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6  
7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10 DONGXIAO YUE,

11 Plaintiff,

12 v.

13  
14 21<sup>st</sup> Century Insurance, et al.,

15 Defendants.  
16

Case No. 10-cv-3634-JW

**PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION TO DISMISS  
FIRST AMENDED COMPLAINT FOR  
FAILURE TO STATE A CLAIM AND  
LACK OF STANDING AND TO DISMISS  
CLAIMS FOR STATUTORY DAMAGES  
AND ATTORNEYS' FEES**

[Fed. R. Civ. P. 12(b)(1), 12(b)(6), 12(f),  
17(a)]

17 Date: TBD  
18 Time: 9:00 A.M.  
19 Courtroom: 8, 4<sup>th</sup> Floor  
20 Judge: The Honorable James Ware

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1 Plaintiff Dongxiao Yue filed this copyright action alleging that Defendants infringed his  
 2 copyrights in the PowerRPC and JRPC computer software. Defendants filed a motion to dismiss  
 3 (Docket No. 100), to challenge Plaintiff's standing and to exclude actual damages. In this  
 4 opposition, Plaintiff will show that the law and facts do not support Defendants' desired outcome<sup>1</sup>.

### 5 SUMMARY OF OPPOSITION

6 On the availability of actual damages, similar cases allowed a copyright owner to recover  
 7 actual damages from downstream infringers. See, Mount v. Book-of-the-Month Club, Inc., 555  
 8 F.2d 1108, 1111-2 (2d Cir.1977). Plaintiff is not trying to extract double recovery, but is seeking  
 9 actual damages resulting from distinct and additional injuries. According to Chordiant: (1) one  
 10 would need "customer-by-customer evidence" to determine its customers' infringement, for which  
 11 Chordiant is not entirely responsible; (2) Chordiant "did not include third-party discovery of the  
 12 copies of CMD copied by its Customers"; and (3) "Neither Chordiant nor its experts did the type  
 13 of analysis of direct infringement by customer" at the Chordiant trial. Chordiant also denied  
 14 granting unlimited licenses to Defendants. See, Chordiant Dkt No. 436, at pp.2:27-3:2, Dkt No.  
 15 467, p.6:10-11, 16-21, Dkt No. 517, pp.27:11-24, 28:12-13.

16 The question of standing of an individual owner of a corporation had been decided in John  
 17 Magnuson v. Video Yesteryear, 85 F.3d 1424 (9th Cir. 1996)<sup>2</sup> and Jules Jordan Video, Inc. v.

18  
 19  
 20  
 21 <sup>1</sup> In Plaintiff's opposition, the Chordiant case refers to the case of Yue v. Chordiant Software, Inc.  
 22 (c08-0019-JW. ND Cal), the Chordiant trial refers to the jury trial in the Chordiant case, Chordiant  
 23 Dkt refers to docket items of the Chordiant case, TT refers to the transcript of the Chordiant trial,  
 24 "Chordiant" and "Chordiant Inc." refer to Chordiant Software, Inc. "Defendants" or "Downstream  
 25 Defendants" refers to the defendants in the instant. The Chordiant documents are attached as  
 26 exhibits to the Declaration of Dongxiao Yue, being filed concurrently. When refers to content in  
 27 the docket items, Plaintiff uses the page numbers stamped by the **ECF** system.

<sup>2</sup> District court case number of which is 4:92-cv-4049-DLJ (N.D. Cal.).

1 144942 Canada Inc., 617 F. 3d 1146 (9th Cir. 2010). Both Magnuson and Jules Jordan Video hold  
 2 that the individual owner of a corporation has standing sue infringers with assignment of copyright  
 3 from the corporation to the owner.

4 The availability of statutory damages depends on whether Defendants acted as co-  
 5 infringers of Chordiant when their infringing acts commenced after the date of copyright  
 6 registration. Since Chordiant denied responsibility for Defendants' copying that would exceed  
 7 Chordiant's license and Defendants have not been judged co-infringers of Chordiant, it will not be  
 8 possible to decide the availability of statutory damages at the motion to dismiss stage.

### 10 **OBJECTIONS TO DEFENDANTS' FACTUAL ALLEGATIONS**

11 Defendants made various factual allegations that are contrary to the record. Plaintiff puts  
 12 some of Defendants' allegations and Plaintiff's objections in the table below.

14 <b>Page</b>	<b>Defendants' Allegation in Their Motion to Dismiss ("MTD")</b>	<b>Plaintiff's Objections</b>
15 11:15- 16 16	Chordiant granted licenses with no express limit on the number of CMD copies customers could make	Chordiant denied granting such licenses before, during and after the trial.
17 13:6-7	Netbula's software does not, itself, function as a program usable by CMD customers directly.	The RPCINFO.EXE program allegedly infringed by Defendants is a program that a customer can use directly. First Amended Complaint ("FAC") at ¶ 45.
20 15:8-10	Chordiant's customer licenses authorized use of CMD without expressly restricting the number of copies the customer could make for its use.	Chordiant denied granting such licenses before, during and after the trial. See, e.g., <u>Chordiant Dkt No. 517</u> at 27:10-28:13.
23 15:15- 24 17	Chordiant argued that the license between Prime and Netbula in 2000, along with a subsequent paid update to that license in 2004, covered distributions of CMD by Chordiant after it purchased Prime...	On the eve of the trial, Chordiant admitted that it had no license to JRPC. The JRPC in CMD was an evaluation version. Evidence showed that Chordiant's engineers decompiled the license management code in JRPC. Though someone at Chordiant made

		an inquiry on JRPC, no Chordiant entity ever purchased any JRPC license. FAC ¶56.
21:10-13	Dr. Yue introduced evidence of the number of copies made by Chordiant's customers, including a list Dr. Yue assembled of over 360 customers, including the Downstream Defendants here. TT at 328:15-23, 520:11-524:24, 964:7-12 & Trial Ex. 1942. His counsel cross-examined witnesses about copies made by specific customers. <i>See, e.g.</i> , TT at 738:21-739:13, 740:12-744:25 & Trial Ex. 1002	<ul style="list-style-type: none"> <li>● Dr. Yue only introduced a table with names of CMD licensees. See, TT at 328:15-23. That was not testimony by Dr. Yue on the “number of copies made” by Chordiant’s customers. Exhibit 1942 was a list of names.</li> <li>● Dr. Yue’s testimony at 520:11-524:24 was Chordiant’s cross-examination to show that Dr. Yue had no direct knowledge of CMD customers’ copying and use.</li> <li>● The testimony at 964:7-12 was not made by Dr. Yue, but by Dr. Lynde, Chordiant’s financial expert.</li> <li>● The testimony at 738:21-739:13, 740:12-744:25 was from Chris Hellewell, an employee of Chordiant, who installed CMD at customer sites.</li> </ul>

## FACTS AND BACKGROUND

### A. Plaintiff’s Software and Copyrights

Since 1994, Yue worked to develop the PowerRPC computer software. In July 1996, when PowerRPC was near completion, he founded Netbula, LLC to market PowerRPC. Yue has always been the owner of the copyrights in the code created prior to the founding of Netbula, registered with the title of YUE-PWRPC. FAC at ¶¶ 42-45, 49.

After founding Netbula, Yue developed several revisions of PowerRPC. In about 1999, Yue also developed a software product named JavaRPC (later renamed to JRPC). Netbula assigned its PowerRPC copyrights to Yue in September 2007, and assigned its JavaRPC copyrights to Yue in August 2010 (after the publication of Jules Jordan Video). FAC Ex.7.

Both PowerRPC and JavaRPC products enable computer programs to execute commands

1 on remote computers. Both include a software development kit (“SDK”) which requires SDK  
2 licenses and a set of distributable files that requires distribution licenses. FAC at ¶48.

3 **B. The Case Against Chordiant Software, Inc.**

4 In 2001, a person with a Chordiant.com email address inquired about JavaRPC licenses,  
5 but made no purchase. FAC at ¶56.

6 In about October 2007, Yue suspected that Chordiant Software, Inc. was copying the  
7 PowerRPC software without license. After numerous exchanges, on December 21, 2007,  
8 Chordiant finally informed Yue that it had distributed 953 copies of PowerRPC and needed  
9 nothing further. FAC at ¶52.

10 In January 2008, Yue filed a lawsuit against Chordiant, alleging infringement of the  
11 PowerRPC copyrights in the Chordiant Marketing Director (“CMD”) software. FAC at ¶53.

12 Chordiant obtained a Court order to limit discovery to its license-based defense and  
13 prohibit any third-party deposition on this issue. Chordiant Dkt No. No. 97.

14 On May 29, 2009, the Court lifted discovery restrictions and set the close of discovery to  
15 October 30, 2009. (On July 9, 2009, the Court denied Chordiant’s motion on its license defense.  
16 Chordiant Dkt No. 142.)

17 In Mid- 2009, Yue obtained binaries copies of the CMD software and discovered that  
18 Chordiant also copied his JRPC software. FAC at ¶55.

19 On October 6, 2009, Yue and Netbula filed a motion to compel Chordiant to identify “each  
20 and every person or entity” Chordiant has authorized to use the CMD program. On November 19,  
21 2009, the Court ordered Chordiant to supplement its discovery responses. Chordiant Dkt No. 261.

22 Prior to the trial, Chordiant motioned to exclude the issue of contributory infringement.  
23  
24  
25

1 The trial was exclusively limited to Chordiant's direct infringement. Chordiant Dkt No. 436.

2 The jury rejected Chordiant's license defense, found Chordiant liable for infringing the  
3 PowerRPC and JavaRPC copyrights, and awarded Plaintiff and Netbula actual damages and  
4 Chordiant's profits attributable to infringement. Chordiant Dkt No. 480 (Jury Verdict).

5 Chordiant denied that it granted unlimited licenses to its customers and stated that the jury  
6 did not award actual damages based on unlimited licenses. Chordiant Dkt No. 517 at pp.27-28.  
7

### 8 **C. The Complaint of the Instant Case**

9 The FAC of the instant action alleges past and continuing copyright infringement by thirty-  
10 four licensees of CMD, for their acts of reproduction, adaptation, distribution of Plaintiff's  
11 copyrighted works and otherwise violating Plaintiff's exclusive rights in his software. In May  
12 2009, at the time of the 4<sup>th</sup> amended complaint in the Chordiant action, Chordiant had not yet  
13 produced discovery about the programs it copied. Since the Chordiant trial, Yue has learnt more,  
14 and the FAC in this action alleges infringement of software not mentioned in the operative  
15 complaint of the Chordiant case. For instance, the complaint alleged that Defendants copied the  
16 PowerRPC SDK files such as "rpcinfo.exe" and the SDK version of "pwrpc32.dll". FAC at ¶¶ 64-  
17 134.  
18

## 19 **ARGUMENT**

### 20 **I. PLAINTIFF IS ENTITLED TO ACTUAL DAMAGES RESULTING FROM** 21 **DOWNSTREAM DEFENDANTS' DIRECT INFRINGEMENT**

22 "Each act of infringement is a distinct harm giving rise to an independent claim for relief."  
23 Bouchat v. Baltimore Ravens Ltd. Partnership, 619 F. 3d 301, 316 (4th Cir. 2010) (citations  
24 omitted). Thus, the causes of action based on distinct acts of infringement are not the same, even  
25 when the same copyrights are infringed. Mount v. Book-of-the-Month Club, Inc., 555 F.2d 1108  
26

1 (2d Cir.1977). Each time someone violates any of the exclusive rights in a copyright, an act of  
2 infringement is committed<sup>3</sup>, 17 U.S.C. §501, and “[t]he copyright owner is entitled to recover the  
3 actual damages suffered by him or her as a result of the infringement...” 17 U.S.C. § 504(b).  
4

5 Contrary to Defendants’ characterizations, Plaintiff is not seeking multiple awards of actual  
6 damages from Chordiant’s direct infringement. The Chordiant case included only claims of  
7 Chordiant’s direct infringement. The acts of infringement alleged against Defendants here are  
8 distinct injuries that are different from the direct infringement committed by Chordiant alone.  
9 Plaintiff is entitled to actual damages resulting from Defendants’ direct infringement, which was  
10 never part of the Chordiant case.

11 The Downstream Defendants contend that “*all copies, however many*, were included in the  
12 *Chordiant* verdict,” MTD at p.10:15-19 (boldface added), and Plaintiff cannot get any actual  
13 damages from them. If Defendants were right, they could make one million copies without  
14 worrying about any actual damages under copyright law.  
15

16 It is perhaps easier to recognize the flaw in Defendants’ proposition if we replace Plaintiff  
17 with Microsoft<sup>4</sup>. If Defendants’ theory prevails, the following hypothetical scheme will doom the  
18 software giant: Chordiant gets a copy of Windows 7, licenses it to Defendants (with or without  
19 restrictions); alarmed, Microsoft sues the master pirate, gets paid \$6000; but Defendants can make  
20 and distribute “however many” copies, and everyone in the world can use Windows 7 for free.  
21

22 \_\_\_\_\_  
23 <sup>3</sup> To establish a claim of copyright infringement, a plaintiff must demonstrate (1) ownership of a  
24 valid copyright and (2) "copying" of protectable expression by the defendant. Baxter v. MCA, Inc.,  
25 812 F.2d 421, 423 (9th Cir.). Here, "copying" is "shorthand for the infringing of any of the  
copyright owner's five exclusive rights." S.O.S., Inc. v. Payday, Inc., 886 F.2d 1081, 1085 n. 3  
(9th Cir.1989).

26 <sup>4</sup> See, e.g., Microsoft Corp. v. Compusource Distributors, 115 F.Supp.2d 800 (E.D.Mich. 2000).

1 Common sense tells us that Defendants must be wrong.

2 **A. Defendants’ Direct Infringement Is Different from Chordiant’s Direct Infringement**

3 The instant action alleges that Defendants reproduced, adapted and further distributed  
4 Plaintiff’s software to others, and are continuing to do so. Such infringing acts are different from  
5 Chordiant’s direct infringement. Chordiant thinks so too. It represented to the Court that its  
6 customers’ direct infringement “would require customer-by-customer evidence” and was  
7 impossible to be included in the action against Chordiant as a contributory infringement claim,  
8 because Chordiant did not produce discovery “of the copies of CMD copied by its Customers.”  
9 Chordiant Dkt No. 436 at 3:1-2.

11 The FAC differentiated Chordiant’s infringement (¶¶52-63), and Defendants’ infringement  
12 (¶¶79-134), including Defendants’ reproduction, adaptation and distribution of the SDK files, such  
13 as “rpcinfo.exe” and the SDK version of “pwrpc32.dll”. “Because each act of infringement is a  
14 distinct harm”, Goldberg v. Cameron, 482 F. Supp. 2d 1136 (N.D. Cal. 2007), Chordiant’s direct  
15 infringement and Defendants’ direct infringement are different and separate injuries. Plaintiff is  
16 entitled to actual damages suffered from all infringing acts, not just Chordiant’s direct  
17 infringement.

19 The Fourth Circuit explained in the following hypothetical to illustrate the principle:

21 Suppose that... M Corp. [made copies] pursuant to an NFLP license...  
22 Bouchat would be entitled in this hypothetical to injunctive relief, actual  
23 damages, and infringement profits against M Corp. and NFLP.

24 Bouchat v. Bon-Ton Dept. Stores, Inc., 506 F. 3d 315, 331 (4th Cir. 2007). A copyright holder  
25 may sue infringers and co-infringers in “successive actions.” Id. at 328. “[T]he Act gives the  
26 author a right to institute an action for each infringement of each exclusive right...” Id. at 332

1 (concurring opinion).

2 The instant action is similar to Mount v. Book-of-the-Month Club, Inc., 555 F.2d 1108 (2d  
3 Cir.1977). The defendant in that case, Book-of-the-Month, was a licensee of Harper & Row  
4 Publishers, Inc. The pro se plaintiff, Charles Merrill Mount, sued Harper, and subsequently signed  
5 settlement agreement with a broad release of “Harper’s and its assigns”. Mount then sued Book-  
6 of-the-Month, Harper’s licensee/assignee, in a new action for infringing the same copyright. The  
7 court held that Mount’s lawsuit against the downstream licensee could proceed because Mount  
8 disputed that the releases included Book-of-the-Month.

9 Such successive suits against licensees of an infringed copyright are common. In Lyons  
10 Partnership, LP v. Morris Costumes, Inc., 243 F. 3d 789 (4th Cir. 2001), the plaintiff sued costume  
11 rental company after it sued the manufacturer of the infringing costume. In many software piracy  
12 cases, the defendants usually acquired the pirated copies from some upstream licensor<sup>5</sup>.  
13  
14

15 **B. The Chordiant Trial was Explicitly Limited to Chordiant’s Direct Infringement**  
16 **Alone and Chordiant Denied Responsibility for Downstream Defendants’ Direct**  
17 **Infringement**

18 In Chordiant’s briefs regarding the jury instructions, it stated that the Chordiant case “was  
19 exclusively for [its] direct infringement”, Chordiant Dkt No. 436 at 3:28-4:2, and its ability to  
20 bring a customer<sup>6</sup> over to trial “does not mean it is fair to try direct infringement claims against  
21 hundreds of other customers... Ms. Hudson cannot speak to the licensing, type of copies and  
22 number of copies of Chordiant’s other customers.” Id. at 6:13-18.

23 <sup>5</sup> See, Microsoft v. Harmony Computers & Elecs., Inc., 846 F.Supp. 208, 212-14 (E.D.N.Y.1994),  
24 Microsoft Corp. v. Software Wholesale Club, Inc., 129 F.Supp.2d 995, 1002 (S.D.Tex.2000), and  
other Microsoft copyright cases.

25 <sup>6</sup> Chordiant introduced Ms. Hudson from Fairmont Hotels as a witness on the eve of the trial.  
26 Fairmont Hotels is now challenging the Court’s personal jurisdiction.

1 Chordiant motioned the court not to submit the question of its contributory infringement to the  
2 jury. It stated, at Chordiant Dkt No. 436, pp.5:26-6:7, and repeated in its Judgment of a Matter of  
3 Law Motion No.4, Chordiant Dkt No. 467, the following position:

4 Neither Chordiant nor its experts did the type of analysis of direct  
5 infringement by customers that a contributory infringement claim would  
6 require...

7 ...Chordiant would have no liability for copies made in contravention of  
8 the rights granted under the Marketing Director licenses. This would  
9 require customer-by-customer evidence as to the terms of their particular  
10 license agreement, the copies made pursuant to that agreement, and any  
11 additional, unlicensed copies made. Some of Chordiant's licenses did  
12 have numerical limits which, if exceeded, could not be Chordiant's  
13 responsibility. But Plaintiffs did not offer evidence at trial as to copying  
14 by Chordiant customers, whether within or outside Chordiant's licensing  
15 terms.

16 Chordiant's above argument makes sense. If Chordiant installed 20 copies of Plaintiff's  
17 software onto computers of IBM, Chordiant would be liable for actual damages due to the 20  
18 copies. However, if IBM itself made another 40 copies and further distributed 100 copies to its  
19 customers, these additional copies were never part of the Chordiant trial; they would be considered  
20 actual damages caused by IBM's direct infringement. Whether Chordiant would be jointly liable  
21 for the additional copies would be a disputed matter, as Chordiant would not take any  
22 responsibility for copies exceeding the scope of Chordiant's authorization.

23 The jury in the Chordiant trial was instructed to award infringement damages for the  
24 distributable files only if they find Chordiant "[i]nstalled" such files "on the computer of  
25 customers who purchased Chordiant Marketing Director."

26 At the Chordiant trial, Plaintiff called Chris Hellewell as a witness, who "actually work[s] at  
27 installing Marketing Director on client server systems" of Chordiant's customers. Mr. Hellewell

1 provided a table showing the number of copies installed. TT at 738:12-740:16; Trial Ex. 1002.  
 2 Chordiant's expert, Dr. Lynde, made a calculation based on Mr. Hellewell's numbers. TT at  
 3 994:4-6. It is clear that the Chordiant trial never included direct infringement by Chordiant's  
 4 customers<sup>7</sup>.

### 5 C. Chordiant Denied Granting Defendants Unlimited Licenses

6 The Downstream Defendants contend that "*all copies, however many*, were included in the  
 7 *Chordiant* verdict," "because Chordiant granted licenses **with no express limit** on the number of  
 8 CMD copies customers could make." MTD at p.10:15-19 (boldface added). However, Chordiant  
 9 denied granting such unlimited licenses.  
 10

11 During the pre-trial discovery in Chordiant case, Plaintiff requested Chordiant ("CSI"-  
 12 Chordiant Software, Inc.) to admit the following facts via Requests for Admission ("RFA"):

- 13 ● RFA 97: "Admit that CSI did not restrict the number of copies  
 14 its licensees could make of CMD."
- 15 ● RFA 98: "Admit that CSI did not restrict the number copies its  
 16 CMD licensees could make of CMD."
- 17 ● RFA 99: "Admit that CSI did not restrict the number computers  
 18 onto which CMD licensees could install CMD server or client."
- 19 ● RFA 100: "Admit that CSI has not restricted the number of  
 20 copies of CMD server or client that its licensees can make in the  
 21 future."

22 Chordiant denied all the RFAs above without any qualification. Chordiant also denied

---

23 <sup>7</sup> Moreover, in its responses to Plaintiff's RFA Nos. 95 and 96, Chordiant admitted that

- 24 ● it has not produced all the agreements licensing the infringing CMD software;
- 25 ● it has not produced all the CD-ROM shipping records for CMD; and
- 26 ● it has not produced all the logs for downloading CMD via the Internet.

27 Yue Decl. ¶ 2; Ex. A.

1 granting any “unlimited” licenses in its responses to Yue’s RFA Nos. 90, 91, 92, 93. Yue Decl. ¶ 2;  
2 Ex. A. In post-trial motions, Chordiant stated that the only admitted evidence in the trial “places  
3 certain limitations on the number of copies of Chordiant’s Marketing Director software that can be  
4 made by Chordiant’s customers”, and “multiple witnesses testified at trial the standard number of  
5 users for the Marketing Director was quite low.” Chordiant Dkt No. 517 at p.27:10-24.  
6

7 Since Chordiant denied that it authorized “unlimited” copying by its customers before and  
8 after the trial, at the very minimum, Chordiant and the Downstream Defendants dispute on the  
9 scope of the CMD licenses, and fact discovery is required to find the truth.

10 **D. The Chordiant Verdict Did Not Make Awards for Unlimited Copying**

11 In addition to denial of granting unlimited licenses, Chordiant asserted that “there was no  
12 finding that Chordiant authorized ‘unlimited’ copying”. Chordiant Dkt No. 517 p.28:2-13.  
13

14 Chordiant initially admitted distributing 953 copies of Plaintiff’s software. FAC at ¶52. At the  
15 jury trial, based on testimony of several of its employees, Chordiant’s expert revised the number to  
16 “2,276 copies” for Windows client, “110 extra copies” for Windows server, and “484 copies of  
17 Java [RPC]”. TT at 994:4-6, 995:18-21, 997:1-2. Eventually, the jury awarded \$38,000.00 as  
18 actual damages for Chordiant’s infringement for the Windows RPC distributable files, and  
19 \$6,000.00 as actual damages for the infringement of the Java RPC distributable files.  
20

21 The actual damages the Chordiant jury awarded were substantially smaller than Netbula  
22 customers paid in the past. For instance, one customer paid \$53,940 for the right to install 6000  
23 copies of the Windows RPC files at one site. Another customer paid \$115,319.28 for 173 copies of  
24 the Java distributable files. Trial Exhibit 0488; Yue Decl. ¶3. The jury’s award of \$38,000 for the  
25 Windows distributable files and \$6,000 for the Java files is indeed contrary to a finding of  
26

1 unlimited licensing by Chordiant.

2 As Chordiant pointed out, if its customer made “any additional, unlicensed copies”, it would  
3 not be Chordiant’s responsibility, and was certainly not included in the Chordiant trial.

4 **E. Defendants and Chordiant Are Not in Privity With Respect to Damages**

5 As shown above, the causes of action in the instant action are different from those in Chordiant;  
6 the issue of Defendants’ direct infringement was not part of the Chordiant case; and there was no  
7 opportunity to litigate Defendants’ direct infringement. Moreover, Chordiant and Defendants are  
8 not privies<sup>8</sup>.

9 Privity cannot be found where “where the interests of the parties to the different actions are  
10 separate or where the parties to the first suit are not accountable to the nonparties who file a  
11 subsequent suit.” Martin v. American Bancorporation Retirement Plan, 407 F. 3d 643, 651 (4th  
12 Cir. 2005). As a law review article on the Bouchat case pointed out<sup>9</sup>, the licensor and licensee’s  
13 interest may diverge, because the licensor would have an incentive to litigate the intent factor to  
14 avoid contributory liability, while the licensee’s direct liability does not depend on culpability.  
15 Chordiant made similar arguments at Chordiant Dkt No. No. 436, p.3:17-4:2. In addition,  
16 Chordiant contended that it is not accountable for “any additional, unlicensed copies made” by its  
17 customers. This contention precludes a finding of privity between Chordiant and Defendants.  
18  
19

20 **F. The Cases Defendants Relied On Are Distinguishable From the Instant Action**

21  
22 <sup>8</sup> The Bouchat court found privity between the licensor and licensees under the doctrine of virtual  
23 representation. However, Supreme Court has disapproved virtual representation, thus the  
24 Bouchat’s analysis on the privity has become questionable.

25 <sup>9</sup> *BOUCHAT V. BON-TON DEPARTMENT STORES, INC.: CLAIM PRECLUSION, COPYRIGHT LAW, AND MASSIVE INFRINGEMENTS* *Harvard Journal of Law &*  
26 *Technology* Volume 21, Number 2 Spring 2008.

1 Defendants contend that “the single recovery rule precludes recovery [of actual damages] from  
 2 jointly liable defendants more than once for the same infringement.” MTD at p.11:10-12.  
 3 However, to apply the “single recovery rule”, Defendants must first prove two factors: (1)  
 4 Chordiant and Defendants were jointly and severally liable for Defendants’ infringement<sup>10</sup>; and (2)  
 5 all of Defendants’ direct infringement had been included in the Chordiant case.  
 6

7 As shown above, Defendants cannot prove the first factor, because Chordiant denied  
 8 responsibility for Defendants’ direct infringement in its effort to exclude contributory  
 9 infringement from the Chordiant trial; Defendants cannot prove the second factor either, because  
 10 the Chordiant trial only addressed Chordiant’s direct infringement and excluded Defendants’  
 11 direct infringement. Moreover, Chordiant denied that it had granted unlimited licenses to  
 12 Defendants, before, during and after the trial. The jury’s actual damages award was a fraction of  
 13 what one Netbula licensee paid for a limited license.  
 14

15 The cases Defendants relied on are distinguishable from the Chordiant action. For easier  
 16 comparison, Plaintiff lists them in the following table.

Case	Settlement with co-defendants	Type of damages sought
<u>Screen Gems-Columbia Music, Inc. v. Metlis &amp; Lebow Corp.</u> , 453 F.2d 552 (2d Cir.1972)	Yes.	Statutory royalty under the 1909 Copyright Act.
<u>BUC Int’l Corp. v. Int’l Yacht Council Ltd.</u> , 517 F.3d 1271 (11th Cir. 2008)	Yes.	Actual damages
<u>Spooner v. EEN, Inc.</u> , Case No. 08-cv-262, 2010 U.S. Dist. LEXIS 46332, at *24-27 (D. Me. May 11, 2010)	Yes.	Statutory damages

23  
 24 <sup>10</sup> “When a copyright is infringed, all infringers are jointly and severally liable for plaintiffs’ actual  
 25 damages, but each defendant is severally liable for his or its own illegal profit; one defendant is  
 26 not liable for the profit made by another.” Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772  
 27 F. 2d 505, 519 (9th Cir. 1985).

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28	McClatchey v. AP, 2007 U.S. Dist. LEXIS 40416, at *9-11 (W.D. Pa. June 4, 2007)	N/A	Statutory damages
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The Spooner v. EEN and McClatchey v. AP involved statutory damages governed by 17 U.S.C. § 504(c), which provides a single statutory damages award “for all infringements involved in the action, with respect to any **one work**, for which any one infringer is liable individually, or for which any two or more infringers are liable jointly and severally”. These two cases are thus irrelevant to the questions of actual damages present in the instant action, which is governed by 17 U.S.C. § 504(b). Moreover, the two cases may be in conflict with Columbia Pictures v. Krypton Broadcasting, 259 F. 3d 1186 (9th Cir. 2001), which affirmed two awards of statutory damages because the each of the downstream infringers was not a joint tortfeasor with respect to the other.

Screen Gems-Columbia Music, Inc. v. Metlis & Lebow Corp., BUC Int'l Corp. v. Int'l Yacht Council Ltd. and Spooner v. EEN, Inc. dealt with situations where multiple defendants were in the same action as co-infringers and some of them settled with the plaintiff. These cases are further distinguishable from the instant one because Defendants here are non-parties to the Chordiant action and Defendants’ direct infringement was never part of that case.

Even in BUC Int'l Corp. v. Int'l Yacht Council Ltd, the Eleventh Circuit found it necessary to decide “whether the payments made to BUC by the settling defendants were for the same injury addressed by the jury's verdict.” 517 F.3d at 1278-79. Plaintiff cannot receive double award of actual damages for the same injury, but he is entitled to one award to each injury. As presented above, the instant lawsuit seeks actual damages from Defendants’ direct infringement, including those Chordiant has denied responsibility.

The copyright owner in Bouchat v. Bon-Ton Dept. Stores, Inc., 506 F. 3d 315, 331 (4th Cir.

1 2007), Mr. Bouchat, lost the actual damages claims in the previous trial, which meant that there  
2 was no reduction in the fair market value of his work despite infringement, and he was bound by  
3 that determination. Had Bouchat won actual damages in the first case, he would have been able to  
4 recover actual damages from the downstream infringers. See, Mount v. Book-of-the-Month Club,  
5 Inc., 555 F.2d 1108 (2d Cir.1977) (copyright owner could recover actual damages from  
6 downstream licensee despite settlement with the licensor). Here, Plaintiff recovered actual  
7 damages from the Chordiant trial, which established that infringement would reduce the fair  
8 market value of his software. If issue preclusion were applicable, it would mean actual damages  
9 would be available for Defendants' acts of infringement.

11 Glenayre Elecs., Inc. v. Jackson, 443 F.3d 851 (Fed.Cir.2006) is a patent case and does not  
12 deal with actual damages under Copyright Act. In that case, a patent owner accepted a remittitur  
13 that included damages due to downstream customers, the court held that his acceptance of the  
14 remittitur barred him from claiming contributory infringement later because the remittitur "he has  
15 accepted fully compensates him as a matter of law." Id. at 873. "Had Jackson refused the district  
16 court's remittitur, the case would be in a very different procedural posture." Id.

## 18 **II. IT IS PREMATURE TO DECIDE THE AVAILABILITY OF STATUTORY** 19 **DAMAGES**

20 The FAC did not include explicit claims of statutory damages or attorney fees under the  
21 Copyright Act. Defendants construe the word "damages" broadly to encompass a claim for  
22 statutory damages. Plaintiff agrees with this reading of the FAC.

23 The Court has previously held that one cannot recover statutory damages if infringement  
24 commenced before the registration of copyright. Plaintiff's earliest copyright registration dated  
25 October 18, 2005. Would statutory damages be available if a licensee defendant's infringement  
26

1 commenced after that date?

2 The Fourth Circuit's decision in Bouchat v. Bon-Ton Dept. Stores, Inc. hinged on the finding  
3 that the licensor and downstream customer are jointly and severally liable for the customer  
4 copyright infringement. 506 F. 3d at 330-1. Here, Chordiant contended that it would not be  
5 responsible for customers' copying exceeding its authorization. Whether Chordiant is jointly liable  
6 for Defendants' infringement is thus fact dependent. Since there has been no finding on joint and  
7 several liability, the question of statutory damages cannot be resolved at this stage.  
8

9 **III. FOLLOWING NINTH CIRCUIT PRECEDENTS, PLAINTIFF YUE HAS**  
10 **STANDING TO SUE AS AN ASSIGNEE OF COPYRIGHTS**

11 Defendants' standing argument is curious. The jury instructions in the Yue v. Chordiant  
12 trial stated that "[y]ou have heard evidence that Netbula assigned some of the copyrights in this  
13 case to Dr. Yue." Nothing in that instruction indicated the assignment was somehow imperfect.  
14 Upon the copyright assignment, Yue "is the real party in interest and is entitled to sue for  
15 copyright infringement." Magnuson v. Video Yesteryear, 85 F.3d 1424, 1429 (9th Cir. 1996)  
16 (corporation assigned copyrights to individual owner after commencement of litigation).  
17

18 "Copyright ... is a creature of statute" and the interpretation of "the 1976 Copyright Act  
19 establishes who is legally authorized to sue for infringement of a copyright." Silvers v. Sony  
20 Pictures Entertainment, Inc., 402 F. 3d 881, 883-84 (9th Cir. 2005). A copyright action must  
21 therefore prosecuted by "a party authorized by statute". FRCP 17(a)(1)(G). The Ninth Circuit  
22 hold that individual owners have standing to sue with copyright assignment from corporations in  
23 two cases: Magnuson v. Video Yesteryear, 85 F.3d 1424 (9th Cir. 1996) and Jules Jordan Video,  
24 Inc. v. 144942 Canada Inc., 617 F. 3d 1146 (9th Cir. 2010). Plaintiff compares the facts of these  
25 two cases with the instant action in the following table:  
26

Case Name	Assignment	Date of lawsuit	Date of Assignment
<u>Magnuson v. Video Yesteryear</u> , 85 F.3d 1424 (9th Cir. 1996)	From Columbus Productions, Inc. to John Magnuson	October 7, 1992 (N.D. Cal.)	February 1, 1993
<u>Jules Jordan Video, Inc. v. 144942 Canada Inc.</u> , 617 F. 3d 1146 (9th Cir. 2010)	From Jules Jordan Video, Inc. to Ashley Gasper	September 15, 2005 (C.D. Cal.)	No written assignment was executed. Products had been marketed with JJV copyright notice.
Yue v. 21 <sup>st</sup> Century Insurance, et al. (the instant action)	From Netbula, LLC to Dongxiao Yue	August 17, 2010 (N.D. Cal.)	September 26, 2007 (PowerRPC); August 18, 2010 (JRPC)

Defendants ignore the two Ninth Circuit authorities, Magnuson and Jules Jordan Video, which are directly adverse to their position that Plaintiff lacks standing. In fact, they cite no copyright cases to support their standing theory.

Based on the two cases, we will show that (1) Defendants have no standing to challenge the copyright transfer<sup>11</sup>; (2) Plaintiff has standing to sue under copyright.

#### **A. Defendants Have No Standing to Challenge the Copyright Assignment**

The situation in Magnuson is very similar to the instant case. John Magnuson founded Columbus Productions, Inc. ("Columbus Inc.") to market a film titled "Lenny Bruce", with the corporation owning the copyright. In October 1992, Magnuson sued Video Yesteryear for

<sup>11</sup> Defendants even challenge Yue's standing on the "YUE PWRPC" copyright, which covers the work Plaintiff created before he founded Netbula, LLC. Yue has always owned this copyright. See, Oddo v. Ries, 743 F.2d 630 (9th Cir. 1984) (author owns copyrights in articles written prior to formation of a partnership). Defendants' only argument was that Yue is a *pro se*.

1 infringing “Lenny Bruce”<sup>12</sup>. In February 1993, Columbus Inc. assigned the copyright of the film to  
2 John Magnuson, 85 F.3d at 1428, who then prevailed in a bench trial. On appeal, the defendant  
3 challenged the validity of assignment<sup>13</sup>. The Ninth Circuit rejected defendant’s standing argument  
4 as “without merit” and held that where an assignor and assignee have little dispute over the  
5 copyright ownership, “it would be anomalous to permit a third party infringer” to attack the  
6 assignment:  
7

8           The logic of Eden Toys is **particularly compelling** in this case, where the  
9           conveyance is between John Magnuson as CEO of Columbus, and John  
10           Magnuson as owner of John Magnuson Associates... As a result, Magnuson is  
11           the real party in interest and is entitled to sue for copyright infringement.

12           Magnuson, 85 F.3d at 1427-29 (emphasis added).

13           Magnuson have guided other courts in numerous copyright cases under the 1976 Copyright  
14           Act. In Fleming v. Miles, 181 F. Supp. 2d 1143 (D. Or. 2001), the court summarized Magnuson’s  
15           holding as follows:

16           When B brought suit, the defendant argued that the transfer to B was invalid,  
17           hence B was not a proper plaintiff. The Ninth Circuit disagreed, reasoning that  
18           so long as A and B were both satisfied, the infringer could not assert this as a  
19           defense... the court was essentially saying that a stranger lacks standing to  
20           assert A’s alleged rights against B when A declines to assert them himself. The  
21           defendant had no right to infringe the copyright, regardless of whether it was  
22           owned by A or B.

23           Id. at 1158. Following the same logic, the Seventh Circuit held that a third-party infringer “simply  
24           [did] not have standing” to contest the validity of a copyright assignment. Billy-Bob Teeth, Inc. v.

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25           <sup>12</sup> John Magnuson filed the lawsuit on October 7, 1992 in the U.S. District Court of Northern  
26           California, Oakland Division, with case number 4:92-cv-04049-DLJ. A bench trial was held in  
27           March 1994. (ref. PACER)

28           <sup>13</sup> VY argued that there was no evidence that Columbus Inc. ever dissolved and therefore, that the  
            transfer alleged in a dissolution process could not have occurred. 85 F.3d at 1428.

1 Novelty, Inc., 329 F.3d 586, 592-93 (7th Cir.2003). The Fifth Circuit also noted that “courts are  
2 hesitant to allow an outside infringer to challenge the timing or technicalities of the copyright  
3 transfer.” Lyrick Studios, Inc. v. Big Idea Productions, Inc., 420 F. 3d 388, 394 (5th Cir. 2005).

4 The same logic is equally compelling in the instant action. Yue is the owner of Netbula and  
5 the author of the copyrighted software. Yue, on behalf of Netbula, transferred the copyrights to  
6 himself. Netbula and Yue are in perfect unity with respect to the copyright ownership. Therefore,  
7 Defendants lack standing to contest the copyright transfer from Netbula to Yue.  
8

9 **B. Plaintiff Has Standing to Sue**

10 Even, assuming arguendo, that Defendants had standing to challenge the copyright  
11 assignment from Netbula to Yue, the assignment had been accomplished according to the statute.  
12 As the copyright owner, Yue “is the real party in interest and is entitled to sue for copyright  
13 infringement.” Magnuson v. Video Yesteryear, 85 F.3d 1424, 1429 (9th Cir. 1996).  
14

15 Recently, the Ninth Circuit decided a similar case: Jules Jordan Video, Inc. v. 144942  
16 Canada Inc., 617 F. 3d 1146 (9th Cir. 2010). There, Ashley Gasper, the owner and president of  
17 Jules Jordan Video, Inc. (“JJV”) sued a number of defendants for copyright infringement. The  
18 district court ruled that Gasper had no standing to sue because the copyrights belonged to his  
19 corporation -- JJV. The Ninth Circuit reversed and held that Gasper “had standing to assert the  
20 copyright claims in question.” *Id.* at 1150. The Ninth Circuit gave several reasons. One of them  
21 was the following  
22

23 If [Gasper] knew that JJV was the owner [of the copyrights in question] and  
24 wanted to own them himself, he needed only to transfer them to himself from  
25 JJV. Copyrights, like any other property right, can be transferred by any  
26 means of conveyance. 17 U.S.C. § 201(d)(1). A simple written note or  
27 memorandum of transfer signed by himself on behalf of JJV would have been  
28 sufficient, 17 U.S.C. § 204(a), and an earlier oral assignment can be confirmed

1 later in a writing. *Billy-Bob Teeth, Inc. v. Novelty, Inc.*, 329 F.3d 586, 591 (7th  
2 Cir.2003). Corporations cannot literally discuss anything. *Id.*...he could have at  
anytime simply memorialized that intent [to own the copyrights] in writing.

3 *Id.* at 1156.

4 It is well settled that “an assignment subsequent to the commencement of litigation is  
5 valid.” *Huebbe v. Oklahoma Casting Co.*, 663 F. Supp. 2d 1196 (WD Okla. 2009) (citations  
6 omitted). In *Magnuson v. Video Yesteryear*, the assignment from Columbus Inc. to John  
7 Magnuson happened several months after the lawsuit. Courts have also enforced copyright  
8 assignments made during a jury trial. *Billy-Bob Teeth*, 329 F.3d at 589-92 (7th Cir. 2003)  
9 (enforcing a “nunc pro tunc” assignment made during trial). Thus, the owner of a company can  
10 assign the copyrights to himself literally “at anytime”.

11  
12 The PowerRPC assignment was in September 2007, almost three years before the  
13 commencement of this action, and even before Yue discovered Chordiant’s infringement. The  
14 JRPC assignment was on August 18, 2010; two days after the Ninth Circuit published the *Jules*  
15 *Jordan Video* decision. With the copyright assignments, Yue “is the real party in interest and is  
16 entitled to sue for copyright infringement.” *Magnuson*, 85 F.3d at 1429 (9th Cir. 1996).

### 17 18 **C. Defendants’ Standing Argument Ignores the Controlling Authorities**

19 As the en banc court in *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F. 3d 881 (9th Cir.  
20 2005) pointed out, the copyright statute determines who has standing to sue in copyright cases.  
21 Under the 1976 Copyright Act, “[t]he legal or beneficial owner of an exclusive right under a  
22 copyright is entitled . . . to institute an action for any infringement of that particular right  
23 committed while he or she is the owner of it.” 17 U.S.C. § 501(b).  
24

25 “The right to sell and transfer personal property is an inseparable incident of the  
26

1 property... The right to prosecute an accrued cause of action for infringement is also an incident  
2 of copyright ownership.” Davis v. Blige, 505 F.3d 90, 98-99 (2nd Cir. 2007). The Ninth Circuit, in  
3 both Magnuson and Jules Jordan Video, held that the owner of a corporation has standing sue  
4 with assigned copyrights, including causes of action accrued prior to the assignment.

5 The en banc Ninth Circuit court explained why: “[T]o receive maximum value for the  
6 impaired copyright, one must also convey the right to recover the value of the impairment by  
7 instituting a copyright action.” Silvers, 402 F.3d 881, 890 n. 1 (9th Cir.2005). When Yue received  
8 the copyrights impaired by infringement, he is entitled to sue the infringers<sup>14</sup>.

10 Defendants ignore all these copyright cases on the standing question, and cite numerous  
11 cases completely unrelated to copyright. Defendants’ main authority is a contract and racial  
12 discrimination case, Jones v. Niagara Frontier Transp. Authority, 722 F.2d 20, 22 (2d Cir. 1983),  
13 where a corporation failed to win construction bids for some transportation projects, and its owner  
14 – Jones-- sued various government entities on behalf of the corporation, alleging, *inter alia*, racial  
15 discrimination. The other cases Defendants cite on the standing question are:

- 17 ● Palazzo v. Gulf Oil Corp., 764 F.2d 1381 (11th Cir. 1985) (a contract dispute between  
18 corporations);
- 19 ● Mercu-Ray Indus., Inc. v. Bristol-Myers, Co., 392 F. Supp. 16 (S.D.N.Y. 1974) (an  
20 antitrust action brought under the Sherman Act between corporations);
- 21 ● Bell v. Carlsen Motor Cars, Inc., 2007 U.S. Dist. LEXIS 75623 (S.D.N.Y. Oct. 10,  
22 2007) (a contract case involving contracts between corporations).

23 These cases are distinguishable from Magnuson and Jules Jordan Video, because they do

24 <sup>14</sup> See also, Infodek, Inc. v. Meredith-Webb Printing Company, Inc., 830 F.Supp. 614, 619  
25 (N.D.Ga.1993) (Causes of action which accrued prior to the assignment "can accompany the  
26 assignment and confer standing for those prior causes of action upon the assignee."

1 not involve assignment of copyright, which is a property right governed by the copyright statute.  
2 Only a party to a contract may sue for contract disputes, FRCP 17(a)(1)(F), whereas the  
3 Copyright Act only authorizes a copyright holder to sue, FRCP 17(a)(1)(G).

4 The right to transfer property is a constitutional right that is fundamental to our rule of law.  
5 It was within Netbula's unalienable right to transfer its property – such as copyrights -- to Plaintiff.

6 Defendants cite no copyright case to disapprove Magnuson and Jules Jordan Video, much  
7 less to trump Plaintiff's constitutionally protected property rights.

8 In the Chordiant case, Chordiant alleged that it acquired an implied license from Netbula.  
9 Since then, the Chordiant verdict has established that CMD was developed and distributed without  
10 any license.

11 Here, Netbula and the Downstream Defendants had no transactions concerning CMD, and  
12 Netbula no longer has an interest in the copyrights and claims in the instant action.

13 Defendants' argument that Netbula is the real party ignores the law applicable to copyright  
14 infringement. Once the copyrights are assigned to Yue, he is the real party in interest to the  
15 infringement action. Magnuson, 85 F.3d 1424, 1429 (9th Cir. 1996).

16 "The framers of our Constitution thought self-representation in civil suits was a basic right  
17 that belongs to a free people." Iannaccone v. Law, 142 F. 3d 553, 556 (2nd Cir. 1998). Plaintiff  
18 has standing to sue, and his "right to proceed *pro se* in civil actions in federal courts is guaranteed  
19 by 28 U.S.C. § 1654." *Id.*

20  
21  
22  
23 **D. Defendants' Attack on Plaintiff is Unwarranted**

24 The Downstream Defendants are copying the tactics of Chordiant to attack Plaintiff and  
25 fan discrimination against a pro se. In the above, Plaintiff has shown various contradictory  
26

1 statements made by Chordiant and Defendants, calculated to avoid copyright liability. The facts  
2 are simple: Plaintiff spent many sleepless nights to write the code, Chordiant infringed the  
3 copyrights of the code, and Defendants have copied and successfully used the code for years.  
4 There is no need for them to add insult to injury.  
5

6  
7 **CONCLUSION**

8 The facts and cases do not support Defendants' contentions. Plaintiff asks the Court to  
9 deny Defendants' motion to dismiss.  
10

11 Respectfully submitted,  
12

13 DATED: February 14, 2011  
14

15 /s/

16 \_\_\_\_\_  
17 DONGXIAO YUE  
18 PLAINTIFF  
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