsing highly questionable business practice.

24 **Objection 4: The Court Lacked Jurisdiction to Adjudge the Reasonableness of the**  
25 **Copyright Claims Post-Judgment because Judge Jenkins Did Not Make Such Findings**

26 In the dismissal order, Judge Jenkins did not make a finding of fact or law on the merits of  
27 10 infringement claims in *Yue-Sun*. The instant *Yue-Sun* case was dismissed solely on the ground  
28 of non-party preclusion by virtual representation.

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1 In their motion for attorney's fees, Sun argued extensively on the merits of the copyright  
2 claims. For instance, citing Michael Abramovitz's declaration made in *Netbula-Sun*, they claimed  
3 that Sun ceased the alleged infringement in late 2005; they say therefore Yue's claims were  
4 objectively unreasonable. Yue refuted Abramovitz's declaration with Abramovitz's own  
5 deposition testimony. Sun then switched to the allegations against Schwartz, knowing that Yue  
6 had no chance to respond further.

7 But, in any case, Judge Jenkins's dismissal order did not reach the substantive issues of the  
8 copyright claims. The 10 infringement claims accused Defendants of very specific unlawful acts.  
9 There was no ruling that decided that any of the 10 claims failed to state a claim for copyright  
10 infringement. There was no discovery, no adversarial process taken to determine validity of the  
11 claims and truthfulness of the facts.

12 Because the case is on appeal, the District Court does not have jurisdiction to decide any  
13 substantive issues (such as objective unreasonableness of the claims) that had not been resolved  
14 before judgment. As stated above, the dismissal order was solely grounded on the theory of virtual  
15 representation. No determination on the merits of the 10-count infringement claims was ever made.  
16 Plaintiff will be glad to have a chance to litigate the merits of these claims, if he is allowed to do  
17 so following proper procedures.

18 **Objection 5: Legal Fees on Collateral Matters are not Awardable under the Copyright Act**

19 "Under the American rule, absent contractual or statutory authorization, a prevailing  
20 litigant ordinarily may not collect attorneys' fees". *International Union of Petroleum & Indus.*  
21 *Workers v. Western Indus. Maint., Inc.*, 707 F.2d 425, 428 (9th Cir. 1983). Defendants requested  
22 fees for the work related to the motion to disqualify Judge Jenkins and the motion to disqualify  
23 Fenwick & West. The motion to disqualify the judge was made pursuant to 28 U.S.C. §§ 144 and  
24 455. The motion to disqualify Fenwick was based on the rules of professional conduct and  
25 Fenwick's apparent conflict of interest and direct communications to Yue on Netbula matters.

1 These collateral matters were separate from and independent of the merits of the case. In fact, both  
2 disqualification motions were originally filed in the *Yue v. CSI* case and were later cross-filed in  
3 *Yue-Sun*. Defendants cited no authority to show that the fees arising under the rules of professional  
4 conduct and 28 U.S.C. 144 and 455 are awardable under the Copyright Act<sup>5</sup>.

5 **Objection 6: Post-Judgment Legal Fees are not Awardable under the Copyright Act**

6 Final judgment in the case was entered on March 4, 2008. The action had been terminated.  
7 Therefore, there had been no longer a “civil action” under the Copyright Act pending before the  
8 District Court. *Brayton Purcell Llp v. Recordon & Recordon*, 487 F. Supp.2d 1124 (N.D.Cal.  
9 2007). The post-judgment matters did not arise under the Copyright Act and related fees are not  
10 awardable under the Copyright Act. Yue did not even have a chance to contest these additional  
11 fees --- defendants simply submitted supplemental declarations with additional fees demands.

12 **Objection 7: “Fees upon fees” are not Awardable under the Copyright Act**

13 Over \$60,000 of the Defendants’ fees was for preparing and filing their motion for  
14 attorney’s fees. Such “fees upon fees” were not authorized by the Copyright Act. See, e.g., *Identity*  
15 *Arts v. Best Buy Enterprise Services Inc.*, No. C 05-4656 PJH. (N.D.Cal. 3-26-2008) (Doc.167)  
16 (“defendants have not submitted any controlling authority regarding the availability of fees upon  
17 fees vis-a-vis the Copyright Act specifically. Accordingly, the court declines to award such fees.”)

18 **Objection 8: The Magistrate Did Not Make a Detailed Lodestar Analysis**

19 Defendants requested over \$220,000.00 in attorneys fees. About \$150,000.00 of which was  
20 incurred after the case was terminated. In computing an award, the Court should provide a  
21 "detailed account of how it arrives at appropriate figures for `the number of hours reasonably  
22 expended' and `a reasonable hourly rate.'" *Hensley v. Eckerhart*, 461 U.S. 424, 436 (1983).  
23 Determining a reasonable hourly rate is a critical inquiry. *Jordan v. Multnomah County*, 815 F.2d  
24 1258, 1262 (9<sup>th</sup> Cir. 1987) (citing *Blum v. Stenson*, 465 U.S. 886, 895 n. 11 (1984)). The Court

25 <sup>5</sup> If Defendants allege these motions were frivolous, fees were available under FRCP 11 or 28 U.S.C. § 1927.

1 may not merely refer to the rates actually charged to the prevailing party. *Chalmers v. City of Los*  
2 *Angeles*, 796 F.2d 1205, 1210-11 (9th Cir. 1985). As for the number of hours, only hours found to  
3 have been reasonably expended may be allowed. *Hensley*, 461 U.S. at 434. The fee applicant must  
4 justify her claim by submitting detailed time records. *U.S. v. City and County of San Francisco*,  
5 699 F. Supp. 762 (N.D. Cal. 1988). The documentation submitted should be sufficient to satisfy  
6 the Court that the hours expended were actual, non-duplicative and reasonable, and to apprise the  
7 Court of the nature of the activity and the claim on which the hours were spent. See *Hensley*, 461  
8 U.S. at 437. The Magistrate Judge made no lodestar analysis to determine the reasonable rates of  
9 and reasonable hours spent by the attorneys. For instance, Pulgram's rate increased from \$625 per  
10 hour in December 2007 to \$690 per hour in January 2008. Why the two different rates were  
11 reasonable were not analyzed. Also, as Yue pointed out at the hearing before Magistrate Judge  
12 Laporte, many of the fee entries did not make sense, such as an entry for negotiating a protective  
13 order and entries about conferring with "counsel for Plaintiff" while Plaintiff was a *pro se*. See,  
14 Yue Decl., Ex.C (transcript).

15 **Objection 9: Block Billing Made it Impossible to Determine the Reasonableness of Fees**

16 In Defendants' fee schedule, there were numerous entries where an attorney billed many  
17 hours (up to 11.30 hours a day) in a single time slot, without providing the details. See **Objection**  
18 **28** below for some examples. "[B]lock billing — the lumping together of multiple tasks in a single  
19 time entry — makes it impossible to determine the reasonableness of the time spent on each task."  
20 *Petroleum Sales, Inc. v. Valero Refining Co. — Calif.*, No. C 05-3526 SBA. (N.D.Cal. 9-11-2007)  
21 (Doc. No. 143). In *Petroleum Sales*, Judge Armstrong ruled:

22 five problematic instances of block billing are the entries by Esmaili for  
23 4.3 hours on May 1, 2006; 4.5 hours on June 15, 2006; 2.4 hours on  
24 August 8, 2006; 5 hours on August 9, 2006; and 6.9 hours on August 10,  
2006. The Court will therefore exclude the total of this time (23.1 hours)  
from the lodestar.

25 *Id.* at p.12. Accordingly, Sun's block billing entries should be excluded.

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**SPECIFIC OBJECTIONS (Nos. 10 to 29)**

In addition to the general objections above, Plaintiff raises the following specific objections to the Recommendation of the Magistrate Judge (“RMJ”).

**RMJ at p.1:20-22:** “On December 14, 2007, the Court ordered that no responsive pleadings would be due until such time as the Court set a date at the upcoming status conference. Despite this order, Plaintiff filed a motion for default judgment, which the Court denied.”

**Objection 10:** On December 14, 2007, *Yue-Sun* had not yet been reassigned to Judge Jenkins. The Executive Committee reassigned the case to Judge Jenkins after the completion of the briefing of the motion for default. “[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). “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). The situation was at least confusing to Yue.

**RMJ at p.2:3-5:** “In that case, the Court granted Defendants’ motion for summary judgment based on its determination that Defendants’ use of Netbula’s software was within the scope of the 2000 and 2004 license agreements between Netbula and StorageTek.”

**Objection 11:** The summary judgment order in *Netbula-Sun* only addressed three narrow issues: (1) the number of users of the SDK; (2) the excess distribution of the PowerRPC runtime; (3) the non-assignment clause of the agreement. That order did not address other infringement claims. For more detailed analysis of the *Netbula-Sun* order, see **Objection 22** below. In addition, the fraud, contract and unfair competition claims are ongoing in *Netbula-Sun*.

**RMJ at p.2:6-7:** “In determining that this action was duplicative of *Netbula-Sun*, the District Court found that this case presented the same claims already asserted.”

**Objection 12:** Plaintiff created a large table showing the differences between the two cases. These differences were not analyzed in the RMJ.

1 **RMJ at p.2:7-10:** “In fact, many of the allegations in the complaint that Plaintiff claimed  
2 constituted additional facts in this case were a verbatim restatement of Yue’s declaration presented  
3 in opposition to the Netbula-Sun defendants’ motion for summary judgment.”

4 **Objection 13:** Yue’s declaration in *Netbula-Sun* was not a complaint. The declaration could not  
5 be used to assert additional claims. Yue’s declaration had 88 paragraphs, with 45 exhibits,  
6 providing a lot of detail about Sun’s infringing activities and fraudulent conduct. The *Netbula-Sun*  
7 court only made reference to paragraphs 35, 40, 49 and Exhibit 13 (a release note of LibAttach  
8 Software) of Yue’s declaration<sup>6</sup>. The only references to Yue’s declaration in the *Netbula-Sun*  
9 summary judgment order were made in the following context:

10 StorageTek purchased at least one more license. (See Yue Decl., ¶¶ 35,  
11 49; Defs.’ Mem. of P. & A. at 23.)

12 Plaintiff’s evidence consists of “release notes” regarding StorageTek’s  
13 LibAttach 1.1 software, which state that this software supports Windows  
14 2000 systems, purportedly showing that it was developed for Windows  
15 2000. (Yue Decl. ¶ 40; Exh. 13)

16 **RMJ at p.2:10-11:** “In addition, the Court granted summary judgment on the merits of claims in  
17 *Netbula-Sun* that were now presented in this case.”

18 **Objection 14:** The *Yue-Sun* case had 10 counts of infringement claims. The comparison table in  
19 Yue’s opposition brief showed that most of the claims were not in the *Netbula-Sun* case. In  
20 addition, the *Yue-Sun* case is about infringement of different intellectual property rights owned by  
21 Yue and not in *Netbula-Sun*. On December 14, 2007, Judge Jenkins clearly stated that *Yue-Sun* “is  
22 not completely overlapping with [*Netbula-Sun*].” Although Judge Jenkins granted summary  
23 judgment as to the copyright claim in *Netbula-Sun* on January 18, 2008, he made no decision on  
24 the merits of the 10 infringement claims in *Yue-Sun*.

25 <sup>6</sup> Paragraph 35 was about the 2000 purchase order with which StorageTek purchased 8 developer licenses  
26 and 1000 runtime licenses. Paragraph 40 was about the release notes for LibAttach. Paragraph 49 was  
27 about Lisa Rady’s email stating she had PowerRPC software on a CD.

1 **RMJ at p.2:10-15:** “Finally, the Court found that the two actions involved infringement of the  
2 same rights. Even though Plaintiff claimed that Defendants’ use of software impacted additional  
3 copyrights, Netbula should have asserted violations of those copyrights in Netbula-Sun, rather  
4 than filing this subsequent lawsuit.”

4 **Objection 15:** *Yue-Sun* involved the infringement of the `987, `847 and `697 copyrights by  
5 different types of infringing activities. The Magistrate Judge overlooked the following:

6 (1) The `987 Copyright was always owned by Yue. Netbula never had any standing to sue for this  
7 copyright. See, e.g., *Triple Tee Golf, Inc. v. Nike, Inc.*, NO. 4:04-CV-302-A. (N.D.Tex. 8-10-2007)  
8 (the corporation plaintiff had no standing to sue on copyright owned by its founder Jack Gillig).

9 (2) After Netbula transferred the `847 and `697 copyrights to Yue in September 2007, it lost  
10 standing on these two copyrights. So Yue sought to join *Netbula-Sun*.

11 (3) Judge Jenkins and Sun specifically constrained the *Netbula-Sun* case to the `063 Copyright.  
12 The `063 Copyright was “the only copyright at issue” in the *Netbula-Sun* case. The `987, `847 and  
13 `697 copyrights were precluded from *Netbula-Sun* **after** *Yue-Sun* was filed.

14 (4) Yue was excluded from *Netbula-Sun* before and after *Yue-Sun* was filed (Catch-22).

15 **RMJ at p.2:19-20:** “The Court further found that Plaintiff entered into this assignment at least in  
16 part due to his desire to bring Netbula’s then pending copyright claims in his own name, on a pro  
17 se basis.”

17 **Objection 16:** There is no evidence that the purpose of the assignment of the `847 and `697  
18 copyrights to Yue was for the purpose of bringing the action *pro se*. Yue had original ownership  
19 of the `987 Copyright. That copyright alone gave him the standing to prosecute his own copyright  
20 claims without any assignment, *pro se*<sup>7</sup> or otherwise.

21 **RMJ at p.2:21-23:** “In dismissing the action, the Court noted that Plaintiff’s tactics have ranged  
22 from duplicative to nearly vexatious.”

23  
24 <sup>7</sup> Proceeding *pro se* is a statutory right granted by the judiciary act of 1789, and “is a right of high standing,  
25 not simply a practice to be honored or dishonored by a court depending on its assessment of the desiderata  
26 of a particular case.” *O’reilly v. New York Times Co.*, 692 F.2d 863, 867 (2nd Cir. 1982).

1 **Objection 17:** The range of “from duplicative to nearly vexatious” was not precisely defined.  
2 There is a qualitative difference between “litigious” and “vexatious.” The heart of the vexatious  
3 litigant analysis is to inquire whether the district court made “substantive findings as to the  
4 frivolous or harassing nature of the litigant's actions.” *Molski v. Evergreen Dynasty*, 500 F.3d  
5 1047, 1059 (9th Cir. 2007) (per curium) (imposing pre-filing requirement for filing 400 lawsuits  
6 on near identical injuries). But, see also, *Molski v. Evergreen Dynasty.*, 521 F.3d 1215, 1220-22  
7 (9th Cir. 2008), for the dissenting opinion by Judge Kozinski and four circuit judges. At every step,  
8 Yue followed the court orders, the rules and the controlling authorities. The Court has not  
9 identified a single incident where Yue filed a frivolous paper or acted in a harassing manner.

10 **RMJ at p.3:3-5:** “This was not the first time Plaintiff attempted to avoid Judge Jenkins in this  
11 case, as he also sought leave to oppose Sun’s earlier motion to relate this case to Netbula-Sun.”

12 **Objection 18:** A litigant should not care who the judge is, but what the law is. But, when a judge  
13 orders a litigant to “cease and desist” from filing papers, it was impossible for that litigant to  
14 meaningfully proceed before the judge. Judge Jenkins “instructed Yue that he could not file  
15 motions, notice hearing dates, or speak in court unless he had leave of court or until he was given  
16 permission to represent himself.” Doc. No. 142, *Netbula-Sun* (Feb 8, 2008). How can a litigant  
17 present his case when the judge refuses to accept his papers or listen to his arguments?

18 Yue did not oppose relating *Yue-Sun* to *Netbula-Sun* and he never indicated that he would  
19 oppose relating *Yue-Sun* to *Netbula-Sun*. In all his papers, he stated that he would file a “response”  
20 if he was permitted to do so. A response is not necessarily an opposition. This distinction is  
21 important: all Yue wanted was to make sure that he could have his day in court once the case was  
22 reassigned to Judge Jenkins.

23 **RMJ at p.4:26-28:** “In addition, Plaintiff’s complaint did not raise a novel issue of law or fact or  
24 an objectively reasonable claim, as the same basic claims had already been previously rejected by  
25 the District Court.”

1 **Objection 19:** The *Yue-Sun* case was filed on November 19, 2008. The summary judgment in  
2 *Netbula-Sun* was issued on January 18, 2008, two months later. Yue could not possibly predict the  
3 outcome of Sun's summary judgment motion back in 2007. All facts and known caselaws pointed  
4 to the conclusion that Sun's conduct was plain software piracy. Yue could not be charged with the  
5 duty to predict the Court's ruling from the parties' papers either. After the completion of the  
6 briefing on the summary judgment motion in *Netbula-Sun*, on December 14, 2007, Judge Jenkins  
7 specifically stated that the *Netbula-Sun* copyright claim "may survive." Even after the summary  
8 judgment order in *Netbula-Sun*, Yue had no reason to believe that *Yue-Sun* would be dismissed  
9 because Judge Jenkins stated that *Yue-Sun* is not completely overlapping with *Netbula-Sun*.

10 There were 10 copyright infringement claims in this case. Judge Jenkins had not made a  
11 finding on whether Plaintiff's complaint raised novel issue of law or fact or an objectively  
12 reasonable claim. Yue didn't have the chance to litigate the claims on the merits. The Court does  
13 not have jurisdiction to make such conclusions on the merits now when the case is on appeal.

14 **RMJ at p.5:1-5:** "Defendants' degree of success in the action was total, as they established that  
15 Plaintiff could not assert new copyrights against Defendants for their use of Netbula's software  
pursuant to licenses, the subject of the prior suit."

16 **Objection 20:** The summary judgment order in *Netbula-Sun* was not final and it only covered  
17 certain narrow issues. To permanently extinguish Yue's copyright claims and declare Sun's  
18 conduct protected by the copyright law, there must be judgment on the merits. The *Yue-Sun*  
19 dismissal order did not make any finding on the merits of the 10 infringement claims.

20 **RMJ at p.5:7-15:** "Plaintiff's lawsuit was also objectively unreasonable. In granting the motion  
21 to dismiss, the District Court recognized that the caselaw clearly prevented a party or those in  
22 privity from bringing a separate action involving the same subject matter against the same  
23 defendants in a different action. See March 4, 2008 Order at 3-6 (quoting relevant case law  
including *Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684 (9th Cir. 2007))."

24 **Objection 21:** The *Adams* case was distinguishable from this case. In *Adams*, **the same party-**  
25 **plaintiff** filed a second suit against the same defendants while the first case is pending. In this case,  
26 a **non-party** to *Netbula-Sun* filed the second suit. Moreover, the *Adams* case was not a copyright

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1 case. As cited in Plaintiff's briefs, the controlling authority for this situation is *Kourtis v. Cameron*,  
2 419 F.3d 989 (9th Cir. 2005) (no privity relationship between an employer and an employee who  
3 filed successive copyright lawsuits). In *Kourtis*, a second copyright owner sued the same  
4 defendants on the same copyright years after the first suit adjudicated that the defendants did not  
5 infringe that copyright. Even though the *Kourtis* plaintiff was closely involved in the first suit and  
6 was deposed as a witness in the first suit, the Ninth Circuit found the second suit not precluded by  
7 the first one. In addition, the U.S. Supreme Court has recently disapproved the "virtual  
8 representation" grounds of non-party preclusion in *Taylor v. Sturgell*, 128 S. Ct. 2161 (June 12,  
9 2008).

10 **RMJ at p.5:16-22:** "In addition, the District Court's previous order in Netbula-Sun granting  
11 Defendants' motion for summary judgment established that Defendants' use of Netbula's  
12 PowerRPC software was licensed and did not constitute infringement. See Jan. 18, 2008  
13 Summary Judgment Order. The Court had already determined as a matter of law that the license  
14 between Netbula and StorageTek foreclosed a claim of copyright infringement."

15 **Objection 22:** Judge Jenkins did not make a broad holding that "the license between Netbula and  
16 StorageTek foreclosed a claim of copyright infringement." A licensee infringes when its copying  
17 exceeds the scope of a license. Whether defendants copied the PowerRPC software without a  
18 license or the copying exceeded the scope of a license is a factual inquiry. In the January 18, 2008  
19 summary judgment order, Judge Jenkins decided the following issues:

20 **(1) The User Count for the SDK license**

21 The SDK licenses were purchased pursuant to a written purchase agreement drafted by  
22 defendant Michael Melnick. The agreement stated in part:

23 NETBULA grants STORAGETEK, a ... license for use by  
24 STORAGETEK's employees, consultants and subsidiaries for up to ONE  
25 user(s), **for each of the licenses purchased**, to use the PowerRPC SDK  
26 Product under Windows NT and 95/98 platforms; **each user can only**  
27 **use the software on one computer....**

28 The license is not transferable without written permission of Nebula...

1 Payment. You agree to pay NETBULA the amounts set forth in Exhibit C  
2 in full payment for the rights and licenses granted...

3 On the number of users, Judge Jenkins wrote:

4 First, turning to the number of users, both the 2000 and 2004 Agreements  
5 state that one user may use each of the licenses purchased. This provision  
6 does not limit how the software may be used... the limitation on the  
7 number of users is a separate contractual promise, or covenant, that does  
8 not limit or condition the use of the license. Therefore, because this  
9 provision is not a limitation on the scope of the license, Plaintiff is not  
10 entitled to a copyright infringement claim on this issue.

11 Plaintiff could not find any prior authority which held that a "one user on one computer"  
12 restriction "does not limit or condition the use of the license." Thus, Judge Jenkins's January 18,  
13 2008 order established a new precedent unknown to Yue when he filed the instant action in 2007.  
14 Even so, Judge Jenkins's conclusion was a narrow one. In fact, in the same section of the order,  
15 Judge Jenkins recognized that the platform restrictions "to use the PowerRPC SDK Product under  
16 Windows NT and 95/98 platforms" did "limit the scope of the license itself." Regarding the  
17 StorageTek's emails indicating they developed software for Windows 2000, Judge Jenkins wrote  
18 that "Plaintiff offers these communications... to show that StorageTek distributed software for  
19 users on unlicensed platforms," leaving such acts open for infringement claims.

20 The Yue-Sun action, filed two months **before** that order, alleged different infringing  
21 activities. On the infringement of the SDK, the *Yue-Sun* complaint alleged that Sun/StorageTek  
22 infringed the SDK copyright by exceeding both the number of users and the number of computers.  
23 Moreover, the *Yue-Sun* complaint alleged that Sun/StorageTek destroyed evidence of the  
24 infringement by erasing the contents of computers. Counts I, II, III, V and VII of the FAC.

25 **(2) *The Excess Distribution of PowerRPC***

26 The 2000 agreement stated that StorageTek "shall pay Netbula ...for the right to distribute up  
27 to 1000 units of software containing the Supporting Programs." Netbula offered StorageTek to  
28 purchase additional licenses. Sun and StorageTek admitted that the agreement was a "prepayment"

1 agreement. The licenses were not unlimited but counted. Mr. Melnick wrote in an internal email:  
2 “The number that Holly has provided and thought it may be low causes quite a problem for you.  
3 We have only made 2 purchases for the rights to distribute a total of 2000 licenses.” The situation  
4 is no different from a bookstore (Netbula) offering customers (StorageTek) to buy books (licenses).  
5 One who pays for one copy of a book but takes home two copies commits theft. “Having taken the  
6 copyrighted material, [defendant] is in no better position ... than an ordinary thief.” *Polar Bear*  
7 *Productions, Inc. v. Timex Corp.*, 384 F.3d 700, 709 (9th Cir. 2004).

8 On exceeding the number of licenses, Judge Jenkins entered summary judgment for Sun in  
9 *Netbula-Sun* on the ground that the “prepayment” term is merely a contract covenant. Again, the  
10 order established a precedent in copyright law. Recently, the Federal Circuit reversed similar  
11 readings of a license agreement in *Jacobsen v. Katzer*, No. 06-CV-01905 JSW, 2007 WL 2358628  
12 (N.D. Cal. Aug. 17, 2007). See, *Jacobsen v. Katzer*, 2008-1001 (Fed. Cir. 8-13-2008) (attribution  
13 clause in Artistic License is not an *independent* contractual covenant). See also, *MDY Industries,*  
14 *Llc v. Blizzard Entertainment, Inc.*, No. CV-06-2555-PHX-DGC (Ariz. 7-14-2008) (using an  
15 automated program to play a licensed computer game constitutes copyright infringement). In any  
16 case, *Yue-Sun* involved claims that are different, such as distributing infringing derivative works,  
17 issuing floating licenses, fail to comply with the limited distribution clause, inducing infringement  
18 by others... See Counts IV, V, VIII and IX of the FAC.

19 **(3) *The Termination of the License Agreement upon Sun’s Acquisition of StorageTek***

20 The Netbula-StorageTek agreement was not transferable and was terminated upon Sun’s  
21 acquisition of StorageTek. In the January 18, 2008 order, Judge Jenkins ruled that “this provision  
22 does not limit the scope of the license.” However, in the instant *Yue-Sun* action filed in 2007,  
23 Plaintiff contends that the license ceased to exist because it was terminated. A non-existent license  
24 does not have a scope. Therefore, the instant action was about the existence of the license, not the  
25 scope. The claim was thus different. See Count X of the FAC.

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

3 **RMJ at p.5:20-23:** “In addition, defense counsel warned Plaintiff that before filing an entirely  
4 new and separate infringement action, he should meet and confer with counsel because the action  
was duplicative, advising that Sun would seek to recover attorney’s fees.”

5 **Objection 23:** Yue requested Sun to stipulate to Yue’s joinder in *Netbula-Sun*. Sun refused to  
6 stipulate. Instead, Sun filed a motion to vacate Yue’s motion to join *Netbula-Sun*, forcing Yue to  
7 file a separate lawsuit. Judge Jenkins later concluded that new lawsuit -- *Yue-Sun* -- was not  
8 completely overlapping with *Netbula-Sun*. Yue Decl., at ¶10, Ex. B. Yue had no reason to believe  
9 that defense counsel knew better than the judge. Ninth Circuit’s controlling authority on  
10 successive copyright suits by a non-party seemed to be the case of *Kourtis v. Cameron*, 419 F.3d  
11 989 (9th Cir. 2005). Yue had the right to bring the additional claims on his personally owned `987,  
12 `847 and `697 copyrights that were excluded from *Netbula-Sun*.

13  
14 **RMJ at p.5:25-28:** “While the Supreme Court recently disapproved of the doctrine of preclusion  
15 by virtual representation, see *Taylor v. Sturgell*, 128 S. Ct. 2161, 2173 (June 12, 2008), it noted  
16 that non-parties to the prior litigation may be precluded under certain recognized exceptions...  
Here, the District Court found privity based on assignment. In addition, Yue appears to have  
assumed control over the earlier litigation.”

17 **Objection 24:** “[P]rivity has shown itself to be an elusive and manipulable concept” and should be  
18 only used as “a convenient means of expressing conclusions that are supported by independent  
19 analysis.” *Meza v. General Battery Corp.*, 908 F.2d 1262 (5th Cir. 1990) (internal quotes and  
20 citations removed). Under federal law, “concepts summarized by the term privity are looked to as  
21 a means of determining whether the interests of the party against whom claim preclusion is  
22 asserted were represented in prior litigation.” *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56  
23 F.3d 343, 346 (2nd Cir. 1995). “Privity may exist for the purpose of determining one legal  
24 question but not another depending on the circumstances and legal doctrines at issue.” *Id.* Such  
25 inquiry avoids the fallacy of circular logic. Yue sued on the `987 Copyright, which he always

1 owned, Netbula had no standing on sue on it. Though the `847 and `697 Copyrights were assigned,  
2 they were not litigated in *Netbula-Sun* – they were excluded. The `063 copyright was the only one  
3 at issue in *Netbula-Sun*. Judge Jenkins made no finding that Yue assumed control of *Netbula-Sun*.

4  
5 **RMJ at p.6:1-9:** “As to factual reasonableness, Plaintiff alleged claims against Sun’s officers  
6 based on communications between them and Plaintiff in 2006. However, Plaintiff knew from the  
7 factual record in *Netbula-Sun* that the allegedly infringing acts stopped in late 2005. For example,  
8 he was present at the deposition where Sun’s Rule 30(b)6 witness testified that it removed the  
9 allegedly infringing Netbula software in late 2005. See *Netbula-Sun* Docket No. 107, Ex. 44 at 3.  
While Yue argues that the evidence shows ongoing infringement as recently as 2007, he does not  
state how the individual defendants are connected to such alleged ongoing infringement. While  
Yue attacks Abramovitz’s credibility, he does not offer any factual basis for naming the particular  
two high level officers in this action, revealing that the allegations against them are speculative.”

10 **Objection 25:** On October 23, 2007, Abramovitz testified about his personal acts of erasing the  
11 PowerRPC software from computers<sup>8</sup>. As cited in Yue’s opposition to the fees motion,  
12 Abramovitz admitted having no knowledge about the control and monitoring of the distribution of  
13 PowerRPC within or outside Sun/StorageTek. He did not even know who had that knowledge. He  
14 was a test engineer. Abramovitz only talked about his own actions of removing the software.  
15 Sun’s managers, such as DeCecco and Melnick, submitted declarations in *Netbula-Sun*, but none  
16 of them was willing to state that Sun stopped the alleged infringement at any time. Therefore, the  
17 allegation that Sun stopped the alleged infringement in late 2005 was unfounded. The *Netbula-Sun*  
18 Court made no finding of fact that Sun or its customers stopped the alleged infringement anywhere.

19 The Magistrate Judge stated that although Yue presented evidence that there was  
20 infringement as recent as 2007, his claims against two high-level Sun executives were  
21 “speculative.” In the FAC, Yue alleged specific facts that support Schwartz, Melnick and  
22 DeCecco’s liabilities under the copyright law. Moreover, judgment in the case was entered at the  
23

24 <sup>8</sup> Yue did not attend most part of the Abramovitz deposition. When Yue came into the room to discuss  
25 Sun’s use of certain confidential documents, the deposition was completed. As alleged in the FAC of *Yue-*  
*Sun*, Yue found evidence of continuing infringement as recent as late 2007.

1 “motion to dismiss” stage. Under Federal Rule of Civil Procedure 8(a), as long as Yue gave  
2 defendants a fair notice of the claim and the ground upon which it rests, “[s]pecific facts are not  
3 necessary.” *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). Thus, the FAC satisfied the notice  
4 pleading standard.

5 In any case, Judge Jenkins did not rule on any of such substantive issues regarding the  
6 sufficiency of the infringement claims or whether they are speculative. The district court did not  
7 have jurisdiction to resolve these issues as the case was on appeal.

8 **RMJ at p.6:12-14:** “In particular, the number of unsuccessful motions for recusal and for relief  
9 from judgment indicates that Plaintiff filed repetitive motions that lacked merit, which only served  
10 to increase fees.”

11 **Objection 26:** The Court has not identified any of Yue’s motions to be frivolous. Yue did not file  
12 repetitive motions. The rule 60(b) motion was re-filed because the Court had ordered Yue to do so.

13 As for Plaintiff’s motion to disqualify counsel, the Court had narrowed the issues to  
14 whether a former Fenwick attorney *presumably* shared confidences within Fenwick on a prior case  
15 involving PowerRPC. In similar situations, a law firm is disqualified. See, e.g., *Cho v. Superior*  
16 *Court*, 39 Cal.App.4th 113 (1995) (former settlement judge in a related case was hired by the law  
17 firm, the law firm was disqualified); *McKenzie Const. v. St. Croix Storage Corp.*, 961 F.Supp. 857  
18 (V.I. 1997); *Fields-D’arpino v. Restaurant Associates*, 39 F.Supp.2d 412(S.D.N.Y. 1999); *Poly*  
19 *Software Intern., Inc. v. Su*, 880 F. Supp. 1487(Utah 1995).

20 As for the disqualification of the former judge, it was filed on March 18, 2008, under the  
21 authority of *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S. Ct. 2194 (1988).  
22 Judge Ware’s finding that the issue was moot due to intervening events does not make the motion  
23 frivolous or lacking merit.

24 **RMJ at p.6:15-19:** “In addition, Plaintiff’s pro se status does not warrant leniency here, where  
25 Plaintiff has received much education throughout the multiple cases that he and Netbula have  
26 litigated. He also has had counsel at times in this litigation and Netbula is still represented by  
27 counsel in Netbula-Sun. As to Plaintiff’s allegations of bias on the part of Judge Jenkins, Yue sets  
28 forth no factual basis for them.”

-22-

1 **Objection 27:** *Yue-Sun* was the first copyright case Yue litigated himself. On March 18, 2008,  
2 defense counsel contacted Yue by email stating that Yue was a *pro se* again. Yue Decl. at ¶¶ 3-8.

3 However, as Judge Ware noted in a recent order,  
4

5 In the Court's Order Granting Defendants' Motion to Dismiss the STK II  
6 [*Yue-Sun*] action, the Court found that the rights of Netbula and Yue are  
7 deeply intertwined," and that Dr. Yue could not represent Netbula *pro se*.

8 Docket entry 51 states that "The Court DID NOT GRANT plaintiff REQUEST to proceed  
9 *pro se*." Under Civil Local Rule 11-5, an attorney may not withdraw until relieved by court order.  
10 It was not until July 23, 2008 that the Court granted attorney Elena Rivkin's motion to withdraw.

11 As for the allegation of bias of the former judge, Yue supplied certain evidence and  
12 indicated that he could provide more confidential documents. Plaintiff does have a constitutional  
13 right to have an impartial decision maker to decide his property rights. However, the Court has  
14 ruled that issue is moot now. To show that he did not file a baseless disqualification motion under  
15 28 U.S.C. § 144 would require Plaintiff to reopen the issue.

16 **RMJ at p.7: 10-13:** "Defendants seek fees and costs in excess of \$92,000 as of their opening brief,  
17 and over \$134,000 as of the reply brief. On July 24, 2008, Defendants submitted a supplemental  
18 declaration stating that over \$87,000 in additional fees had been incurred since April 8, 2008,  
19 when the reply brief was filed. The first amended complaint in this case lists ten claims, all for  
20 copyright infringement. Therefore, there is no need to apportion copyright versus non-copyright  
21 claims. The hourly rates charged by Fenwick range from \$245 per hour to \$690 per hour. These  
22 rates are comparable to other full service Bay Area law firms, Wakefield Decl. ¶ 4, and are  
23 reasonable."

24 **Objection 28:** "Plaintiff's complaint did not raise a novel issue of law or fact." RMJ at p.4:27-28.  
25 The Court ruled that the instant action was duplicative of *Netbula-Sun*. No analysis of the merits  
26 of the 10-count infringement claims was made. The case was quickly dismissed. No discovery was  
27 done. These factors would reasonably suggest that this case should consume very little attorney  
28 time.

1 About 30% of the fees requested were the so called “fees upon fees” -- the attorney fees  
2 spent on the motion for attorneys’ fees. Defense counsel’s “fees upon fees” was over \$60,000.00  
3 (sixty thousand dollars). For instance, on March 4, 2008, Laurence Pulgram spent 1.8 hour  
4 conferring with his colleagues and clients on “strategies on potential motion for attorney’s fees”;  
5 March 15 and 16, 2008, Albert Sieber billed \$5453 for 13.3 hours of work on drafting motion for  
6 attorney’s fees; On March 17 and 18, 2008, Wakefield billed \$8409.5 for 13.9 hours of work to  
7 “draft arguments for fee motion”; April 5 and 6, Sieber billed \$4428 for 10.8 hours of work  
8 drafting the reply brief for the fee motion; April 7, 2008, Wakefield billed \$6292 for 10.4 hours of  
9 work for fee motion related work; April 8, 2008, Wakefield, \$5082 for 8.4 hours on reply brief for  
10 the fee motion and Sieber billed for another 7 hours on the same task the same day. There are  
11 many block billing entries with fewer hours, and they add up.

12 The opening brief of Sun’s fee motion totaled 19 pages. The argument portion was about 9  
13 pages and 4000 words. Of that, about three (3) pages were dedicated to the analysis of two emails  
14 between Pulgram and Yue on *Netbula-Sun* matters and one paragraph of the complaint. Defense  
15 counsel have previously quoted and analyzed these communications in their motion to dismiss.  
16 The rest of the six pages of argument consist of standard arguments for asking fees, mostly  
17 repeating their arguments in the motion to dismiss. Defense counsel billed over \$22,000.00 for  
18 preparing and filing the opening brief.

19 In *Cancio v. Financial Credit Network, Inc*, 2005 US DIST LEXIS 13626 at 16 (N D Cal  
20 2005) (Henderson, J), the plaintiff asked \$9312.00 for spending 22.65 hours in preparing and  
21 filing the fee motion. Because “[t]he issues raised by this fee application are neither novel nor  
22 complex” and “[t]he litigation was limited in time and complexity”, the court found the “fees on  
23 fees” to be too excessive and reduced the amount to about \$3000.

24 Unlike *Cancio*, this case was terminated without any ruling on the merits of the 10-count  
25 infringement claims, and there was no discovery or planning of discovery. In the more involved

1 and more complex *Cancio*, \$9312 of “fees on fees” was excessive and the proper amount should  
2 be \$3000. Here, the “fees on fees” was over \$60,000, twenty (20) times more excessive.

3 *Cancio* was an FDCPA case, “fees upon fees” was allowed. There is no similar allowance  
4 of “fees upon fees” under the Copyright Act. Nevertheless, the amount of hours spent on “fees on  
5 fees” shows that defense counsel’s hourly rate and hours are unreasonable. In addition, Plaintiff  
6 re-states Objections 2-9 above, including “block billing” on other tasks.

7 **RMJ at p.8:19-20:** “The prevailing party in a copyright infringement action is also entitled to  
8 recover out of pocket expenses incurred by the attorney and passed on to the client.”

9 **Objection 29:** Under the Copyright Act, the decision to award costs is also discretionary and  
10 should be made only after the same analysis of the fees award, for which the pivotal criterion is  
11 faithfulness to the purposes of the Copyright Act.

12 **MOTION FOR *DE NOVO* DETERMINATION AND CONCLUSION**

13 Based on Objections 1-29 above and authorities cited, Plaintiff respectfully disagrees with  
14 the Magistrate Judge’s report and recommendation. Plaintiff requests the District Court to make a  
15 *de novo* determination of Defendants’ motion for attorneys’ fees.  
16

17 Respectfully submitted,

18  
19 Dated: August 20, 2008

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21 By: \_\_\_\_\_ /S/  
22 DONGXIAO YUE  
23 SELF-REPRESENTED  
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United States District Court  
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

Dongxiao Yue,

NO. C 07-05850 JW

Plaintiff,

**ORDER ADOPTING REPORT AND  
RECOMMENDATION OF MAGISTRATE  
JUDGE; DENYING MOTION FOR *DE  
NOVO* REVIEW**

v.

Storage Technology Corp., et al.,

Defendants.

Presently before the Court is Magistrate Judge Laporte’s Report and Recommendation Regarding Attorney’s Fees. (hereafter, “R&R,” Docket Item No. 142.)

The duties of the district court in connection with a report and recommendation of a magistrate judge are set forth in Rule 72(b) of the Federal Rules of Civil Procedure and 28 U.S.C. § 636(b)(1). Any party may serve and file specific written objections to a magistrate judge’s report and recommendation within ten (10) working days after being served with a copy. See 28 U.S.C. § 636 (b)(1)(C); Fed. R. Civ. P. 72(b); Civil L.R. 72-3.

When the parties object to a report and recommendation, the district court “shall make a *de novo* determination of those portions of the [report and recommendation ] to which objection is made.” 28 U.S.C. § 636(b)(1); see United States v. Raddatz, 447 U.S. 667, 676 (1980). When no objections are filed, the district court need not review the report and recommendation *de novo*. Wang v. Masaitis, 416 F.3d 992, 1000 n.13 (9th Cir. 2005); United States v. Reyna-Tapia, 328 F.3d 1114, 1121-22 (9th Cir. 2003) (*en banc*). A district court may “accept, reject, or modify, in whole or

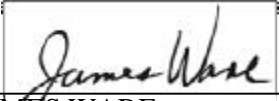
1 in part, the findings or recommendations made by the magistrate judge.” Fed. R. Civ. P. 72(b); 28  
2 U.S.C. § 636(b)(1).

3 In this case, Plaintiff has timely filed his objection to the Judge Laporte’s Report and  
4 Recommendation. Plaintiff has also filed a Motion for *De Novo* Review.<sup>1</sup> Plaintiff objects to the  
5 Judge Laporte’s denial of Plaintiff’s motion to strike Defendants’ motion for attorney fees and costs  
6 for failure to comply with Civil Local Rule 54-6(b). (Docket Item No. 113). Plaintiff also objects to  
7 Judge Laporte’s subsequent award of attorney fees to Defendants. The Court finds that Judge  
8 Laporte properly considered Plaintiff’s contentions and her finding that the meet and confer  
9 conference would have been futile so as to not warrant striking Defendants’ motion for fees is  
10 consistent with the Court’s interpretation of Civil Local Rule 54-6(b). (R&R at 10.)

11 Since the Court has wide discretion to consider and reconsider a magistrate’s  
12 recommendation,<sup>2</sup> the Court finds that Judge Laporte’s award of attorney fees and costs are  
13 reasonable and ADOPTS Judge Laporte’s Report and Recommendation.<sup>3</sup>

14 Defendants’ Motion for Attorney Fees and Costs is GRANTED. Plaintiff is ordered to pay  
15 Defendants the sum of \$219,949.90 within thirty (30) days from the date of this Order.

16  
17 Dated: September 5, 2008

  
\_\_\_\_\_  
JAMES WARE  
United States District Judge

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23 \_\_\_\_\_  
24 <sup>1</sup> (Plaintiff’s Objections to the Recommendations of the Magistrate Judge on Plaintiff’s  
25 Motion to Strike Defendants’ Motion for Attorney’s Fees for Failure to Comply with Civil Local  
26 Rule 54-6 and Motion for *De Novo* Determination of Plaintiff’s Motion to Strike, Docket Item No.  
27 145.) In light of this Order, the Court VACATES the hearing on Plaintiff’s Motion for *De Novo*  
28 Determination currently noticed for November 3, 2008.

<sup>2</sup> See Raddatz, 447 U.S. at 673-75.

<sup>3</sup> Judge Laporte’s Report and Recommendation is attached to this Order.

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United States District Court  
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

Dongxiao Yue,

NO. C 07-05850 JW

Plaintiff,

v.

**ORDER DENYING PLAINTIFF'S  
MOTION FOR STAY PENDING  
APPEAL**

Storage Technology Corp., et al.,

Defendants.

Presently before the Court is Plaintiff's Motion for Stay Pending Appeal. (hereafter, "Motion," Docket Item No. 152.) Defendants have filed a timely opposition. (See Docket Item No. 161.)

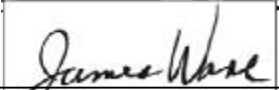
In the Ninth Circuit, "[t]he standard for evaluating stays pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction." Lopez v. Heckler, 713 F.2d 1432, 1435 (9th Cir. 1983); see also Hilton v. Braunskill, 481 U.S. 770, 776 (1987). There are four factors governing issuance of stay pending appeal: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in proceeding; and (4) where the public interest lies." Id. The Ninth Circuit uses "two interrelated legal tests for the issuance of preliminary injunction." Lopez, 713 F.2d at 1435. Thus, a moving party may either show a "probability of success on the merits

1 and the possibility of irreparable injury” or “demonstrate that serious legal questions are raised and  
2 that the balance of hardships tips sharply in its favor.” Id.

3           Upon consideration of Plaintiff’s motion, the Court finds that Plaintiff has failed to  
4 demonstrate either of the interrelated legal tests articulated above. Each of Plaintiff’s claim on  
5 appeal appears to challenge the Court’s factual determinations rather than to present serious legal  
6 questions. (Motion at 3-7.) Moreover, other than a declaration that he does not have the money to  
7 pay the judgment, Plaintiff fails to submit any financial records for the Court to evaluate his current  
8 economic standing. (See Declaration of Dongxiao Yue in Support of Reply Brief for Motion for  
9 Stay Pending Appeal, Docket Item No. 163.)

10           Accordingly, the Court DENIES Plaintiff’s Motion for Stay Pending Appeal. The hearing on  
11 the motion currently set for November 24, 2008 is VACATED.

12  
13 Dated: November 19, 2008

  
\_\_\_\_\_  
JAMES WARE  
United States District Judge

**United States District Court**  
For the Northern District of California

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SEYMOUR BERGEN  
(1923-2003)  
ANNETTE G. BIALSON  
RETIRED

November 12, 2008

**Via Federal Express**

Clerk of The Court  
United States District Court  
Northern District of California  
280 South First Street  
San Jose, CA 95113

Re: Dongxiao Yue v. Sun Microsystems, Inc., et al.  
Case No. C-07-05850-JW

Dear Sir or Madam:

Our firm represents Defendant Sun Microsystems, Inc., in the above-referenced matter. On September 5, 2008, judgment was entered in favor of Sun and against Plaintiff Dongxiao Yue, in the amount of \$219,949.90. We have enclosed an original plus three (3) copies of a *Writ of Execution/Possession of Personal Property*. Please issue the original and return it to our office using the Federal Express supplies provided. It is our understanding that there is no fee for issuance of the Writ.

Should you have any questions regarding the above, please do not hesitate to contact our office. Thank you for your attention to this matter.

Very truly yours,

BIALSON, BERGEN & SCHWAB



Sharon M. Geenen  
Paralegal

:smg  
Enclosures  
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**FILED**

UNITED STATES COURT OF APPEALS

DEC 05 2008

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

DONGXIAO YUE, Ph. D.,

Plaintiff - Appellant,

v.

STORAGE TECHNOLOGY  
CORPORATION; et al.,

Defendants - Appellees.

Nos. 08-15927, 08-17034

D.C. No. 5:07-cv-05850-JW  
Northern District of California,  
San Jose

ORDER

Before: GOODWIN and CLIFTON, Circuit Judges.

Appellant's emergency motion to stay enforcement of the district court's  
September 5, 2008 order pending appeal is denied.

The briefing schedule established previously shall remain in effect.