No. 21-56046

In the United States Court of Appeals for the Ninth Circuit

EVOX PRODUCTIONS LLC,

Plaintiff-Appellant,

v.

VERIZON MEDIA INC., YAHOO! INC., and OATH, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:20-cv-02852-CBM-JEM
Hon. Consuelo B. Marshall

BRIEF OF THE COPYRIGHT ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

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MARCH 14, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and local rules 29(4)(A) and 26.1, the Copyright Alliance states that it is a non-profit 501(c)(4) organization and does not have a parent corporation and that no publicly held corporation owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Copyright Alliance is dedicated to advocating for policies that promote and preserve the value of copyright and to protecting the rights of creators and innovators. It is a nonprofit, nonpartisan 501(c)(4) public interest and educational organization. The Copyright Alliance represents the copyright interests of over 1.8 million individual creators and over 13,000 organizations across the entire spectrum of creative industries, including graphic and visual artists, photographers, writers, musical composers and recording artists, journalists, documentarians and filmmakers, and software developers, as well as the small and large businesses that support them.

The Copyright Alliance's members depend on copyright law to protect their works against infringement and to sustain their ability to create

[1] This brief is filed pursuant to Federal Rule of Civil Procedure 29(a)(2). The parties have consented to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* states that no counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amicus curiae*, its members, or counsel, contributed money intended to fund preparation or submission of this brief.

expressive works for the benefit of the public. Members depend on licensing agreements to commercialize their works in the marketplace, and they rely on courts to recognize infringement when the scope of a license is violated or when unauthorized use occurs after a license expires. The Copyright Alliance submits this *amicus curiae* brief to help the Court understand why this case carries significant implications for creators, as well as for online service providers like Appellees, who should not be allowed to get off scot-free when they directly infringe the rights of copyright owners.

SUMMARY OF ARGUMENT

This case—involving copyright infringement of photographic works by a website operator—presents an opportunity for this Court to clarify the meaning of the exclusive display, reproduction and distribution rights in a way that ensures copyright owners have effective recourse against infringement. The district court below erred in its interpretation of *Perfect 10 v. Amazon.com,*[2] making it harder for copyright holders to bring cases against infringers.

The opinion below directly contradicts this Court's subsequent holding in *Bell v. Wilmott Storage Servs., LLC*,[3] and other decisions of this Court that clearly articulate when a copyright owner's display, reproduction, and distribution rights are violated. The court erroneously determined that the display of copyrighted photographs on a website with a large number of followers—some of whom interacted with the images—did not violate Plaintiff's display rights. To reach this conclusion, it relied

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[2] 508 F.3d 1146, 1160 (9th Cir. 2007).

[3] *Bell v. Wilmott Storage Servs., LLC*, was issued two weeks after the decision below. 12 F.4th 1065, 1072 (9th Cir. Sep. 9, 2021).

on inapplicable dicta in *VHT v. Zillow*.[4] The allegations in the complaint state a claim for violations of the display, distribution and reproduction rights, none of which were properly analyzed by the court.

Additionally, the district court erred by ignoring the factual allegations in the complaint regarding how the images were allegedly displayed, reproduced and distributed to viewers on a website (not just made available). The court rejected these allegations at the motion to dismiss stage, without providing Plaintiff the opportunity to take discovery to prove the facts underlying its allegations.

Finally, the ruling below threatens the health of copyright licensing agreements by setting a precedent that would render them meaningless. If the terms of a license require the display of a work to cease when a license ends or is terminated, licensors must have a cause of action when those terms are violated.

This Court should correct this clear error to ensure that the display, reproduction and distribution rights are protected, and to prevent the premature dismissal of properly pled copyright cases at the pleading stage.

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[4] ER 7-8, *citing VHT v. Zillow Group, Inc.*, 918 F.3d 723, 736 (9th Cir. 2019).

ARGUMENT

I. THE DISPLAY RIGHT IS CLEARLY OUTLINED IN BELL, WHICH SHOULD BE FOLLOWED HERE

The display right is one of the enumerated exclusive rights granted to a copyright owner under the Copyright Act. 17 U.S.C. § 106(5). The copyright owner has the exclusive right to display the copyrighted work publicly, or to authorize the same. *Id.*; *Bell v. Wilmott Storage Servs., LLC*, 12 F.4th at 1072. The allegations in this case clearly involve the public display of copyrighted works on a publicly accessible website, yet the court dismissed the case on the pleadings, thereby rendering the exclusive display right granted to a copyright owner under the Copyright Act meaningless.

A couple of weeks after the district court in this case issued its erroneous ruling, this Court engaged in a straightforward analysis of the display right in a way that would have helped the court below gain clarity, and that now serves as grounds to reverse the decision below. *See generally*, *Bell v. Wilmott Storage Servs., LLC*, 12 F.4th 1065. In *Bell*, this Court issued a clear rule on the display right: A defendant who displays a photo on a publicly accessible website violates the display right even if

"a member of the public could not access the photo by simply visiting [the defendant's] website." *Id.* at 1073. When the defendant in *Bell* transmitted a photo from a specific server where the photos were stored without permission, it was accessible to "any member of the public who used the pinpoint address or a reverse image search." *Id.* That alone violated the right. Displaying a photo on a server that is publicly accessible to anyone with an internet connection is a public display of the photo "*regardless* of whether or not any particular person actually found and viewed it" *Bell* at 1073 (emphasis added).

The *Bell* Court went on to explain why its ruling is consistent with the holding in *Perfect 10 v. Amazon*: "In *Perfect 10*, we had no trouble concluding that Google's list of thumbnails gave rise to a prima facie case of infringement of Perfect 10's exclusive display right without requiring proof that users had in fact accessed the photos." *Bell v. Wilmott Storage Servs., LLC*, 12 F 4th at 1073 (citing *Perfect 10*, 508 F.3d at 1160). The court below clearly misconstrued *Perfect 10* when it decided that allegations that the website was open to the public was not enough to find a public display right violation. Contrary to the district court's ruling, the

Copyright Act "does not require proof that the protected work was actually viewed by anyone," for a violation of the display right to be found. *Id*. at 1074 (citing 17 U.S.C. § 101). For a "public display" violation, the Act simply requires that the work is displayed at "a place *open to* the public," including publicly accessible servers.[5] *Id*. (emphasis added) Other federal courts have come to similar conclusions,[6] but the rule in the Ninth Circuit could not be more clear after *Bell*. The *Bell* rule should be applied consistently and requires reversal.

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[5] Even though *Bell* does not require anyone to have viewed the copyrighted work when displayed on the internet, this court should certainly hold that allegations of social interaction such as likes and sharing a work are sufficient to state a claim that a publicly displayed work *was* viewed.

[6] *See, e.g.*, *Teter v. Glass Onion, Inc.*, 723 F. Supp. 2d 1138, 1146 (W.D. Mo. 2010) (holding that creating copies to display copyrighted works on a website was infringing); *Healthcare Advocates, Inc. v. Harding, Earley, Follmer & Frailey*, 497 F. Supp. 2d 627, 635 (E.D. Pa. 2007) (holding that under the expansive definition of public display, the display of copyrighted images on computers in an office constitutes a public display); *Advance Magazine Publrs. Inc. v. Leach*, 466 F. Supp. 2d 628, 637 (D. Md. 2006) ("Displaying a copy of a work on the Internet, especially on a commercial site, falls squarely within the definition of 'public display.'").

II. THE COURT IMPROPERLY DISMISSED AT THE PLEADING STAGE DESPITE CLEARLY ALLEGED VIOLATIONS OF THE RIGHTS OF REPRODUCTION AND DISTRIBUTION

It is well settled that a complaint must make allegations that state a claim for relief that is plausible. It is also well settled that courts must accept factual allegations as true and construe them in a light most favorable to the plaintiff. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). The district court's decision to demand more proof introduces a higher pleading standard that cannot be squared with the law.

The pertinent question at this stage of litigation is not what evidence there is, but "whether the [complaint] alleged enough facts to state a claim to relief that is plausible on its face." *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 668 (9th Cir. 2017). In this Circuit and others, factual allegations in a copyright claim "need not be detailed" to survive a 12(b)(6) motion to dismiss. *Malibu Textiles, Inc. v. Label Lane Int'l, Inc.*, 922 F.3d 946, 951 (9th Cir. 2019). Rather, they simply "must be enough to raise a right to relief above the speculative level" and to state a claim that is facially plausible. *Id.*

In *Perfect 10 v. Giganews*, this Court mapped out the proper way to analyze a motion to dismiss involving the same trio of exclusive rights that are at issue here: display, distribution and reproduction. A court must examine each one separately, analyzing the elements and the appropriateness of dismissal prior to discovery, giving consideration to the evidentiary burdens of each. *See Perfect 10, Inc. v. Giganews*, 847 F.3d at 668-70 [evaluating claims in turn]. *See also, Ashcroft v. Iqbal*, 556 U.S. at 678.

If the decision is allowed to stand, copyright holders will consistently be unable to survive a motion to dismiss and alleged infringers will be able to have cases thrown out at an alarming rate. Copyright owners must be able to assert all of their exclusive rights in their complaint, each of which should be analyzed under the distinct legal principles that protect those rights.

A. Reproduction Right

Uploading a photograph onto a server without authorization is copying and therefore a violation of the exclusive right of reproduction. 17 U.S.C. § 106(1); *N.Y. Times Co. v. Tasini,* 533 U.S. 483, 503-04, 121 S. Ct. 2381, 2393 (2001); *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d at 737 (an

image stored on a computer is a "copy" under copyright law); *Perfect 10, Inc. v. Amazon.com*, Inc., 508 F.3d at 1160; *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1066 (9th Cir. 2014); *APL Microscopic, LLC v. United States*, 144 Fed. Cl. 489, 495 (2019). *See also*, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) ("The Copyright Act provides the owner of a copyright with the exclusive right to reproduce the copyrighted work in copies."). Discovery can be critical in determining whether unauthorized uploading or copying has occurred. When unauthorized reproduction is plausibly alleged in a complaint with sufficient facts from which the court can draw a reasonable inference that the defendant is liable, a motion to dismiss should be denied. *Ashcroft v. Iqbal*, 556 U.S. at 678. As noted above, slavish detail is not required at this stage. *Malibu Textiles, Inc. v. Label Lane Int'l, Inc.*, 922 F.3d at 951. That the photos are alleged to have been on the defendant's server certainly gives rise to a plausible inference that copying occurred to put them there.

B. Distribution Right

In the Ninth Circuit and elsewhere, a violation of the exclusive distribution rights in section 106(3) occurs when a copyrighted work is

uploaded without authorization. *Columbia Pictures Indus. v. Gary Fung*, 710 F.3d 1020, 1034 (9th Cir. 2013); *A&M Records v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001). *See also*, *N.Y. Times Co. v. Tasini,* 533 U.S. 483, 503-04 (uploading written works to "a storage and retrieval system" violated the authors' reproduction and distribution rights). Often, without discovery "it will be impossible to prove if and when copies have actually been disseminated." *APL Microscopic, LLC v. United States*, 144 Fed. Cl. at 498. Because a court must accept the allegations in a complaint as true, courts must not dismiss a well pled claim of a violation of the distribution right when a plaintiff hasn't had the benefit of discovery. *Id.* Plausible allegations that a work has been uploaded online, or otherwise disseminated, are enough to raise a claim of infringement of the distribution right and dismissal must be denied. *Ashcroft v. Iqbal*, 556 U.S. 662, 678; *Malibu Textiles, Inc. v. Label Lane Int'l, Inc.*, 922 F.3d 946, 951; *Columbia Pictures Indus. v. Gary Fung*, 710 F.3d 1020, 1034.

C. Display Right

As outlined in detail above, a party violates the exclusive display right when it displays a copyrighted photograph without authorization on a

publicly accessible website. *Bell*, 12 F.4th at 1073. This is true regardless of whether or not a member of the public actually viewed it or navigated to it. *Id*. The ease of infringement online already makes it difficult for creators to protect their rights. Yet digital infringement is just as harmful as "standing outside the neighborhood Redbox—or Blockbuster Video, for fans of history—and giving away copies of [a] movie for free." *Glacier Films (USA), Inc. v. Turchin*, 896 F.3d 1033, 1041 (9th Cir. 2018). A court should not dismiss a complaint which clearly and unambiguously alleges and even demonstrates that a photo is displayed on a publicly accessible website.[7] *Ashcroft*, 556 U.S. 662, 678; *Bell*, 12 F.4th 1065 at 1073; *Malibu Textiles, Inc.*, 922 F.3d 946, 951.

D. When an Investigator Views an Infringing Work, that Is Sufficient to Find Display and Distribution to the Public

The court below improperly held that the display and distribution of the work to an investigator did not satisfy the pleading requirements for a display and distribution violation. This is contrary to the great weight of authority, which holds that display and distribution to a party's

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[7] The court below also seemed to misunderstand the fundamental nature of social media—that in order for viewers to "like" or re-blog photographs, a website would have to display the image to the viewer.

investigator is sufficient to support an allegation of infringement. *See, e.g.*, *Olan Mills Inc. v. Linn Photo Co.*, 23 F.3d 1345, 1348 (8th Cir. 1994) (holding that copies made at the request of an investigator was a copyright violation); *Sony BMG Music Entm't v. Gray*, No. C 07-4854 WDB, 2008 U.S. Dist. LEXIS 70128, at *5 (N.D. Cal. Sep. 15, 2008) (an investigator's download of sound recordings was evidence of distribution to the public). "Indeed, courts have consistently relied upon evidence of downloads by a plaintiff's investigator to establish both unauthorized copying and distribution of a plaintiff's work." *UMG Recordings, Inc. v. RCN Telecom Servs., LLC*, 2020 U.S. Dist. LEXIS 158269, at *20 (D.N.J. Aug. 31, 2020); *BMG Rights Mgmt. (US) LLC v. Cox Commc'ns, Inc. ["Cox II"]*, 199 F. Supp. 3d 958, 972 (E.D. Va. 2016)(same), *aff'd in part, rev'd in part on other grounds*, 881 F.3d 293 (4th Cir. 2018); *Arista Records LLC v. Usenet.com, Inc.*, 633 F.Supp.2d 124, 149–150 n.16 (S.D.N.Y. 2009) (same, collecting cases); *Warner Bros. Records Inc. v. Walker*, 704 F. Supp. 2d 460, 467 (W.D. Pa. 2010) (downloads by a third-party service used to detect infringement established a violation of the distribution right); *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210, 1216 (D. Minn. 2008) (holding that distribution to an investigator can form the

basis of an infringement claim). The court here improperly treated the fact that an investigator accessed the copyrighted work as weighing against the plaintiff, when in fact it is proof of infringement. That finding should be overturned.

III. COURTS MUST HOLD ONLINE SERVICE PROVIDERS ACCOUNTABLE FOR DIRECT INFRINGEMENT

Unlike in many copyright infringement cases in the digital era that involve the actions of users of a service, this is a case of direct infringement by the service provider. Here, Yahoo was the party to a license, and they were the party who displayed, distributed and reproduced the copyrighted works after that license expired. While it is unfortunate that some platforms have been able to exploit loopholes in the law and profit from the infringing activity of its users while getting a pass—something that is already incredibly damaging to the creative industry—they must be held accountable when they are the direct infringers.

Copyright infringement is just as damaging in the digital realm as it is in the brick-and-mortar world and it is essential that courts apply the law in an equivalent manner. *Glacier Films (USA), Inc. v. Turchin*, 896 F.3d 1033, 1041 (comparing digital and physical infringing activity). As

it did in *Bell*, this Circuit has always held platforms and website operators accountable for their own infringing conduct. For example, one of the claims in *Perfect 10 v. Amazon.com* involved a set of thumbnail images which resided on Google's servers and were directly copied and distributed by Google. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163. This Court understood that the plaintiff in that case had established "a prima facie case that Google's thumbnail images infringe Perfect 10's display rights" before launching into its fair use analysis. *Id.* Likewise, in *VHT, Inc. v. Zillow Group* a portion of the claim involved "photos that Zillow curated, selected, and tagged for searchable functionality—activities that amount to volitional conduct establishing direct liability" and this Court upheld a finding of infringement against Zillow for its actions. *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 737, 744 (rejecting a fair use defense on images that were curated by VHT and thus violated the display right). [8]

[8] Recently, on remand, the district court awarded $1,927,200 in statutory damages to *VHT* for the set of images that it found were infringing. *VHT, Inc. v. Zillow Grp., Inc.*, No. C15-1096JLR, 2022 U.S. Dist. LEXIS 14453, at *29 (W.D. Wash. Jan. 26, 2022).

IV. LICENSES—AND THEIR LIMITS—ARE CRITICAL TO THE CREATIVE ECONOMY

Copyright holders, like members of the Copyright Alliance, rely on courts to find copyright infringement when a license expires and there is subsequent unauthorized use. A large number of creators are small businesses and individuals "many of whose fortunes are small." *Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ'g Co.*, 747 F.3d 673, 686 (9th Cir. 2014). Licenses will be meaningless in the marketplace if licensees can exceed their scope without consequence. As this Court has previously noted, the "inability to bring an infringement suit [for a license violation] would be an incentive to engage in infringing behavior." *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1005 (9th Cir. 2015). Usually when a license expires or is terminated, any continued uses are unauthorized, and thereby, copyright violations. *See, e.g.*, *Teter v. Glass Onion, Inc.*, 723 F. Supp. 2d 1138, 1150 (continued display of copyrighted work on a website after revocation of a license was infringement as a matter of law).

This Circuit divides the terms of a license into two parts: "conditions" which affect the aforementioned scope of the license, and "covenants" which are promises in the contract that do not affect the scope of the license. *MDY Indus., LLC v. Blizzard Entm't, Inc.*, 629 F.3d 928, 939 (9th

Cir. 2010). A one-year limitation on a license is a condition, not a covenant. Consequently, use beyond a license's time frame gives rise to a copyright infringement claim. *See Virtual Studios, Inc. v. Royalty Carpet Mills, Inc.*, No. 4:12-CV-0077-HLM, 2014 U.S. Dist. LEXIS 206344, at *25 (N.D. Ga. Feb. 10, 2014). Put another way, "a licensee who acts outside the scope of a license infringes the copyright as if there were no license at all." *Valve Corp. v. Sierra Entm't, Inc.*, 431 F. Supp. 2d 1091, 1102 (W.D. Wash. 2004) (citing Nimmer on Copyright § 10.15). Because the license in the case at bar had expired, the Defendants-Appellees' continued use was unauthorized and therefore infringing. If the decision below is upheld, licenses across the industry will lose their value—this would provide a roadmap for licensees to purchase a limited license and then exceed it, confident that they will be able to avoid any consequences. *Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1005.

A. If Creators Cannot Rely on Courts to Find Infringement When Unauthorized Use Occurs After a License Has Expired, Those Agreements Will Be Rendered Meaningless and the Industry Will Suffer

Licensing is fundamental to the economic viability of creative businesses. Professional creative work does not happen in a vacuum; it requires time, training, experience, skill and talent. Even though many

in the creative sector are small businesses, the sector's overall economic impact is substantial. Collectively, copyright industries contribute trillions in value to the U.S. gross domestic product ("GDP").[9] According to an annual report prepared for the International Intellectual Property Alliance in 2020, the value added by copyright industries to the U.S. economy has increased steadily in recent years and, in 2019, accounted for 11.99 percent of the U.S. GDP.[10] These copyright industries, together, employ approximately 11.7 million people.[11]

The creative economy contributed $1.5 trillion to the U.S. economy in 2019.[12] "These industries include books, newspapers and periodicals, motion pictures, recorded music, radio and television broadcasting, and

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[9] *Copyright Industries in the U.S. Economy: The 2020 Report*, by Robert Stoner and Jéssica Dutra of Economists Incorporated, prepared for the International Intellectual Property Alliance (IIPA), (December 2020), at 4, 7. https://www.iipa.org/files/uploads/2020/12/2020-IIPA-Report-FINAL-web.pdf.).

[10] Stoner & Dutra, Copyright Industries in the U.S. Economy: The 2020 Report at 4, 7.

[11] *Id.* at 11.

[12] *Id.* at 7.

software in all formats, including video games."[13] While the creative individuals behind these works include employees of major corporations, many of these workers are either self-employed, or work for small businesses. This is especially true in the photography, graphic arts, and video industries, where individual creators and small businesses are the norm, not the exception.[14] According to the Bureau of Labor Statistics, over 170,000 individuals and small businesses are classified as photographers or videographers in the United States, and over 265,000 are classified as graphic designers or fine artists.[15]

The Plaintiff-Appellant in this case is in the business of creating a massive catalog of specialized photographs, something that requires a

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[13] *Id*. at 6.

[14] OCCUPATIONAL OUTLOOK HANDBOOK, *Photographers*, Bureau of Labor Statistics, U.S. Department of Labor (Feb. 21, 2022), https://www.bls.gov/ooh/media-and-communication/photographers.htm.

[15] *Id.*; OCCUPATIONAL OUTLOOK HANDBOOK, *Film and Video Editors and Camera Operators,* Bureau of Labor Statistics, U.S. Department of Labor (Apr. 16, 2019), https://www.bls.gov/ooh/media-and-communication/film-and-video-editors-and-camera-operators.htm; OCCUPATIONAL OUTLOOK HANDBOOK, *Graphic Designers,* Bureau of Labor Statistics, U.S. Department of Labor (Feb. 22, 2022), https://www.bls.gov/ooh/arts-and-design/graphic-designers.htm; *Fine Artists, Including Painters, Sculptors, and Illustrators,* Bureau of Labor Statistics, U.S. Department of Labor (Feb. 22, 2022), https://www.bls.gov/oes/current/oes271013.htm.

significant investment—between the time involved and the expense of hiring professional photographers. In the proceedings below the Defendants-Appellees attempted to frame Plaintiff-Appellant as an opportunistic party who should somehow be beyond the bounds of copyright protection when in fact, Plaintiff-Appellant is simply taking action against a company that continued to make use of copyrighted work—which the parties had previously agreed was worth six figures—after their license to do so had expired. ER 166. Creators who license images and then enforce their rights are no different than other businesses who provide value to their customers and then protect that value by pursuing those who take their service or product without paying. The hundreds of thousands of businesses in this country that make up the creative economy would fail without the ability to license their work, enforce their licenses, and pursue copyright infringements. Even in cases where a plaintiff's litigation revenue exceeds its licensing revenue (which isn't applicable here), that imbalance is often merely an indication of the volume at which others choose to infringe. It would be perverse to treat frequently infringed—and therefore highly sought after—work as somehow less entitled to recover for the many losses associated with that infringement. This Court put it

perfectly when it held that "it is difficult to see how pursuing a meritorious infringement claim 'less aggressively' furthers the Copyright Act's essential goals." *Glacier Films (USA), Inc. v. Turchin*, 896 F.3d at 1042.

The clients of creative professionals are often small businesses as well. When infringers get a pass, it is unfair to the many companies that properly license copyrighted works. *See, e.g.*, *The Copyright Alternative in Small-Claims Enforcement Act of 2017:* Hearing on H.R. 3945 Before the H. Comm. on the Judiciary, 115th Cong. (2018) (Testimony of Jenna Close, Commercial Photographer on Behalf of herself and the American Society of Media Photographers) ("We have witnessed our photos enlarged as the backdrop to a competitor's tradeshow booth while our paying client was rightfully using the same artwork at the same tradeshow in their own booth. You can guess how our client felt about that!").[16] When the creative economy breaks down, authorized users suffer too. Ultimately though, it is the copyright holders and creators who suffer the most harm by not just loss of licensing fees, but by the

[16] *Available at,* http://docs.house.gov/meetings/JU/JU00/20180927/108733/HHRG-115-JU00-Wstate-CloseJ-20180927.pdf.

possibility of attorney's fees when a case is dismissed.[17] In this way, unclear or unjust standards perpetuated by a district court can be devastating to creators and the creative economy.

It is therefore not possible to overstate the importance that this Court issue clear and proper guidance on the elements of each individual exclusive right, with instructions to consider each in turn. Depriving copyright owners of a means to enforce their rights would inflict real damage on these industries that contribute so much to the economy, as well as the workers and business owners in the industry who—without the ability to monetize and enforce their rights—will not be able to afford a basic living. The court below should have accepted as true the plausible factual allegations, which alleged infringement of multiple exclusive

[17] A dismissal in a copyright case does not just result in a lost opportunity to enforce the copyright holders' rights. It can result in the copyright holder being forced to pay the attorney's fees of the infringer. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534, 114 S. Ct. 1023, 1033 (1994) (holding that prevailing defendants can be awarded attorney's fees at the court's discretion. This has the potential to bankrupt a small business creator such as a photographer or illustrator, the threat of which can cause them to opt out of enforcing their rights. *See Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 766 (9th Cir. 2003) (attorney's fees awards against non-wealthy creator plaintiffs can have a chilling effect or be inequitable).

rights. If this Court doesn't reverse, creators will continue to suffer even greater setbacks.

CONCLUSION

The Copyright Alliance respectfully submits that the district court's decision should be reversed and remanded for further proceedings.

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March 14, 2022

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing AMICUS CURIAE BRIEF with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using appellate CM/ECF system on the undersigned date. All parties are represented by registered CM/ECF users and will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B) and because this brief contains 4,497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted by the word processing software used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 365, Century Schoolbook font, 14 point.

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