

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY**

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KEV & COOPER LIMITED LIABILITY  
COMPANY

Civ. No.: 22-cv-02029-SDW-JRA

Plaintiff,

- against-

GLADWELL EDUCATION LLC,

Defendant.

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**Plaintiff's Brief in Opposition  
to Defendant's Motion to Dismiss**

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**Plaintiff's Brief in Opposition  
to Defendant's Motion to Dismiss**

Plaintiff Kev & Cooper Limited Liability Company ("Plaintiff" or "Kev & Cooper") designs and sells children's educational carpets, including rugs bearing the "ABC Shapes Design" (or "Plaintiff's Work") which is registered in the United States Copyright Office. Defendant, Gladwell Education LLC ("Defendant") is Plaintiff's direct competitor, who has copied, advertised and sold rugs that infringe Plaintiff's Work.

Defendant seeks to evade liability in this case by improperly challenging the Plaintiff's ownership of the Plaintiff's Work. Defendant claims that, instead of belonging to the Plaintiff, the rights in the Plaintiff's Work actually belong to Omer Copur, who is the Plaintiff's managing member. In short, Defendant asks the court to dismiss this case by asserting that instead of Kev & Cooper LLC, this action should have been brought by Mr. Omer Copur.

Neither the applicable law nor facts support Defendant's contention. The facts clearly establish that Plaintiff's ownership of the ABC Shapes Design arises from the work made for hire doctrine of the Copyright Act or by assignment of rights.

Moreover, it is well-established law that an infringer like the Defendant cannot excuse its bad acts by trying to raise an issue of ownership about which there is no dispute among the copyright creators and transferors. In this case, since everyone involved in the creation of the Plaintiff's Work agrees that *Plaintiff* is its rightful owner, Defendant, as a third-party infringer, cannot properly challenge such ownership or transfer.

Thus, no matter how the Plaintiff's Work may be found to have been created – as a work made for hire or via independent creation and assignment – it is beyond cavil that *Plaintiff* owns

the exclusive rights and copyright registration in it. For these reasons, set forth in greater detail below, Defendant's motion to dismiss must be denied in its entirety.

## **I. BRIEF STATEMENT OF MATERIAL FACTS**

As set forth briefly above, Plaintiff Kev & Cooper is a limited liability company that designs, manufactures and sells educational carpets that are designed to appeal to children. One of the members in the limited liability company is Omer Copur. (Declaration of Omer Copur dated August 22, 2022 (the "Copur Decl.") at ¶ 4). Among Mr. Copur's roles at Kev & Cooper have been the creative design and supervision of the creation of Kev & Cooper's original designs and products. *Id.* at ¶ 5. In performing these functions, Mr. Copur has at all times relevant to this action worked to further the business of the Plaintiff company, and understood and agreed that the rights to any and all works created by him and under his supervision would be assets of, and be owned exclusively by, Plaintiff. *Id.* at ¶ 4.

With respect to the Plaintiff's Work at issue in this litigation, Mr. Copur oversaw a third party illustrator's creation of artwork that resulted in the ABC Shapes Design. *Id.* at ¶¶ 6-8. The illustrator was commissioned on a work made for hire basis, and Mr. Copur (working for the Plaintiff) provided her with design suggestions, identifying creative elements and layout the Plaintiff believed would most appeal to children; he then gave feedback, suggestions and edits with respect to the images, which in the end culminated in the Plaintiff's Work. *Id.*

For her part, the illustrator performed her services on a work made for hire basis, working with Plaintiff in late 2015 and early September 2016. Decl. ¶ 9. She later signed a confirmation of the parties' understanding that the Plaintiff's Work was in fact created on a work made for hire basis for the Plaintiff, and in the alternative – i.e. if the work did not qualify as such – that her entire right, title and interest in the work be assigned to the *Plaintiff* (not Mr. Copur):

If for any reason the Artwork is deemed not to be a “work made for hire” under the meaning of the U.S. Copyright Act, Designer confirms and acknowledges that it has assigned, effective as of **December 29, 2015, or if created later, immediately upon creation** (and to the extent necessary, Designer hereby assigns to Kev & Cooper), the entire right, title and interest of Designer in and to all versions of the Artwork, including but not limited to any copyrights (registered or otherwise), along with all claims, demands, accrued damages, causes of action, at law and in equity arising from, based on, and relating to the Artwork or any infringement thereof. This assignment expressly includes the right to sue and collect for any and all past and future infringements of the Artwork, for its own benefit. Designer has no rights or title of any nature in the Artwork.

*See* Ex. A.

Once the Plaintiff’s Work was completed, Mr. Copur prepared and filed the copyright application for submission in the Copyright Office. In doing so, he confirmed the members’ and the illustrator’s understanding that the work was to be owned by and was created for the benefit of the Plaintiff by listing the works as being “works made for hire.” As such, he confirmed that Kev & Cooper was the author of the work and the owner. *See* Copur Decl. at ¶ 9; Ex. B. This is the treatment permitted for works made for hire in 17 U.S.C. § 201(b)

Thus, to the extent Mr. Copur had any rights in the Plaintiff’s Work, he too has confirmed his understanding and prior assignment to the company of the Work. In the face of Defendant’s challenge, furthermore, he has re-confirmed his understanding, intent and assignment, and has stated that if the Court may require a further writing to confirm the Plaintiff’s ownership in the Plaintiff’s Work, he is prepared to provide one. *See* Copur Decl. at ¶ 9, 10; Ex. C.

In short, there simply is no dispute between Mr. Copur, the Plaintiff or the illustrator as to who owns the copyrighted work at issue in this litigation. Everyone, apart from Defendant, agrees that the Plaintiff owns the Plaintiff’s Work and the registration for the same. As set forth below, Defendant has no legal standing or factual basis to challenge such ownership.

## II. LEGAL STANDARD

It is not stated clearly in Defendant's papers whether it is seeking dismissal under Rule 12(b)(6) or 12(b)(1). For purposes of reviewing a motion to dismiss under Rule 12(b)(6), the Court is "required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the nonmovant." *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 154 n.1 (3d Cir. 2014).

"When considering a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), the court must accept as true all material allegations of the complaint and construe that complaint in favor of the non-moving party." *Laudano v. Credit One Bank*, No. 15-7668(NLH/KMW), 2016 U.S. Dist. LEXIS 81028 at \* 11-12 (D.N.J. June 22, 2016) (quoting *Thompson v. Nienaber*, 239 F. Supp. 2d 478, 481 (D.N.J. 2002)). To the extent, furthermore, a factual question pertaining to jurisdiction exists, the court may hear facts based on affidavits and material outside of the pleadings. *See Thompson*, 239 F. Supp. 2d at 482.

The allegations in the Complaint, particularly when construed appropriately and in the light most favorable to Plaintiff, clearly and properly state a claim for copyright infringement: Plaintiff has sufficiently pleaded ownership and registration of copyright in the Plaintiff's Work, and it has pleaded the Defendant's copying of that work without authorization.

If, for any reason the Court may find that the Plaintiff somehow lacks standing due to some technical matter, or because Mr. Copur may own some portion of the rights in the Plaintiff's Work, Plaintiff respectfully seeks leave to amend the Complaint to have Mr. Copur join the suit or otherwise cure this deficiency, which he is prepared to do. Copur Decl. at ¶ 11.

### III. ARGUMENT

#### A. Defendant Lacks Standing to Challenge Plaintiff's Ownership of the Copyright at Issue

There is no dispute between Mr. Copur and the Plaintiff as to the latter's ownership of the Copyrights in the Plaintiff's Work. Nor is there any question that Plaintiff has received, by operation of law or assignment, all rights in the work as a result of the illustrator's contributions. Therefore, Defendant cannot avoid liability by challenging the Plaintiff's rights in the ABC Shapes Design vis-à-vis Mr. Copur's (or anyone else's) rights.

In this judicial District, it is black letter law that where no dispute exists between the creator and owner of copyrights being asserted, a third-party infringer having no claim to the work and who is not a party to any disputed transfer has no standing to challenge a plaintiff's copyright ownership. *See, e.g. Malibu Media, LLC v. Tsanko*, No. 12-3899 (MAS)(LHG), 2013 U.S. Dist. LEXIS 169186 a \* 18 (D.N.J. Nov. 30, 2013). In *Malibu Media*, this Court flatly refused to permit a third-party infringer to "dodge" an infringement lawsuit by challenging the ownership or transfer of rights between the copyright creator and author, particularly, as here, where the plaintiff and the transferor have alleged and executed numerous agreements and affidavits to prove that the ownership of the works rests with the plaintiff. *Id.* at \*18, 19.

Just as in *Malibu Media*, Defendant cannot be permitted to dodge its liability by raising red herrings without appropriate standing to do so.

Other courts around the country have rejected similar arguments by similar defendants seeking to avoid liability for their infringing acts. *See, e.g. Billy-Bob Teeth v. Novelty, Inc.*, 329 F.3d 586, 592-93 (7th Cir. 2003)("[T]hird party infringer does not have standing to challenge a transfer of ownership 'where there is no dispute between the copyright owner and the transferee about the status of copyright'"); *Eden Toys, Inc. v. Florelee Undergarment Co.*, 697 F.2d 27, 36



(2d Cir. 1982)(“anomalous” to permit a third party defendant to challenge agreement and ownership as between plaintiff and owner of copyrights); *Basketball Mktg. Co. v. Steve & Barry's Univ. Sportswear*, No. 07-716, 2008 U.S. Dist. LEXIS 107249 \* 2-3 (E.D. Pa. June 30, 2008) (recognizing doctrine and citing cases); *Rottlund Co. v. Pinnacle Corp.*, No. 01-1980 (DSD/SRN), 2004 U.S. Dist. LEXIS 16723 (D. Minn. Aug. 20, 2004) (Where there is no dispute between the copyright owner and the transferee about the status of the copyright, it would be “unusual” and “unwarranted” to permit a third-party infringer to avoid suit for copyright infringement by challenging ownership and transfer)(quoting *Imperial Residential Design, Inc. v. Palms Dev. Grp., Inc.*, 70 F.3d 96, 99, (11th Cir. 1995)).<sup>1</sup>

In the case at hand, there is absolutely no question that any rights the illustrator may have had lie with Plaintiff. There is similarly no dispute between Mr. Copur and the Plaintiff that he meant and intended Plaintiff to own the copyright in the copyrighted work asserted on a for hire basis, or via assignment. Mr. Copur clearly has assigned any rights he may have in the work to the Plaintiff, has applied for registration of copyright in the Plaintiff's name, has treated at all times the Plaintiff's Work as the Plaintiff's asset, and has for the further benefit of the Court signed a writing confirming such assignment. *See* Copur Decl. at ¶¶ 8, 9, 10; Ex. C.

In light of all of the foregoing, Defendant cannot challenge Plaintiff's ownership of rights, which is an independent basis upon which its motion must be denied.

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<sup>1</sup> This, of course, is an eminently sensible doctrine since “the chief purpose of section 204(a), (like the Statute of Frauds), is to resolve disputes between copyright owners and transferees and to protect copyright holders from persons mistakenly or fraudulently claiming oral licenses or copyright ownership.” *Imperial Residential Design, Inc.* 70 F.3d 96, 99, (11th Cir. 1995) (citing *Eden Toys*, 697 F.2d 27 (2d Cir. 1982)).

**B. The Copyright-Related Cases Cited By The Defendant Involve Disputes Between Partners or Alleged Co-Creators of the Works at Issue, and Are Not Relevant to the Facts in This Action.**

As set forth above, court after court has refused to permit infringers like the Defendant to raise a defense of improper copyright transfer (or lack of vesting due to ownership on a work made for hire basis) where (1) the defendant is wholly unrelated to the transfer and claims of authorship, and (2) all creators and/or parties to any transfer of rights agree that the Plaintiff owns the rights at issue.

The cases cited by Defendant do not lead to a different result. In fact, none of them address the issue before this Court, as none involve a third party defendant seeking to avoid liability for copyright infringement. Instead, Defendant solely cites to cases in which parties challenge *one another's* ownership of the copyrights at issue in the respective litigations:

- *Heimerdinger v. Collins* involved two partners who argued about who owned the copyright in a particular work. No. 2:07CV00844 DN, 2009 U.S. Dist. LEXIS 51758, at \*1 (D. Utah June 17, 2009).
- *Brown v. Flowers*, involved a claim of ownership of copyright in a co-partner dispute. 297 F. Supp. 2d 846, 852 (M.D. N.C. 2003).
- *Woods v. Resnick* involved a dispute as to who owned copyright between equal partners of a company that developed a web-based software program. 725 F.Supp.2d 809 (W.D. Wis. 2010).
- *Brownstein v. Lindsay*, is a declaratory judgment case between two former business partners/shareholders concerning joint authorship in copyright. 742 F.3d 55 (3d Cir. 2014).
- *M & A Associates, Inc. v. Vcx, Inc.* is a breach of contract action in which the parties litigated the question whether a contract that is silent as to copyright protection can be interpreted as including the requirement that one party obtain copyright protection for the film. 657 F. Supp. 454 (E.D. Mich. 1987).
- *Donaldson Pub. Co. v. Bregman, Vocco & Conn, Inc.*, involved the ownership of copyrights in certain works of authorship, as between the heirs of a composer and his former company. 375 F.2d 639 (2d Cir. 1967).

None of these cases stands for the proposition asserted by Defendant – that by operation of law, and *despite all of the agreements and understandings between the creators of the work and the Plaintiff*, Kev & Cooper lacks ownership of copyright and cannot stop an infringer from copying its work, due to a hypertechnical reading and application of the work made for hire provision of the Copyright Act. The Supreme Court, in *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 142 S. Ct. 941 (2022), decided February 24<sup>th</sup> of this year, dispelled the notion that this kind of rigid reading of the Copyright Act might be appropriate.

Notably, Defendant does not and cannot challenge the *existence* of Plaintiff’s copyright or the *validity of its registration* based on the work made for hire provision and purported lack of ownership issue. Nor could it do so, since the Court, in *Unicolors*, held that errors of fact or of law in an application for copyright registration concerning issues such as, *whether a work was made “for hire”*, whether it was “published”, and whether it is a “compilation or derivative work”, will not invalidate a copyright registration. *Id.* at 5 (emphasis added). Defendant’s motion appears to be an effort to elliptically reformulate this very same issue.

Plaintiff urges the Court to reject Defendant’s attempts to both circumvent the Supreme Court’s interpretation of the Copyright Act, and to disregard the intent of and actions of the parties that created the work at issue in this case.

**C. Defendant’s Assertion of “Facts” in Support of its Argument Case is Incomplete and Incorrect**

Even if all of the above case law were to be ignored, however, the facts of this case confirm that the Plaintiff owns the copyright asserted in this action, either by virtue of the work made for hire doctrine or via assignment(s) of rights. Thus, the Defendant cannot use the 2021 Copur Declaration (attached as Exhibit B to Def’s Mot. To Dism.) to argue that Mr. Copur (and not Kev & Cooper) is the owner of the Plaintiff’s Work because of the work made for hire

doctrine. The 2021 Copur Declaration states that “[a]mong [Mr. Copur’s] responsibilities at Kev & Cooper is creative design and supervision of the creation of Kev & Cooper’s original designs and products” and that Mr. Copur “designed and oversaw” the Plaintiff’s Work at issue in this case). 2021 Copur Decl. at ¶¶ 5, 10. But that declaration is incomplete and lacks context.

Mr. Copur’s declaration in the instant action more fully sets out his design, supervision and overall contribution to the Plaintiff’s Work - all of which, again, were performed for the benefit and ownership of Plaintiff. He identified various creative and design elements and the layouts that would most appeal to children, gave feedback, made suggestions and gave instructions to the illustrator with respect to the images she created that resulted in the Plaintiff’s Work. Copur Decl. at ¶ 7. Furthermore, and as set forth above, the illustrator was commissioned to create the artwork for Plaintiff, at Mr. Copur’s direction acting as the creative designer of the Plaintiff. Through this process, the Plaintiff’s Work came to fruition.

Thus, all of Mr. Copur’s creative contributions to the Work were performed with the understanding and intent that the Plaintiff would own all rights. All of the illustrator’s services also were performed on a “for hire” basis for the Plaintiff, and in any case all of her rights, title and interest have been assigned to the Plaintiff (and not to Mr. Copur).

Although both the questions of authorship and the work made for hire doctrine are complex and highly fact-intensive concepts, this much is clear: both Mr. Copur and the illustrator have long agreed that Plaintiff is the sole owner of the Plaintiff’s Work. For the above reasons, Defendant cannot overcome the facts of this case, and cannot escape responsibility for its copying by raising the red herring that Plaintiff somehow lacks ownership in the Plaintiff’s Work.

#### IV. CONCLUSION

In light of the foregoing, Plaintiff respectfully requests that Defendant's motion to dismiss be denied in its entirety.

Dated: August 23, 2022

MERLE, BROWN & NAKAMURA, P.C.

By: /s/ Scott K. McClain  
Scott K. McClain

IPHORGAN LTD.

By: /s/ Zeynel M. Karcioğlu  
Zeynel M. Karcioğlu  
(pro hac vice application to be submitted)