C.A. NO. 14-3097

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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

v.

PODIATRIC BILLING SPECIALISTS, LLC,
Appellee.

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

APPEAL FROM ORDER DATED JUNE 9, 2014, DISMISSING PLAINTIFFS' COMPLAINT, GRANTING DEFENDANT'S 12(B)(6) MOTION ON ALL COUNTS

BRIEF OF APPELLANTS
GREGORY S. MARKANTONE, DPM, PC., AND GREGORY S. MARKANTONE

WITH APPENDIX VOLUME I (A1-A13)

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

On February 13, 2014, this action was commenced in the United States District Court for the Western District of Pennsylvania, captioned as Gregory S. Markantone, DPM, PC, and Gregory S. Markantone v. Podiatric Billing Specialists, Case No. 2:14-cv-00215-LPL. All parties are residents of the Commonwealth of Pennsylvania. [Complaint, App. A18; DDE 1]

The District Court has exclusive original jurisdiction of the civil action pursuant to 28 U.S.C. §1332(a) for cases arising under the United States Copyright Act, in that Plaintiffs' (Appellants') claims in Count I-Declaratory Relief and Count VI-Copyright Infringement are grounded in the Copyright Act, and Defendant's defense is independently grounded in the Copyright Act.

On April 14, 2014, Defendant Appellee filed a Motion to Dismiss Complaint and Memorandum in Support pursuant to Fed.R.Civ.P. 12(b)(6). [Defendant's Motion to Dismiss and Memorandum, App. A38; DDE 5, 6]

On May 13, 2014 the parties filed a Consent to Jurisdiction by U.S. Magistrate. [Stipulated Consent, DDE 12]

On June 9, 2014, the Chief Magistrate Judge granted Defendant Appellee's Motion to Dismiss, dismissing the Complaint on all counts with prejudice. The court below further denied Plaintiffs' pending Notice of Demand for Data Backup and pending Motion to Compel Impoundment and/or Special Case Management Order as moot. [Order, App. A3, DDE 18; Notice of Demand for Data Backup, App. A36, DDE 4; Motion to Compel/Case Management Order, App. 62, DDE 14]

This Appeal was taken from a final Order that disposed of all claims. [App. A1, DDE 20] This Court has jurisdiction to review final Orders of the District Court pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The Court below erred in formulating or applying a legal concept, for which the review of the Third Circuit is plenary, *de novo*. This case is believed to be a case of first impression under the Copyright Act in any jurisdiction, only recently made first legally judiciable by the United States Supreme Court in Reed Elsevier v. Muchnick, 559 U.S. 154, 169 (2010), now factually converged with the rapidly growing newly available model of remote creation of subject-matter in "**The Cloud.**"

1. **The Court below erred by failing to apply the legal standard in dismissing Plaintiffs' Complaint.**

    a. **The court below erred by prejudging all counts and all claims exclusively as a contract case in the light most favorable to Defendant, referring to the demand letters attached to the Complaint in a manner to be superseding the actual averments by negative implication, inferring that not expressly and specifically asserting a copyright claim in the demand letters is evidence or a waiver of all claims under the Copyright Act, rather than using those exhibits in an integrated and reconciled manner to recognize the gist of Plaintiffs' claims to obtain their valuable medical data with inferences most favorable to Plaintiffs.**

    b. **The court below erred by failing properly to consider averments in the Complaint, the attachments and the public record and holding that Plaintiffs failed to plead sufficient factual content to allow the court to draw the inference that Defendant is liable for the averred misconduct of Defendant.**

    c. **Contrary to necessary inferences and implications favorable to Plaintiffs, the court below erred by requiring the express pleading of formalisms under the Copyright Act to maintain an action for infringement, notwithstanding the clarity of the factual gist of the action: to wit, simply that Defendant will not give Plaintiffs, a medical practice, their medical data.**

d. The court below erred in dismissing Count I, failing to recognize or opine in substance, that Count I is for declaratory relief, *vis a vis, Defendant's* own claim of a copyright (in templates) and threats of Plaintiffs' infringement, and is not grounded in *Plaintiffs'* claim of its own copyright (in medical data) regarding Defendant's infringement, per Count VI, and notwithstanding that Defendant's copyright claim assertions and threats of federally judiciable legal action are averred in the Complaint, exhibits, public documents, and Defendant's own express admissions during motion practice.

2. The Court erred by summarily refusing to provide Plaintiffs with a full and fair right to be heard on their request to obtain the subject-matter and/or special scheduling order, and notice of request for data backup, rendering the requests moot by its dismissal of the case.

a. The court below erred, notwithstanding admitting its subject-matter jurisdiction over the subject-matter, by refusing to allow the Plaintiffs the right to acquire the subject-matter of the dispute by force of law, or even to consider the request of record as justiciable, and then dismissing the action because Plaintiffs' did not acquire the subject-matter which is a necessary pre-condition to registration of the copyright.

b. The court below failed to recognize the right to an archive backup as federally judiciable under the Copyright Act.

c. The court below erred by not treating the actual and known catch-22 context of the controversy (that Plaintiffs cannot acquire the res of the action without judicial process and force of law, in order to file the copyright registration that supports enforcement of the proprietary interest) as a fundamentally necessary special and equitable exception to any pre-condition registration requirement to maintain a copyright action and/or to maintain that action for a sufficient time for the right to a hearing and right to obtain the subject-matter from the Defendant over which the court has jurisdiction.

STATEMENT OF THE CASE

This case exposes the new risks of doing business in "**The Cloud.**" With the advent of significantly decreasing costs of Internet connectivity bandwidth to transmit data, and the significantly decreasing cost of data storage, the latest user technologies are being developed for The Cloud. Advertising for The Cloud technologies is pervasive.[1]

The Cloud paradigm is that the user software exists on the web (not physically on the user's personal computer) and/or the related data is stored on the vendor website (not local to the user). The Cloud is industry independent "horizontally"; that is, The Cloud technology is advertised to attorneys, governmental agencies, doctors (such as in this case), banks, artists, etc.[2] Traditionally, mission-critical software and data were "housed" locally on-site, with Internet connectivity being for communication, research, and software updates and acquisition; accordingly, the owner of the subject-matter retained power and control over mission-critical software and/or data. However, the new paradigm of The Cloud, to some or the full extent, removes ultimate possession, power and control from the owner of the information.

The Cloud is particularly attractive now because, when applications (apps) and related data are stored exclusively remotely on the web, all disparate physical equipment, including mobile phones, tablets as well as

[1] The term "The Cloud" is a general marketing term that embodies multiple technologies, whether or not marketed or phrased as "The Cloud" that are the outsourcing to a vendor of remotely managed software and/or data storage. For example, Microsoft Windows v.8.1's "OneDrive" integrated remote data storage technology uses the icon of a group of clouds.

[2] Googling "**what is the cloud and how does it work**" provides significant explanations of the operational paradigm.

personal computers, may seamlessly access the apps and the related data. Therefore, doctors, lawyers and everyone else are baited, if not effectively forced with increasing market pressure, to accept the new paradigm, which is driven by manufacturers, top-down.

Notwithstanding that Plaintiffs' copyright property interest is legally cognizable pursuant to 17 U.S.C. 102(a), a federal case for infringement of that recognized proprietary interest could not be maintained without first registering the copyright with the United States Copyright Office pursuant to 17 U.S.C. 411(a).

Indeed, prior to 2010, if a plaintiff filed a federal copyright infringement action without having first registered the copyright, the case would be dismissed without prejudice on subject-matter jurisdictional grounds, the federal courts then opining that the federal courts did not have subject-matter jurisdiction. These lower court rulings were finally overruled by the United States Supreme Court in Reed Elsevier v. Muchnick, 559 U.S. 154, 169 (2010). Now, with or without the copyright registration, the federal courts have subject-matter jurisdiction over the full scope of the recognized proprietary interest. Thereby having jurisdiction, the federal courts have the full power of the federal judiciary to hear a dispute and to fashion the appropriate remedial justice following a full and fair hearing on the matter presented.

Plaintiffs are Dr. Gregory S. Markantone, a medical doctor of podiatry, and his related medical practice. Defendant is a purported professional billing service and was engaged as vendor for the purpose of the hosting online Plaintiffs' medical data (cloud services) using a third-party software product, Allscripts, for which Defendant was, at all relevant times, a representative. Plaintiffs' medical data was created and

stored on The Cloud, controlled by the Defendant vendor; therefore, Plaintiffs never acquired the subject-matter of their creation, nor power for the purpose of registration, or even for its backup and disaster control. [Notice of Demand for Data Backup, App. A36, DDE 4; App. A47, DDE 9]

As a result, from a copyright perspective, the scenario is simply that, Defendant has refused to provide Plaintiffs their medical data, so Plaintiffs do not have the subject-matter they created, and they cannot register the copyright. Plaintiffs must use available legal process, or resort to self-help, to acquire the subject-matter to perform the task of registration.

The Allscripts software never worked correctly, and Plaintiffs expended significant time and resources trying to manage the problems. Ultimately, the manufacturer of the software announced discontinuance of the software. Dissatisfied with the product and services of Defendant, Plaintiffs decided to move to a new vendor. However, of course, Plaintiffs necessarily cannot move to a new vendor without their medical data.

The agreement referenced by the court below [Complaint Exhibit 1, App. A26, DDE 1] and attached to the pleadings regards certain Allscripts add-on functionality provided by the Defendant vendor; that is, Allscripts is a software product owned by a third-party manufacturer for which Defendant is an authorized representative, but Defendant claims a registered copyright in certain Allscripts add-on data entry "templates" that physicians use to enter medical data.

Defendant expressly claims a copyright in the templates [Complaint Exhibits, App. A26 "copyrights," App. A30 "threat," App. A34 "copyrights"; Defendant's Motion, App. A39 "copyright-registered"], Plaintiffs claim a copyright in its medical data [Complaint, App. A19, A24]. If these cate-

gories were mutually exclusive, some of the contention might have resolved; however, the templates are used in a manner by which some of the data from the templates becomes entwined with, or "incorporated" into, the doctors' own medical data. [App. A27, Sect. III. Termination]

When Plaintiffs demanded their medical data [Complaint, App. A19-A20, ¶10-11, 14, Exhibits A32, A35, DDE 1], Defendant refused on the basis of its claim that some of the medical data contained information from Defendant's copyrighted templates. [Complaint Exhibits A30, A34, DDE 1] Holding Plaintiffs' medical data hostage, and irrespective of how presented or coated by Defendant, Defendant's position is that Plaintiffs must concede to a delivery mechanism that risks destruction of medical data, and results in a format different from its native format, preventing seamless importing into the new vendor's software product, and jeopardizing the integrity. Plaintiffs' position is simply that, to the extent that Defendant's template data has been incorporated into Plaintiffs' medical data, there is no basis to withhold all medical data, because the agreement reconciles that condition with transfer to Plaintiffs for continued use. [Complaint, A20 ¶14, Exhibit 3, App. A32, Exhibit 5, A35, DDE 1][3] The agreement [Complaint Exhibit 1, App. A26, DDE 1] only addresses Defendants' claimed "template" subject-matter, not the proprietary rights of Plaintiffs' medical data.

Therefore, as stated, there are two separate copyrights at issue: Plaintiffs' copyright to the medical data and Defendant's copyright to the

[3] Plaintiffs' position is that Defendant has acted in bad faith, because it has continued to refuse to provide any good faith explanation of the agreement phrase "**(except that [Plaintiffs] will continue to have the right to use content that has been incorporated into patient care and billing records prior to the date of termination of this License ...**" the disregard for which by Defendant, in its own contract, is a seed of this dispute. [Complaint Exhibits, A27-III. Termination, A32, A35] This clause reconciles the intersection of the two respective copyright claims.

templates. And, there is a mixed question regarding Plaintiffs' data that may be incorporated with Defendant's template information. From Plaintiffs' perspective, Count I-Declaratory Relief addresses the defensive posture, seeking relief from Defendant's threat of a violation of its copyright, and Count VI-Infringement addresses the offensive posture, seeking an infringement determination of Plaintiffs' copyright.

The agreement references the mixed category so as to make it clear: to the extent that template data actually has been incorporated with medical data, it is properly returned as such to Plaintiffs.[4] The frustration by Plaintiffs that they cannot get their medical data is clear from the pleadings, attachment, and documents of public record. [Complaint, ¶¶10-11, 14, DDE 1].[5]

It is also clear from the Complaint that there are two federal claims that rest on federal questions; to wit, Plaintiffs' defensive claim in Count I seeking declaratory relief from Defendant's threat of a violation of its registered copyright in the templates if Plaintiffs exercise self-help, and Plaintiffs' Count VI infringement claim in the medical data grounded in Defendant's refusal to provide Plaintiffs' medical data.

Moreover, after filing the Complaint, Plaintiffs filed a "Notice of Demand for Data Backup" [App. A26, DDE 4] as a matter of public record. Even for any portion of the subject-matter asserted to be owned by Defendant, the agreement expressly provides that Plaintiff is entitled to a

[4] For example, the templates may offer a variety of available data entry text, only some of which might be used in the field by the doctors; therefore, it may be that only some of the template information is incorporated into Plaintiffs' medical data.

[5] It has been long said, "Possession is 9/10's [or 9 points] of the law." The Cloud paradigm makes accession of data convenient, but it exemplifies the meaning of the quotation. If a cloud vendor retains possession, with or without authority, and/or in breach of agreement, the owner must resort to legal processes in equity or use self-help.

backup, which is also contemplated by 17 U.S.C. 117. [App. A26, I. License, Sentence 3] Defendant further refused to provide a substantive response. [App. A47, DDE 9 (re-docketed from DDE 7)][6] These documents were referenced during the motion practice. [Plaintiffs' Motion for Impoundment and/or Special Case Management Order, App. A62, DDE 14] The reason these documents were filed as such was to make an assured public record of the fact that Defendant refuses not only to provide Plaintiffs' copyrighted medical data, but further refuses even to provide the medical data for disaster control backup purposes, notwithstanding the copyright violation and the express contractual violation.[7]

What is absolutely clear from the pleadings, exhibits, public records and motion practice is, quite simply, that Defendant has Plaintiffs' medical data and refuses to give it to Plaintiffs, trespassing by copyright violation, and if Plaintiffs try any form of self-help, legal action has been threatened by Defendant.[8] [Complaint, A19-20, ¶¶10-11, 14, DDE 1] The nature and gist of the action is clear in the record, and certainly can be taken by inference favorable to Plaintiffs.

[6] Defendant later referenced these documents in a pejorative manner, but the documents were duly accepted for filing by the Clerk and Defendant did not file any motion to strike off the record.

[7] It is noted that, again, there is no good faith reconciliation by Defendant of the data "incorporation" language or the authorization to make a "backup."

[8] It is worth following any alternative trail of jurisdiction, in that Defendant's copyright infringement lawsuit would be in federal court, or, if either party started a lawsuit in state court, the issues would necessarily be removed to federal court.

Indeed, the facts are not complicated or unknown, such as in Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), or Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L.Ed 2d 868 (2009). Plaintiffs simply want their patient medical data to serve the healthcare needs of their patients and Defendant is preventing Plaintiffs use and enjoyment of its proprietary interests.

STATEMENT OF RELATED CASES

There are no related cases and this case has not been previously reviewed. Appellants believe that the issues presented in this case are of first impression before any court.

SUMMARY OF THE ARGUMENT

From Plaintiffs' perspective, there are no facts remaining to plead from a "short and plain" perspective, pursuant to Fed.R.Civ.P. 8(a). Defendant is certainly on fair notice to frame a defense as to the claims made. Everyone, being the Plaintiffs, Defendant and the court below clearly acknowledge the facts and the nature of the dispute for purposes of isolating the nature of controversy. Defendant has Plaintiffs' medical data and refuses, after demand, to give it to Plaintiffs. [Complaint, A18, DDE 1]

This is not a Twombly or Iqbal type of case, indeed:

> **Defendant has conceded all essential facts: Defendant is holding Plaintiffs' patient medical data and refuses to give it. At the same time, Defendant avers the legally frustrated argument that Plaintiffs must register the thing that Defendant withholds from Plaintiffs. The bad faith equity of the question is crystal clear.**

[Motion for Impoundment and/or Special Case Management Order, App. A73, DDE 14, ¶4; Complaint A19-20, ¶¶6, 10-11, 14, DDE 1]

The Copyright Act exists to protect proprietary rights. To create a proprietary right and then to deny the mechanism of protection and enforcement would ostensibly frustrate the core intention of the legislature.[9] There is no available data, at least available to the undersigned, that demonstrates that the legislature contemplated that copyrightable subject-matter might be created, stored and used, *ab initio,* without ever possessing it in a manner that provides the opportunity to register the claim to satisfy a registration pre-condition. That is, although this is understood to be the case of first impression, to assume a time in the near future when most creative subject-matter is in The Cloud, most obdurate vendors who refuse to provide the subject-matter, whether or not contractually permitted, will regularly escape copyright culpability. This case may be unique that it is first for appellate review, as such, but it is not unique in light of the new paradigm of The Cloud.

Prior to 2010, by Reed Elsevier v. Muchnick, 559 U.S. 154, 169 (2010), the question might have been more elemental regarding the same conundrum from a jurisdictional perspective, but the jurisdiction of the federal courts is now certain. The question is now one of determining the

[9] Plaintiffs' Count I seeks declaratory relief from Defendant's threats grounded in its own registered copyright; it is not an infringement count and thereby does not require any pre-conditioned registration by Plaintiffs.

larger justice for the context, within the framework of all judicial powers. The statutory requirement for a copyright registration may remain, but the ability of the federal judiciary to manage the context has fundamentally changed. Now, the larger questions are ripe for ruling, and, accordingly, Plaintiffs request the determination of this Third Circuit Court of Appeals.

With respect for the court below, it may be that the court below cannot or will not interpret the Copyright Act in a manner to reconcile the equities, such as implying that the requirement to register necessarily implies a full and fair opportunity to do so. However, irrespectively, the court below, having jurisdiction, refused even to consider Plaintiffs' request for an order of court to acquire the subject-matter at issue for the purpose of registering the copyright. [Order, App. 3, DDE 18; Motion to Impound and/or Special Case Management Order, App. 62, DDE 14]

The court below reviewed the pleadings and, not for lack of facts pleaded, *per se,* but apparently for lack of a formalism of claim, dismissed the entire case. [Order, A3, DDE 18] And, the scope of Defendant's motion was only the infringement count and not Count I for Declaratory Relief, which was also dismissed.[10] [Defendant's Motion, A38, ¶1, DDE 6]

Plaintiffs' argument is simply that it is universally conceded that the Court has jurisdiction to hear the case and controversy. However, the Court failed to view the facts and averments, exhibits and public record in the light most favorable to Plaintiffs. The registration requirement

[10] Defendant's motion addressed the infringement claim only, although requesting for dismissal of the case. [Defendant's Memorandum, App. A38 P. 1 ¶1, P. 4-II. (Count VI only)] Likewise, the court below substantively ignores the federal judiciability unrelated to infringement under Count I-Declaratory Relief. [Memorandum Opinion, App. A4, DDE 17]

of the Copyright Act did not contemplate, nor possibly could have reasonably contemplated The Cloud, and that the creation and control of the subject-matter of a cause of action would be wholly remote via The Cloud.[11] But, even so, the court below, having before it a claim to a copyright, and also having before it the equities and unclean hands of Defendant retaining the subject-matter of the copyright and thereby preventing the registration to permit a registration, had the power to enter a case management order and to provide Plaintiffs with a full and fair opportunity to be heard. [Motion for Impoundment/Case Management Order, A62, DDE 14]

ARGUMENT

In all prudence and caution, Appellants incorporate into its argument by this reference the Summary of the Issues, Summary of the Case and Summary of the Argument.

I. THE STANDARD OF REVIEW

1. The Scope of Appellate Review for Third Circuit.

This appeal arises from the court below granting Defendant vendor's Fed.R.Civ.P. 12(b)(6) motion to dismiss the infringement count, but dismissing the entire action with prejudice. [Motion to Dismiss, App. A28, DDE 5; Order, App. 3, DDE 18]

The standard of review for a dismissal under Fed.R.Civ.P. 12(b)(6) is *de novo*. Phillips v. County of Allegheny, et.P al. , 515 F.3d 224; 2008 U.S. App. LEXIS 2513 (3rd Cir. 2008), quoting, Omnipoint Communications Enters., L.P. v. Newtown Township, 219 F.3d 240, 242 (3d Cir. 2000);

[11] Particularly 25 years ago, regarding the registration and deposit requirement, it was not necessarily an intuitive concept, nor at least one of rational practical probabilities, that someone could create copyrightable subject-matter without ever touching it or possessing it, as such.

see In re Paoli R.R. Yard PCB Litigation, 221 F.3d 449, 461 (3d Cir. 2000) ("de novo means [that] ... the court's inquiry is not limited to or constricted by the record ... nor is any deference due the ... conclusions [under review]").

2. The Standard of Review for Fed.R.Civ.P. 12(b)(6).

The standard of review for a dismissal under Fed.R.Civ.P. 12(b)(6) is to accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. Phillips, 515 F.3d at 231, citing, Pinker v. Roche Holdings Ltd., 292 F.3d 361, 374 n.7 (3d Cir. 2002); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, at 1969 n.8, 167 L. Ed. 2d 929 (2007); World-com, Inc. v. Graphnet, Inc., 343 F.3d 651, 653 (3d Cir. 2003).

> **Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Phillips*, 515 F.3d at 231. In considering a motion to dismiss, the issue is not whether the plaintiffs ultimately will prevail but whether they are entitled to offer evidence to support their claims.**

Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996) (emphasis added). As the court below duly cited:

> **Under the "notice pleading" standard embodied in Rule 8 of the Federal Rules of Civil Procedure, a plaintiff must come forward with "a short and plain statement of the claim showing that the pleader is entitled to relief." As explicated in *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009), a claimant must state a "plausible" claim for relief, and "[a] claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Although "[factual allegations must be enough to raise a right to relief above the speculative level," *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555 (2007), a plaintiff "need only put forth allegations that raise a reasonable expectation that discovery will reveal evidence of the necessary element." *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).**

Thompson v. Real Estate Mortg. Network., _ F.3d _ ,2014 WL 1317137, *2 (3d Cir. Apr. 3, 2014). [Memorandum Opinion, App. A8, DDE 17]

II. THE COURT BELOW ERRED BY FAILING TO APPLY THE LEGAL STANDARD IN DISMISSING PLAINTIFFS' COMPLAINT.

Plead More Details.

The court below opined that Plaintiffs' averments were a "blanket assertion," which is phraseology derived from a line of cases holding that Plaintiff was not able to set forth facts to support a claim that Defendant is liable for the misconduct alleged. [Memorandum Opinion, App. 4, DDE 17, at P. 4] The Complaint, attachments and public record demonstrates clear error.

Plaintiffs pleaded facts; to wit, the "office procedures, patient information, operational rules and related data." [Complaint, A19, ¶6, DDE1] These are facts. These are not conclusions of law. And, this subject-matter is commonly claimed for proprietary interests, and for which the conclusion of a copyright claim can certainly subsist if provided the proper inference favorable to Plaintiffs. Defendant did not move for a more definite statement pursuant to Fed.R.Civ.P. 12(e), nor is Plaintiffs' claim in any manner a "fishing expedition" for facts, such as in the Twombly and Iqbal line of cases, such as claiming a conspiracy without facts or otherwise fishing for conspiratorial facts.

> **In considering a motion to dismiss, the issue is not whether the plaintiffs ultimately will prevail but whether they are entitled to offer evidence to support their claims.**

Nami v. Fauver, 82 F.3d 63, 65 (3d Cir. 1996) (emphasis added). Plaintiffs did not plead that it owns a copyright without facts. Indeed, the court below effectively either ignores the facts pleaded, or treats the

facts as incapable of stating themselves, as such, or must be more fully described as a matter of law. Moreover, this Court will take judicial notice that the official Copyright Office official forms do not require specific details but only minimal description of the copyright interest asserted. Plaintiffs are not required to plead evidence, and, indeed, the very gist of the action is that Plaintiffs cannot acquire the evidence to attach, if required, the evidence being in the possession of Defendant.

All inferences are properly that the facts are in data form, and it is no more or less a fact, that the operational procedures are embodied in a physical handbook or stored in data form on Defendant's computer. This is not a situation, for example, where Plaintiffs plead the conclusion of a conspiracy without any assertion of the facts to support it. Defendant may or may not deny the facts, but it is improper to treat the factual averment as either a fishing expedition, which it certainly is not, or to treat the factual averment as a legal conclusion.

Even more so, this is a situation where the essential facts are admitted, such that Defendant has Plaintiffs' medical data. The standard and question again are whether Plaintiffs will have the right to produce evidence of the claim that rests upon a short and plain statement.

Plead Special Formalities.

The court below opined that the Plaintiffs must have determined and pleaded the legal conclusion of exactly which exclusive copyright statutory rights were violated, and that, as a matter of law, that legal conclusion cannot be inferred. [Memorandum Opinion, App. A4, at P. 6, ¶1, DDE 17] The court below never cited law for the proposition requirement of its express copyright pleading requirement, per Fed.R.Civ.P 8(a), that Plaintiffs must state the legal conclusion that the facts

averred, so concluded, violate the legally stated exclusive rights. The court cited only the statutory rights and then opined an additional pleading condition that Plaintiffs must specify which of statutory copyright rights were violated. [Memorandum Opinion, App. 4, DDE 17, P. 7, ¶3 and related footnote 9] There requirement is ungrounded and unnecessary.

Indeed, the legal conclusion of whether that act of defendant is a violation of the statutory right to copy, the right to create derivative works, etc., or all the legally exclusive statutory copyright rights, is taken by proper inference. In this case, Plaintiffs simply plead that Defendant will not give Plaintiffs their medical data that is, particularly with proper inferences, clearly a violation of Plaintiffs' exclusive rights. The act for which relief is sought is grounded in a fact that is conceded: Defendant has Plaintiffs' medical data and refuses to give it to Plaintiffs.

Defendant pleads the conundrum that Plaintiffs cannot maintain a lawsuit without registering the copyright that requires the medical data that Defendant refuses to provide. Then, similarly, Defendant further pleads the conundrum that Plaintiffs must plead facts that Plaintiffs cannot yet discover and do not know. Plaintiffs know and pleaded, and most certainly with proper inferences, that Defendant has Plaintiffs' medical data and will not provide it to Plaintiffs depriving them of their use; Plaintiffs do not yet know if Defendant is copying the medical data, distributing it, performing it, displaying it, etc. [Complaint, App. A18, ¶¶10-11, 14, DDE 1] Therefore, Defendant asserts that Plaintiffs must have the registration that Plaintiffs cannot perform by Defendant's unclean hands, and then Defendant asserts that Plaintiffs must plead what Defendants are doing with Plaintiffs medical data as a legal conclusion

within one of the statutory rights, even though Defendants have the medical data and discovery has not yet occurred.

Simply stated, if Defendant holds Plaintiffs' medical data without permission, but does no more than that act, and is not copying, creating derivative works, displaying, performing, etc., there is no specific act the Defendant is doing that violates any of the statutory rights *in Defendant's hands*; the violation is that, even in simply possessing the subject-matter, Defendant interferes with *Plaintiffs'* exclusive rights. [Plaintiffs' Response in Opposition, App. A50 at A54] Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984). Copyright infringement subsists in any trespass to the exclusive rights, which, by its nature, interferes with the rights. Guide to Computer Law, CCH ¶1000.

The court below erred by opining, without applicable legal authority, that Plaintiffs must plead "expressly" the legal conclusion of the exclusive right that is being violated without any inference permitted or necessary implication. If anything is absolutely, unequivocally if not admittedly expressly clear, then by every necessary inference, if Plaintiffs cannot acquire their data, then they cannot enjoy the right to copy it, back it up, create derivate works, transmit, perform, display the work, etc.

The net effect of the ruling by the court below is to create a pleading standard that requires special formalities in the nature of "magic words" contrary to Fed.R.Civ.P. 8(a)(1) and Fed.R.Civ.P. 8(e), such as the case will rise or fall on such additional technical words, such as "and as a result of the foregoing, Plaintiffs cannot copy, backup up, create derivative works..." It is a formalism that is not supported by the law, or by the necessary implications required of the courts. It is or

should be straight-forward enough that all proper inferences are that Plaintiffs cannot copy what they do not possess.

A Contract Case.

The court below indicated that "this case is simply a contractual dispute between the Pennsylvania parties," [Memorandum Opinion, App. 4, DDE 17, at P. 4].

In support, the court below indicates, with footnote, that Plaintiffs' counsel did not frame earlier demand letters as a copyright violation, thereby implying the determination of a contract-only state law dispute. [Memorandum Opinion, App. 4, DDE 17, P.3, fn. 4.] This demonstrates the presumptive error in drawing a proper inference.[12]

The matters relating to the agreement [Complaint, Exhibit 1, App. A26, DDE 1] do not address Plaintiffs' medical data, which is not referenced as such, and which is the exact subject of the copyright infringement action, Count VI. That is, the agreement only sets forth the mechanism for either Defendant's templates and/or to the extent integrated into Plaintiffs' medical data. The agreement itself is not applicable to Plaintiff's own medical data as such; its scope is limited to the created content of Defendant, not the medical data created by Plaintiffs.

In further violation of proper inferences, the court below footnotes variance in Plaintiffs' identification of the medical data. Respectfully, the court below is bound to draw inferences in favor of Plaintiffs, not to make pre-evidentiary fine distinctions in descriptions used in different contexts, for different purposes, at different times; if such attention is given, it must properly be inferred that the terms are cumulative and not

[12] If anything is clear from the referenced exhibits, it is that Defendant has Plaintiffs' data and refuses to give it to Plaintiffs.

otherwise. [Memorandum Opinion, App. 4, DDE 17, P. 7, ¶3 and related footnote 8]

Registration Required without Equitable Exception.

The court below clearly misstates Plaintiffs' argument into a *non sequitur*. The court cites Plaintiffs' argument that, as a matter of equity and reconciled interpretation of the statute, that Plaintiffs must have a full and fair opportunity to register the work. Then, the court concludes that Plaintiffs have argued that the requirement to register is elective, which wholly does not follow Plaintiffs' argument. [Memorandum Opinion, P. 7, ¶1, App. A10, DDE 17] Plaintiffs argument is simply that substantial justice and fair play require that Plaintiffs have an opportunity to register and not be ousted from the federal judiciary, where the Plaintiffs have sought redress.

Prior to 2010, the federal judiciary did not arguably have jurisdiction over copyright infringement case (and excepting declaratory relief cases); accordingly, its opportunities for redress were fundamentally constrained. Now clearly having jurisdiction, the federal judiciary can conduct a hearing regarding basic equities surrounding the registration requirement. Whether the court reconciles the "Plaintiff cannot register what it cannot acquire" conundrum by interpreting the statute as not intending to frustrate its own intention, or by creating a case management order with an opportunity for equitable relief, is for the court to determine in the context.

What is reasonably clear, however, is that this case of first impression may be unique as such only for being first, but portends the market trends; the time is nearly approaching when the greater volume of copyrightable creation will occur by The Cloud, where the creator will not

have possession of the subject-matter. If the Copyright Act is presumed to fulfill its purpose in light of 100%, for example, of all creation on The Cloud, and the risk that 100% of vendors will not provide the subject-matter as a self-interested act to avoid a copyright violation, then the Copyright Act would not fulfill its essential purpose. The Copyright Act must continue to work in the real world, and must work the same whether Plaintiffs are first plaintiffs or the last plaintiffs, or the only ones or with everyone, in bringing this context for review. On this point, this Court is now empowered, as is customary and usual, to meet the law to the circumstances and to do substantial justice in a sensible manner.

Declaratory Relief is Subsumed into Infringement without Support.

Defendant's motion for dismissal requests that Count VI for Plaintiffs' claim of copyright infringement to be dismissed. [Defendant's Dismissal Memorandum, App. A38, DDE 6, P. 38]

The court below stated in footnote 10, with somewhat of an impugning tone, that the count for declaratory relief is an unusual mechanism, and moreover expressly pre-judges the subject-matter with an express adverse inference in favor of Defendants and against Plaintiffs.[13] [Memorandum

[13] The court below identifies "raw data" in a pre-judging manner that presumptively exceeds proper inference. In a digital environment, all data is represented in 1's and 0's, being binary digits. Even an electronically created picture of Mona Lisa in raw digital storage is simply data in the form of binary digits, irrespective of how that data will be, at times, manifested visually through some other means of humanly-viewable display. The point itself exemplifies artists who store their work in The Cloud and cannot retrieve it for registration of the related copyright. It also exemplifies that the contract for services cannot supersede the copyright claim, since cloud services always have a contractual attribute related to the cloud hosting service itself, and, as is the case here, a violation of the contract by the vendor in providing the data to the artist, would prevent a copyright infringement claim against the cloud vendor.

Opinion, App. 4, DDE 17, P. 7, ¶3 and related footnote 10]. As expressly stated in the Complaint [App. A21, DDE 1, ¶18], Plaintiffs have been threatened with Defendant's registered copyright proprietary interest by legal counsel for Defendant. [App. A26, DDE 1: Exhibit 1, ¶2 "copyrights"; Exhibit 2, A30, ¶1 "threat"; Exhibit 4, A34, ¶4; also, App. A39, ¶2 "[Defendant] has every right to insist that Plaintiffs not share Podiatric's copyright-registered works".][14] If Plaintiff uses any form of self-help over its own medical data, to the extent that Plaintiffs can only acquire their own medical data by a potential claim of infringement by Defendant, and in reasonable apprehension thereof, Plaintiffs have a proper, and long-established, basis for declaratory relief for the claim regarding exclusive federal right. The continued claims of copyright violation by Defendant, and statements to that effect by its attorneys, is ostensibly a proper basis for justiciability by the federal judiciary.

The dispute grounding Plaintiffs' Count I-Declaratory Relief is certain, present, concrete, not abstract and obvious by admissions. The acts complained of are causing immediate harm by adverse interests and a declaratory judgment would have a useful and conclusive impact on the matters brought within the claim. Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227 57 S.Ct. 461, 81 L.Ed. 617 (1937).

[14] Plaintiffs have never indicated that the templates would be "shared," but only continued to be used as part of the customary patient management. However, the point is raised for the proposition that Defendant is threatening its legal rights grounded in its registered copyright.

III. THE COURT ERRED BY SUMMARILY REFUSING TO PROVIDE PLAINTIFFS WITH A FULL AND FAIR RIGHT TO BE HEARD ON THEIR REQUEST TO OBTAIN THE SUBJECT-MATTER AND/OR SPECIAL SCHEDULING ORDER, AND NOTICE OF REQUEST FOR DATA BACKUP, RENDERING THE REQUESTS MOOT BY ITS DISMISSAL OF THE CASE.

The court below did not consider matters presented in Plaintiffs' Notice of Demand for Data Backup [App. A36, DDE4] or its Motion for Impoundment of Subject-Matter and/or Special Case Management Order. [App. A62, DDE14], summarily rendering both moot by its Order and Memorandum Opinion. [Order, App. A3, DDE 18; Memorandum Opinion, App. A4, DDE 17]

Simply stated, Plaintiffs requested a right to be heard regarding an impoundment of the subject-matter and an appropriate scheduling order to allow a process to perform the necessary registration application. With Plaintiffs' medical data in hand, Plaintiffs would have the deposit material required for a registration application and would have a basis for special relief procedures of submission. The Proposed Order suggested by Plaintiffs was intended as forthright, equitably balanced, simple and reasonably calculated to manage the context without requiring the court below to opine on the statutory interpretation.

Plaintiffs' motion provided the court, with jurisdiction and power over the subject-matter, an opportunity to provide a mechanism of reconciliation for fair play and substantial justice within the context; to wit:

> **AND NOW, this ____ day of _____, 2014, it is hereby ORDERED that Defendant shall produce to counsel for Plaintiffs all data that is the subject of professional services by Defendant. Said produced data shall be not used by Plaintiffs for any purpose other than applying for the registration of a copyright. Within fourteen (14) calendar days of the receipt of such production, Plaintiffs shall make its copyright application and shall file a notice of compliance.**

[Proposed Order re Motion for Motion for Impoundment of Subject-Matter and/or Special Case Management Order, DDE 14] And, if the Proposed Order was not finally acceptable for any reason, a hearing and/or simple status conference might have worked through the situation in an ultimately stipulated manner.

Nevertheless, the court below dismissed the entire case (including Count I, Declaratory Relief, Count II, Equitable Relief), claiming a lack of registration. Plaintiffs simply requested a full and fair process to obtain the subject-matter in controversy, and the granting of which would not prejudice Defendant, but not granting it would prejudice Plaintiffs. This was summarily mooted and not considered by the Court below.

CONCLUSION

Plaintiffs' Complaint was properly pleaded from a Fed.R.Civ.P. 8(a) perspective. Plaintiffs pleaded such facts as it has and controls, and there is certainly no dispute that the gist of the action is simply that

Defendant is withholding Plaintiffs' medical data. To any extent that simply point is not absolutely clear, it is made clear by proper inferences and application of Fed.R.Civ.P. 8(e).

Plaintiffs are a medical practice and should be entitled to full and fair opportunity to make their case. This case clearly raises issues of copyright law and interpretation of relative copyright rights and remedies.

To the extent that the lower court chose not to read necessary equitable conditions into the meaning of the Copyright Act, it could have considered Plaintiffs' Motion for Impoundment and/or Special Case Management Order. With jurisdiction of the claim and controversy acknowledged, the court below could have, and should have, considered the request in light of the equities, and as a matter of fair play and substantial justice.

Irrespective of the methodology of the court below to provide a full and fair right to be heard and to make a case, the Supreme Court has now opined on the proper jurisdiction of the federal judiciary over copyright claims with or without a registration.

In light of the advent of new technologies for The Cloud, it is altogether fitting and proper for guidance to be provided by appellate review of a context that is sure to be more voluminously forthcoming and for which the district courts require guidance.

Plaintiffs seek reinstatement of the Complaint, and all counts, with a directive for Defendant to answer in due course and/or for the court below to consider Plaintiffs' Motion for Impoundment and/or Special Case Management Order.

Respectfully submitted,

Date: October 14, 2014

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ATTORNEY CERTIFICATE OF BAR MEMBERSHIP

I, Gregg Zegarelli, certify on the date specified below, that I am admitted as an attorney of the United States Court of Appeals for the Third Circuit and that I am a member of the bar in good standing.

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CERTIFICATE OF COMPLIANCE

I, Gregg Zegarelli, certify that this Brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because it contains 7,446 words, excluding parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii). I further certify that 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 it has been prepared in a non-proportionally spaced type-face using Microsoft Word 2010 with 10.5 point Courier New typeface.

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CERTIFICATION OF IDENTICAL BRIEFS AND VIRUS SCAN

I, Gregg Zegarelli, certify that the text of the electronic brief and the ten (10) hard copies of the brief are identical and are submitted on this same date. I further certify that the .PDF file enclosed was scanned for viruses by virustotal.com, dated October 14, 2014, anti-virus document verification.

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CERTIFICATE OF SERVICE

The undersigned certify that on this date ten (10) true and correct copies of **Appellants' Brief and Appendix Volume I** and four (4) true and correct copies of **Appendix Volume II** were served on, Marcia M. Waldron, Clerk of Court of the U.S. Court of Appeals for the Third Circuit located at 21400 U.S. Courthouse, 601 Market Street, Philadelphia, PA 19106 by Federal Express courier as provided by Federal Rule of Appellate Procedure 25(a)(2)(B)(ii), and on the following counsel of record pursuant to 3rd Cir. L.A.R. 113.4(a) as Filing Users and by U.S. First Class Mail:

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