

**C.A. NO. 14-3097**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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**GREGORY S. MARKANTONE, DPM, PC.,  
AND GREGORY S. MARKANTONE,  
Appellants,**

**v.**

**PODIATRIC BILLING SPECIALISTS, LLC,  
Appellee.**

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**Appeal from Western District of Pennsylvania  
2:14-cv-00215-LPL**

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**APPELLANTS' PETITION FOR REHEARING *EN BANC***

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Gregg R. Zegarelli, Esq.  
Counsel for Appellants-Petitioners  
mailroom.grz@zegarelli.com

Technology & Entrepreneurial  
Ventures Law Group, P.C.

2585 Washington Road, Suite 134  
Summerfield Commons Office Park  
Pittsburgh, PA 15241-2565  
v.412.833.0600 f.412.833.0601

## APPELLANTS' PETITION FOR REHEARING *EN BANC*

Petitioners-Appellants request a rehearing *en banc*, because exceptional circumstances exist for the just and proper adjudication of the controversy brought to the federal judiciary.

With deserved respect for this Court, the Panel overlooked or misapprehended points of law and mixed questions that truly affect the fair and judicious outcome of the appeal, as more fully set forth herein.

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This controversy is as fundamental, as factually basic—and possibly as seminal—as a simple theft or other trespass case, with the exception that the subject-matter is electronic data, being subject-matter arising under the Copyright Act.

Dr. Markantone created medical data that is stored remotely *in The Cloud*, held in the hands of the defendant.

Dr. Markantone never possessed the data he created because it was created in *The Cloud*, it is in the exclusive possession of Appellee, and Appellee will not give it to Dr. Markantone.<sup>1</sup>

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<sup>1</sup> It is a colloquialism to assert, “Defendant-Appellee will not give it *back*” since property interests are now created *in The Cloud* with the copyright owner never possessing it for a tortfeasor to “give it *back*.”

Notwithstanding that a valid copyright subsists without registering the copyright, the copyright ordinarily must be registered prior to filing a lawsuit. Under historically traditional circumstances, the reasonable statutory claim-processing “condition” of requiring a registration prior to filing a lawsuit becomes an unreasonable “anomaly” in this context:

**A plaintiff cannot register what the defendant prevents the plaintiff from getting. The Copyright Act condition is naturally premised upon access.**

There is no citation by the Appellee, the Magistrate Judge below, or the Panel that contradicts this statement, which is the gist of this particular action, and a request for Appellants to cite express precedent for a context that never existed, is not fair to the question presented.

The citations provided against Appellants are to the usual common historical context *for a different set of facts and context*, to be fair, not at issue in this particular controversy. Indeed, the question in this case could not have existed before; the new real-world, *e.g.*, of a wrist-video *iWatch* that creates and stores data in *The Cloud* repository, was the dream of a Dick Tracy story. *The Cloud* is a new phenomenon, *now socially pervasive*, based upon new technologies never before available.

**Therefore, in its salient essence, the question is whether it is a reasonable interpretation that Congress would create the express statutory legal rights, *grounded in the U.S. Constitution*, for the common man of society in such context, who is now *de facto* powerless to enforce the right?**

**Or, stated another way, is the condition of copyright registration *always* to be rationally adjudicated as a rote simplistic “registered or not” standard as a matter of law and statutory interpretation?**

Petitioners—consistent with the U.S. Supreme Court in Reed Elsevier v. Muchnick, 559 U.S. 154 (2010)—do not believe so. Moreover, it is well-settled that this Third Circuit will not interpret a statute in a manner to create an absurd result. United States v. Fontaine, 697 F.3d 221 (3rd Cir. 2012).

**Appellant’s position is that interpreting the Copyright Act to require registration of subject-matter that a plaintiff owns but the would-defendant will not provide, so that the would-be defendant causes failure of the condition of registration, effectively nullifying the protections of the statute, creates an absurd result that could not have been intended by Congress.**

This Third Circuit agrees or should agree with Appellants’ position. As recently stated by this Third Circuit in Fontaine:

**A court's primary purpose in statutory interpretation is to discern legislative intent.” Morgan v. Gay, 466 F.3d 276, 277 (3d Cir.2006). In determining legislative intent, “[t]he plain**

**meaning of legislation should be conclusive, except in ... rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.” United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989) (internal quotation marks and citation omitted). In those rare cases, we are obligated “to construe statutes sensibly and avoid constructions which yield absurd or unjust results.” United States v. McKie, 112 F.3d 626, 631 (3d Cir.1997); see also In re Chapman, 166 U.S. 661, 667, 17 S.Ct. 677, 41 L.Ed. 1154 (1897) (“[N]othing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.”).**

Fontaine, at 226 (emphasis added). The Supreme Court, in Reed Elsevier, overruled the Circuit Court rulings denying federal jurisdiction arising from failure to register a copyright prior to filing a legal action, and, implied, by the nature of the Supreme Court’s holding, that the registration requirement is not a simplistic “registered or not” analysis, for if it were that simple and easy, the Supreme Court would not have decided or opined as it did in Reed Elsevier.

The undersigned has the professional responsibility as advocate and not the role of judge, powerless ultimately to require the federal courts to answer any question forthrightly presented to it. But, the Panel did not answer the gist of the question set forth above for the particular context of this controversy now before this Court; to wit, the

question of statutory interpretation for the context presented was not addressed by the Panel. Instead, the Panel stated hypotheticals, in part, with avoidance of the facts as plainly and well-pleaded, and not giving proper inferences in favor of the Appellants, as follows:

**Markantone *could have*, as a precautionary matter, *tried to register the medical data before entering into the licensing agreement. He also could pay the fee demanded by Podiatric Billing for the return of the medical data, register the copyright, and file suit afterwards if he believes he still has a cause of action. Additionally, Markantone could sue Podiatric Billing in Pennsylvania court. As we see it, Markantone's reliance on his self-described conundrum is a misguided effort to pursue a state-law breach of contract claim under federal copyright law.***

Appellate Opinion, at P.3 (emphasis supplied). The undersigned takes professional responsibility for the guidance, or misguidance, as the case may be, in the filing of this case in federal court: Dr. Markantone is a medical doctor, not a lawyer. But, the facts are clear and not speculative, and, for all purposes of pleading and argument, the facts are conceded: Appellee-defendant, the vendor, has the data and will not give it to Dr. Markantone against his directive to do so. Copyright law, as is well-known in the trade, is a complex law, often requiring special training even for attorneys, fundamentally expressly grounded in Article I,

Section 8 of the U.S. Constitution, with 200 years of national and treaty evolution, and the impact of the landmark case of Reed Elsevier is recent. That said, each of the Panel statements will be addressed:

**1. Dr. Markantone Should Have Pre-Registered.** There is no record that Dr. Markantone could register data that did not exist; the statement contradicts the record and the inferences that well-settled precedent requires to be drawn in favor of the plaintiffs. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007); Fowler v. Univ. of Pittsburgh Med. Ctr. Shadyside, 578 F.3d 203, 213 (3d Cir. 2009); see also Covington v. Int'l Ass'n of Approved Basketball Officials, 710 F.3d 114, 117-18 (3d Cir. 2013). The Panel's hypothetical is not grounded within this case's actual factual framework. Moreover, *The Cloud* is a top-down vendor-imposed paradigm: consumers, artists, and certainly even otherwise highly intelligent and sophisticated business people simply do not understand the risks of the new technology remote storage mechanisms in light of enforcement within the complex Copyright Act.

It is unquestionably conceded that it is the exclusive purview of the judgment of this Third Circuit to determine the point at which purchasers must have legal knowledge of complex statutes, and factual

knowledge of complex data repository paradigms, without the sensitive benefits of protection of the Copyright Act as intended by Congress.

**2. Dr. Markantone Should Have Paid the Demand.** It is a somewhat difficult position for an appellant to be chided by an appellate court that an appellant should have resolved the controversy, as it is not part of the standard of review. Id. a) Appellants' position is that the vendor's condition of payment is extortive in nature; indeed, the facts are clear that the vendor's demand was unilaterally imposed as post-dispute condition without legal grounding. Every case would be resolved prior to a request for judicial help if the would-be plaintiff succumbs to the unilateral, ungrounded and unreasonable demands of the adverse party. b) Moreover, there is no record that Dr. Markantone could afford to pay \$2,000, or \$200,000, or the \$2,000,000 had the defendant demanded any of those sums instead. To a starving artist, \$2,000 is the same as \$2,000,000. And, in fact, review of the record discloses that the vendor, pressing its own "registered copyright" claim to different but related content, only offered to provide a mash-up/mock-up of the sensitive patient medical data for the \$2,000 payment, not the copyrighted data in its usable native format, and leaving the unilateral-

ly modified data subject to data errors subjecting the medical practice to risks of liability for consequential errors in patient care.

**3. Dr. Markantone Should Have Sued in State Court.** Respectfully, the statement is beyond the question presented for review. Plaintiff cannot bring its copyright case in state court. Without addressing the precise controversy, the suggestion of the Panel is again simply that the plaintiffs concede the entire question as presented, with the theory of recovery, and the forum selected, and the statutorily available remedies, notwithstanding a validly subsisting federal copyright, the new factual context, and well-settled and recent landmark cases. Twombly, Fontaine, Reed Elsevier, supra.

On Page 3 of its decision, the Panel reiterated an incidental point raised by Appellants in the briefs, that Appellants seek “substantial justice.” It is true that plaintiffs seek justice, but the soft abstraction of that selected statement is not a fair reiteration, or even a summary, of Appellants’ more precise legal basis, or is otherwise a misunderstanding of Appellants’ argument, with respect to the legal question at issue for determination.

**Appellants' position is more accurately and specifically stated: to interpret the Copyright Act registration requirement as a condition of enforcement is not always a simplistic "registered or not" rote binary mechanistic determination, and to interpret it as such, in this context, creates an absurd result that Congress did not intend, the United States Supreme Court does not condone in concept, and the Third Circuit does not endorse in application.**

On page 4 of the Panel decision, the Panel states:

**Without any basis for believing that Podiatric Billing is violating one or more of his exclusive rights, Markantone improperly requests permission to go on a fishing expedition.**

Respectfully, this statement is not comprehensible to the undersigned for the context as pleaded. In simple terms, a "fishing expedition" is a request to seek discovery of the facts needed to make a *prima facie* case. This is clearly a misunderstanding of Appellants' argument or a misapplication of the applicable law of pleading.

The statement of the Panel fails to acknowledge that the facts of the controversy are effectively conceded: the vendor will not give Dr. Markantone his data contrary to his directive to do so.

Other than requiring what is tantamount to "magic words" or other formalisms to make a pleading well-pleaded, if Appellants cannot obtain their data, the federal court, as a neutral, must take by obvious

necessary implication favorable to Appellants that defendants have trespassed upon the “exclusive” rights. Appellants cannot “copy” what they do not possess. See, Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) (anyone who trespasses into his exclusive domain is an infringer).

It is a reasonable interpretation that, if someone has taken an umbrella, then the plaintiff can plead being cold, wet and in the rain. The plaintiff cannot necessarily plead that the tortfeasor is, *e.g.*, cold, wet, in the rain, parasailing, or relaxing in the umbrella’s shade. Otherwise, there is further absurdity in the statute’s interpretation, that the worst would-be defendants, particularly in *The Cloud*, control, by isolation of facts, the ability for a plaintiff to plead a basis of recovery.

Appellants know that their own exclusive rights have been violated and so pleaded. Twombly, Fontaine, supra.

Lastly, the Panel decision indicates that Appellants’ claim for declaratory relief fails by anticipating “a defense,” citing, generally, Trent Realty Assocs. v. First Fed. Sav. & Loan Ass’n of Phila., 657 F.2d 29, 32-33 (3d Cir. 1981) and disregards applicable Aetna Life Ins. Co. of Hart-

ford, Conn. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937). Trent is misread and not properly applicable to a claim not based upon a defense. Properly addressed, Appellants' declaratory relief count relates to different subject-matter and is based upon the vendor's own "offensive" threats, not a defense to Appellants' infringement case. Count VI regards Appellants' unregistered copyright; Count I regards the Appellee-vendor's claim of enforcing its own "registered copyright" *to different subject-matter*. Appellants have a yet unregistered copyright, the subject of the infringement count. The vendor has its own "registered copyright" that is the subject of a license agreement entwined into the controversy, but separately pleaded and that must properly be analyzed separately.

The counts are different controversies, regarding different copyrightable subject-matter, that intersect from the same set of transactions and occurrences. Accordingly, the Panel misreads the holding and applicability of Trent and should have followed Aetna Life Ins. Co. of Hartford, Conn. v. Haworth in accordance with usual principles applied for declaratory relief of a present controversy for an offensive threat of enforcement under the Copyright Act.

In light of the foregoing, Appellants pray for a rehearing *en banc*, because exceptional circumstances exist for the just and proper adjudication of the controversy brought to the federal judiciary. Respectfully, the undersigned believes that it is clear that the Panel overlooked or misapprehended points of law and mixed questions that truly affect the fair and judicious outcome of the appeal, as more fully set forth herein. And, as cited by this Third Circuit in Fontaine in stating the Court's obligation, nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.

Respectfully submitted,

Date: May 11, 2015

s/ Gregg R. Zegarelli/  
Gregg R. Zegarelli  
PA ID No. 52717  
mailroom.grz@zegarelli.com

Counsel for Appellants-Petitioners

Technology & Entrepreneurial  
Ventures Law Group, P.C.  
2585 Washington Road, Suite 134  
Summerfield Commons Office Park  
Pittsburgh, PA 15241-2565  
v.412.833.0600 f.412.833.0601

**STATEMENT OF COUNSEL  
PURSUANT TO L.A.R. 35.1**

I, the undersigned, Counsel for Petitioners-Appellants, make the following representation, in accordance with 3rd Cir. L.A.R. 35.1:

I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit or the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court, *i.e.*, the panel's decision is contrary to the decision of this court or the Supreme Court in the manner set forth below.

This appeal, moreover, involves a question of exceptional importance, *i.e.*, it summarily denies the right to a trial of a known present controversy within a framework of a legal question that is of such exceptional importance specifically referenced in Article I, Section 8, of the United States Constitution in light of the application and impact of new technologies that are now pervasive throughout society.

The Panel's decision, by its own express terms, clearly contradicts the benefit of favorable pleading inferences contrary to Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); Covington v. Int'l Ass'n of Approved Basketball Officials, 710 F.3d 114, 117-18 (3d Cir. 2013); Fowler v. Univ. of Pittsburgh Med. Ctr. Shadyside, 578 F.3d 203, 213 (3d Cir. 2009).

The Panel interpreted the Copyright Act in a manner that results in: a) creating a registration requirement in circumstances that creates an absurd result contrary to United States v. Fontaine, 697 F.3d 221 (3rd Cir. 2012) and in a rote mechanistic manner contradicted by implication in Reed Elsevier v. Muchnick, 559 U.S. 154, 169 (2010); and b) creating formalisms for pleadings that do not otherwise exist at law, contrary to the rules for pleading, and particularly in requiring the pleading of acts of a defendant regarding the subject-matter outside of the knowledge or control of a plaintiff (in the defendant's hands), rather than pleading the resultant trespass expressly or implied by necessary interference with the plaintiffs rights (in the plaintiff's hands). Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); Covington v. Int'l Ass'n of Approved Basketball Officials,

710 F.3d 114, 117-18 (3d Cir. 2013); Fowler v. Univ. of Pittsburgh Med. Ctr. Shadyside, 578 F.3d 203, 213 (3d Cir. 2009); Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984); Reed Elsevier v. Muchnick, 559 U.S. 154, 169 (2010).

The Panel decision clearly contradicts the claims as expressly made for the context with regard to the separate property interests of the respective parties and combines them in a manner that does not distinguish the legal question presented for review, being a present controversy, contrary to Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617 (1937) and misreads or misapplies Trent Realty Assocs. v. First Fed. Sav. & Loan Ass'n of Phila., 657 F.2d 29, 32-33 (3d Cir. 1981).

Date: May 11, 2015

s/ Gregg R. Zegarelli/  
Gregg R. Zegarelli  
PA ID No. 52717  
mailroom.grz@zegarelli.com

Counsel for Appellants-Petitioners

Technology & Entrepreneurial  
Ventures Law Group, P.C.  
2585 Washington Road, Suite 134  
Summerfield Commons Office Park  
Pittsburgh, PA 15241-2565  
v.412.833.0600 f.412.833.0601

## CERTIFICATE OF COMPLIANCE

I, the undersigned counsel for Petitioners-Appellants, hereby states that this Petition for Rehearing *En Banc* is within the FRAP 35 page limit of 15 pages, and it complies with the typeface requirements of L.A.R. 32 and FRAP 32(a)(5)-(6), being prepared in a proportionally spaced Century Schoolbook typeface, in 14 point, using Microsoft Word 2010. The Petition includes as an exhibit a copy of the panel's judgment, order, and opinion, if any, as to which rehearing is sought.

Date: May 11, 2015

s/ Gregg R. Zegarelli/  
Gregg R. Zegarelli  
PA ID No. 52717  
mailroom.grz@zegarelli.com

Counsel for Appellants-Petitioners

Technology & Entrepreneurial  
Ventures Law Group, P.C.  
2585 Washington Road, Suite 134  
Summerfield Commons Office Park  
Pittsburgh, PA 15241-2565  
v.412.833.0600 f.412.833.0601

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PETITION FOR REHEARING *EN BANC*** was filed electronically with the Court on the 11th day of May, 2015, and I believe that notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system, including the following counsel of record for Appellee:

Christopher S. Channel, Esq.  
Jessica K. Ziemski, Esq.  
Leech Tishman Fuscaldò & Lampl  
1800 Frick Building  
Pittsburgh, PA 15219-3423, USA

Date: May 11, 2015

s/ Gregg R. Zegarelli/  
Gregg R. Zegarelli  
PA ID No. 52717  
mailroom.grz@zegarelli.com

Counsel for Appellants-Petitioners

Technology & Entrepreneurial  
Ventures Law Group, P.C.  
2585 Washington Road, Suite 134  
Summerfield Commons Office Park  
Pittsburgh, PA 15241-2565  
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UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 14-3097

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GREGORY S. MARKANTONE DPM, P.C;  
GREGORY S. MARKANTONE,

Appellants

v.

PODIATRIC BILLING SPECIALISTS, LLC

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On Appeal from the United States District Court  
for the Western District of Pennsylvania  
(No. 2-14-cv-00215)  
Magistrate Judge: Hon. Lisa P. Lenihan

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Submitted Pursuant to Third Circuit L.A.R. 34.1(a)  
March 17, 2015

Before: RENDELL, FUENTES, and BARRY, *Circuit Judges*

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JUDGMENT

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This cause came to be considered on the record from the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit L.A.R. 34.1(a) on March 17, 2015. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the Order of the District Court entered on June 9, 2014 be and the same is hereby AFFIRMED. Costs taxed against Appellants. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Marcia M. Waldron  
Clerk

Dated: April 27, 2015

**NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 14-3097

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GREGORY S. MARKANTONE DPM, P.C;  
GREGORY S. MARKANTONE,

Appellants

v.

PODIATRIC BILLING SPECIALISTS, LLC

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On Appeal from the United States District Court  
for the Western District of Pennsylvania  
(No. 2-14-cv-00215)  
Magistrate Judge: Hon. Lisa P. Lenihan

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Submitted Pursuant to Third Circuit L.A.R. 34.1(a)  
March 17, 2015

Before: RENDELL, FUENTES, and BARRY, *Circuit Judges*

(Filed: April 27, 2015)

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OPINION\*

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\* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

FUENTES, *Circuit Judge*

Gregory Markantone runs a podiatry practice and claims a copyright interest in certain medical data that he describes as “office procedures, patient information, operational rules, and related data.” He admittedly has never registered his supposed copyright. Markantone entered into a licensing agreement with Podiatric Billing Specialists and, in connection with that agreement, Podiatric Billing came into possession of the medical data. After the agreement was terminated, Markantone demanded the return of his medical data, but Podiatric Billing refused unless Markantone paid it two thousand dollars.

This litigation followed, with Markantone and his medical practice asserting a claim for copyright infringement and various causes of action under Pennsylvania law. The District Court dismissed the federal copyright claim and declined to exercise supplemental jurisdiction over the remaining state-law claims as there is no diversity among the parties.<sup>1</sup>

Subject to certain exceptions not applicable here, an action for infringement of a copyright may not be brought until the copyright is registered. 17 U.S.C. § 411(a); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010) (“Section 411(a)’s registration requirement is a precondition to filing a claim.”). Acknowledging this requirement,

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<sup>1</sup> The District Court had jurisdiction under 28 U.S.C. § 1331 and we have jurisdiction under 28 U.S.C. § 1291. We exercise plenary review over a district court’s dismissal under Rule 12(b)(6). *Evancho v. Fisher*, 423 F.3d 347, 350 (3d Cir. 2005). We review a district court’s refusal to exercise supplemental jurisdiction for abuse of discretion. *Elkadrawy v. Vanguard Grp., Inc.*, 584 F.3d 169, 172 (3d Cir. 2009).

Markantone argues that “substantial justice” requires that we excuse registration in light of the purported Catch-22 he finds himself in: he cannot file a lawsuit for copyright infringement without registering the medical data, but he is unable to register the medical data because Podiatric Billing refuses to return it to him. Markantone cites no authority for what amounts to an equitable exception to the mandatory registration requirement. Nor will we consider such an argument. Markantone could have, as a precautionary matter, tried to register the medical data before entering into the licensing agreement. He also could pay the fee demanded by Podiatric Billing for the return of the medical data, register the copyright, and file suit afterwards if he believes he still has a cause of action. Additionally, Markantone could sue Podiatric Billing in Pennsylvania court. As we see it, Markantone’s reliance on his self-described conundrum is a misguided effort to pursue a state-law breach of contract claim under federal copyright law.

The complaint fails for the additional reason that, assuming he had a valid copyright, Markantone does not allege that Podiatric Billing violated any of his exclusive rights in the medical data. Copyright owners have the exclusive right to, among other things, reproduce, distribute, and publicly perform their works. *See* 17 U.S.C. § 106; *Reed Elsevier*, 559 U.S. at 157; *Brownstein v. Lindsay*, 742 F.3d 55, 68 (3d Cir. 2014) (“A copyright is better described as a bundle of rights.”). The closest Markantone comes to alleging a violation of his exclusive rights is his contention that Podiatric Billing is using the medical data against his “directive.” But this vague allegation says nothing about how Podiatric Billing is using the medical data in violation of copyright law. Markantone even

concedes in his brief that he does “not yet know if [Podiatric Billing] is copying the medical data, distributing it, performing it, displaying it, etc.” (Appellants’ Br. 17.) Without any basis for believing that Podiatric Billing is violating one or more of his exclusive rights, Markantone improperly requests permission to go on a fishing expedition.

Once the federal copyright claim was dismissed, the District Court declined to exercise supplemental jurisdiction over the remaining state-law claims. *See* 28 U.S.C. § 1367(c); *Elkadrawy*, 584 F.3d at 174. Markantone challenges only one aspect of this issue on appeal. He maintains that one of the dismissed claims is actually based on federal rather than state law because it seeks a declaration that he may recover the medical data without violating any of Podiatric Billing’s copyrights. But Markantone cannot create federal jurisdiction by asserting claims or defenses Podiatric Billing might raise. *See Trent Realty Assocs. v. First Fed. Sav. & Loan Ass’n of Phila.*, 657 F.2d 29, 32-33 (3d Cir. 1981). And even if we assume this is a federal claim, it still must be dismissed because Markantone does not allege any facts showing that Podiatric Billing has threatened him with a copyright infringement suit.

For all these reasons, we affirm the District Court’s order.