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

REPLY BRIEF OF APPELLANTS [CORRECTED] GREGORY S. MARKANTONE, DPM, PC., AND GREGORY S. MARKANTONE

Gregg R. Zegarelli, Esq.
PA I.D. #52717
mailroom.grz@zegarelli.com

Z E G A R E L L I
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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules, Treatises and Restatements

REPLY ARGUMENT

1. A Case of First Impression.

This is a case of first impression, because the precise fact upon which this appeal is grounded, in light of the precise question of applicable law, has never been ruled upon by any court. Defendant may try to state otherwise by self-interest, but, to do so, Defendant requires this court to ignore, or otherwise to disregard, the precise fact that grounds this appeal. To wit:

> **By Defendant's own misconduct, unclean hands, and refusal to provide the copyrightable subject-matter, Plaintiffs cannot register the copyright.**

The law for this precise context has never been ruled upon, being historically not judiciable by failure of subject-matter jurisdiction, and not factually ripe until recent technologies. [Appellants' Brief (hereafter "App. Br."), at 11, *et. seq.*] The cases cited by Defendant are distinguishable on that basis and are not responsive to the precise factual context of this case or this appeal.

The simplistic mechanical task of "it is registered or not" does not meet the issue or question presented for review: that the ruling below, in light of the applicable facts, creates an absurd result that Congress could not have intended. [Opposition to Motion to Dismiss, App. A53, DDE 8]; cf., Reed Elsevier v. Muchnick, 559 U.S. 154 (2010).

This fact of Defendant's own culpability as the cause for the lack of registration may be exceptional, but it is nevertheless material and relevant to the precise factual context grounding this appeal; it cannot properly be ignored or disregarded. Certainly, Defendant can and does

cite some cases that deal with the general usual factual context for the registration requirement, but not this exceptional factual context.[1]

Defendant argues a point that no one is disputing, and none of the cases cited overcome the absurd result for this context: that, by Defendant's own misconduct, unclean hands, and refusal to provide the copyrightable subject-matter, Plaintiffs cannot register the copyright. The cited cases deal only with the *general rule* of statutory interpretation, and do not overcome the *interpretive exception* when the result is absurd. United States v. Fontaine, 697 F.3d 221 (3rd Cir. 2012) ("absurdity doctrine") [Opposition to Motion to Dismiss, App. A53, DDE 8]

It is not a concession, error or oversight that Plaintiffs do not have a registration: it is part of the very injury caused by Defendant; Plaintiffs are injured because they cannot register their copyright. The injustice occurs through no fault of Plaintiffs, but by the act of Defendant itself and its principals, and, with unclean hands, the withholding of Plaintiffs' medical data, including Plaintiffs' patient data. [App. Br., at 17]

Regarding the registration requirement, the Copyright Act does not say, logically, such as it is for a patent, "If you have a registration, then you have a copyright." To the contrary, the Copyright Act, in Section 102(a), says that a proprietary copyright subsists with or without a registration. The proprietary copyright interest is granted untethered to

[1] For example, Defendant stretches to bring to this Third Circuit the unreported Peirson v. Clemens, 2005 U.S. Distr. LEXIS 4587, which does not stand for the proposition that is responsive to the precise question presented. Indeed, in this case and the other cited cases, there was no assertion that, by the defendant's own misconduct, unclean hands, and refusal to provide the copyrightable subject-matter, that plaintiff could not register the copyright. The failure of any authority or controlling authority on the precise matter brought forth on this appeal, demonstrates it is a case of first impression.

the registration. There is no sensible reason that Congress would intend the Copyright Act not to apply in the very situation where it most assuredly must apply: with the most obdurate and culpable defendant who withholds or absconds with the copyrightable subject-matter that is expressly already recognized by § 102(a).[2]

It is an absurdity that Congress would create an entire statute for a vast range of proprietary subject-matter and then to nullify the practical effect by allowing the very malefactor against whom the Copyright Act surely is intended to bind, by even further culpability, to escape the protections afforded to the owner regarding whom the proprietary rights have been expressly granted. It is well-settled that the courts will not interpret a statute in a manner to create an absurd result. United States v. Fontaine, 697 F.3d 221 (3rd Cir. 2012) ("absurdity doctrine") [Opposition to Motion to Dismiss, App. A53, DDE 8].

Ostensibly by its omission, the Memorandum Opinion does not even address the salient point of fact that is the crux of the entire controversy, and the point of fact upon which all averments are connected:

> **By Defendant's own misconduct, unclean hands, and refusal to provide the copyrightable subject-matter, Plaintiffs obtain and therefore cannot register the copyright.**

[Memorandum Opinion, App. A11, DDE 17] Moreover, a simplistic and mechanical "is it registered or not" review of the registration requirement is not suggested by the Supreme Court in light of Reed Muchnick. Reed Elsevier v. Muchnick, 559 U.S. 154 (2010).

---

[2] There is an old riddle that a man and his son are critically injured in an automobile accident. The boy is taken to the operating room, where the surgeon says, "I cannot operate on this boy, he is my son." This riddle confounded many people at the time. It is now simply understood that the surgeon is a woman. Twenty-five years ago, Congress did not contemplate that someone could create copyrightable subject-matter without ever touching it or possessing it. But, now, this is the very essence of The Cloud.

2. Not A Contract Case.

Any assertion that this case is exclusively a contract case is wholly unsupported and contrary to required inferences in favor of Plaintiffs. The referenced agreement is Defendant's form and is intended to address Defendant's "content." [Complaint, Exhibit 1; App. A26]. Plaintiffs' rights do not flow through Defendant's so-named, "Content License Agreement," which regards only the license of Defendant's own claimed registered copyrighted content. [Id.]

The effect of Defendant's assertion that this case is solely a contract case is to say that Plaintiffs waived their own copyright claim by entering into an agreement regarding Defendant's claimed "content," or in demanding their medical data be returned intact. Such an assertion is wholly unsupported in the record, and refuses to provide Plaintiffs with the inferences to which they are entitled by law. [App. Br., at 14]

Defendant's so-named "Content License Agreement" controls only Defendant's claimed registered copyrighted "content" and not Plaintiffs' copyrightable subject-matter. Even the referenced post-termination license provision is merely an exception to the termination of Defendant's pre-existing content copyright license, to wit:

> …**except that [Plaintiffs] will continue to have the right to use [Defendant's] content that has been incorporated into [Plaintiffs'] patient care and billing records prior to the date of termination of this License**…

[Complaint, Exhibit 1, App. A27 (III. Termination)]. This post-termination "exceptive" provision grants Plaintiffs a continued right of usage of Defendant's "content" to the extent Defendant's data has been "incorporated" into Plaintiffs' medical data.[3]

[3] To date, a review of every Defendant-authored document will reveal that Defendant has refused to reconcile or even to acknowledge, the '…except

Plaintiffs claim a copyright in their medical data. [Complaint, App. A19] Defendant claims "copyrights" in the "Content." [Complaint, Exhibit 1 (Preface, ¶2), App. A26; DDE 1; App. Br., at 19] Because Defendant refuses to acknowledge the stated exceptive clause (as if it did not exist), Plaintiffs cannot take their possession of their data without apprehension of violating the registered copyright.[4]

Therefore, the conundrum for Plaintiffs:

> **Like trying to remove a pound of flesh without spilling a drop of blood, Plaintiffs cannot get to their medical data without touching Defendant's content.**

Accordingly, with proper inferences that were not afforded to Plaintiffs by the court below, a review of Plaintiffs' counsel's demand letters will quite simply demonstrate that, as a fair request in good faith, Plaintiffs were simply asking for Defendant's response to the contractual provision that would permit continued usage of Defendant's claimed copyrightable subject-matter that is incorporated into Plaintiffs' copyrightable subject-matter. [Complaint, Exhibit 3, App. A32; supra, fn 3.]

But, as the facts are, Plaintiffs cannot obtain the flesh of its medical data because it also contains the blood of the Defendant's incor-

---

that [Plaintiffs] will continue to have the right to use [Defendant's] content that has been incorporated into [Plaintiffs'] patient care and billing records prior to the date of termination of this License…'" [Complaint, Exhibit 5, App. A35] Therefore, the two copyright claims compete, and Plaintiffs seek declaratory relief against Defendant's post-termination infringement claim, and infringement relief for Defendant withholding Plaintiffs' data hostage. If Defendant did not withhold Plaintiffs' medical data, in that hypothetical case, Plaintiffs would not have copyright infringement case; if Defendant permitted the continued post-termination use of Defendant's "content" so that self-help would not be at issue, in that hypothetical case, Plaintiffs would not have a declaratory relief case. If both of those fact patterns actually existed, then Plaintiffs would assess their cloud/hosting services rights pursuant to state law claims, but those fact patterns are not the actual facts of this case.

[4] This apprehension is the grounding for the First Claim for Relief, Declaratory Relief, addressed, infra. [App. Br., at 22]

porated "content." On this basis, Defendant is withholding Plaintiffs' medical data, interfering by an infringement with Plaintiffs' copyrights (ostensibly necessarily, and by necessary inference, all of the legal rights), and creates a reasonable apprehension of legal action against Plaintiffs for violating Defendant's claimed registered copyright if Plaintiffs should resort to self-help. [App. Br., at 22.]

Defendant's agreement regarding its own templates does not defeat, particularly as a matter of law, Plaintiffs' claim to a copyright regarding Plaintiffs' medical data. It wholly does not follow, particularly as a matter of law, that, because there is a license provision in Defendant's form granting Plaintiffs a license to continue to use Defendant's content after termination, that it thereby nullifies Plaintiffs' copyright in Plaintiffs' own medical data. Any such contention is not supported in the record, is illogical and demonstrates clear error in failing to give Plaintiffs the presumptions to which they are clearly entitled by law.

3. Registration Requirement Requires Equitable and not "Absurd" Interpretation.

In its Brief, Defendant repeated the *non sequitur* misstatement made by the Magistrate Judge below. [App. Br., at 20] Because Plaintiffs "cannot" register the copyright, by Defendant's own culpable conduct, does not mean that Plaintiffs have argued that the registration requirement is elective. The assertion demonstrates clear error. An *election* implies there is a *choice*, but, clearly, Plaintiffs' entire position regarding registration, and the precise issue in this appeal, is that Plaintiffs have no choice, and, in fact, the lack of a choice is to Plaintiffs' further injury. As stated:

> **By Defendant's own misconduct, unclean hands, and refusal to provide the copyrightable subject-matter, Plaintiffs <u>cannot</u> register the copyright.**

[Id.] Plaintiffs argument is simply that substantial justice and fair play require that Plaintiffs have the opportunity to register the copyright; otherwise, the result is absurd. Defendant's action is, in and of itself, adding to the injury. Congress did not intend for the most culpable defendants to escape application of the law that exists for the beneficiaries thereof. United States v. Fontaine, 697 F.3d 221 (3rd Cir. 2012) ("absurdity doctrine") [Opposition to Motion to Dismiss, App. A53, DDE 8][5]

At Footnote 3 of its Brief, Defendant indicates that Reed Elsevier court held certain specific statutory exceptions to registration. That is not accurate; the Court's precise holding was that the registration requirement is not a jurisdictional requirement. In actuality, the holding of the Supreme Court and its rationale generally support Plaintiffs' argument. Indeed, the facts presented to the Court caused the Court to discuss why a simplistic "Is it registered or not; is it in one of the statutory exceptions or not?" is not always the appropriate mechanism to achieve substantial justice regarding the complexity of the Copyright Act registration requirement. Reed Elsevier v. Muchnick, 559 U.S. at 158, et. seq. Clearly, the registration requirement of the Copyright Act must be interpreted in a manner that achieves a substantial justice.

Regarding the registration requirement, Plaintiffs' position is that it is an absurd result for the Copyright Act to be interpreted to be applicable in all cases except when the greatest degree of circumstantial

[5] More precisely, Plaintiffs provided two different options for the Magistrate Judge, either of which would accomplish the procedural justice sought be Plaintiffs: a) to interpret the registration requirement for the precise context of this case as creating an absurd result not intended by Congress, there being no contrary controlling legal authority (an option based upon law and statutory interpretation); or b) to create a case management scheduling order that permitted the opportunity to register the subject-matter (an option based upon practicalities). [App. Br., at 20]

culpability of the defendant is occurring. It is absurd to interpret the Act as permitting cloud vendors to further the injury by refusing to provide the copyright owner's subject-matter as a self-interested act by unclean hands to avoid a Copyright Act violation; such an interpretation is clearly absurd and the Copyright Act would not fulfill the essential purpose for which it was created by Congress.[6] United States v. Fontaine, 697 F.3d 221 (3rd Cir. 2012) ("absurdity doctrine") [Opposition to Motion to Dismiss, App. A53, DDE 8]

4. Pleading Formalities.

Defendant and the Magistrate Judge cite directly to 17 U.S.C. § 106 for the proposition that a plaintiff must plead not only the facts of defendant's conduct, but also the legal conclusion of exactly which statutory copyright right is violated, and the failure to do so defeats the claim. No law is cited for such a requirement.

To require not only the factual averments of defendant's *conduct*, and not only the *legal conclusion* of a theory of recovery under the Copyright Act, but also individual averments setting forth the legal conclusion of exactly which subsection of Section 106 of the Copyright Act is violated *in the defendant's hands* is far more than pleading: "defendant is liable for the misconduct alleged". [App. Br., at 14; Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007)][7]

---

[6] In Reed Excelsior, it should be noted that there is a registration requirement that is "ordinarily" required and there are three express statutory exceptions. However, the nature of the Court's action for that context suggests the exception from the ordinary, not the ordinary; the nature of the opinion addressed matters outside of the express statutory provisions. Cf. Reed Elsevier v. Muchnick, 559 at 158.

[7] In Paragraph 12 of the Complaint, the subject-matter is further tied to attached exhibits. Pursuant to F.R.Civ.P. 8, a plaintiff is not required, particularly when the subject-matter is actually known, to start, for example, indicating how many chapters are in the book, or how many charac-

That is, the ruling below requires a, "Not only is he withholding my copyrightable subject-matter from me," but also, "and he's doing this with it and violating subsection x of the Copyright Act." Simply stated, it is another absurd interpretation of the Copyright Act to hold that a culprit can take an original artwork masterpiece, and simply to withhold it from the artist, and not violate the Copyright Act, because the plaintiff cannot plead that the culprit is copying it, performing it, distributing it, displaying it, etc. Indeed, the violation of the Copyright Act is the impingement on a *plaintiff's exclusive right — in plaintiff's hands* — to copy it, distribute it, perform it, displaying it, etc.

It does not follow, and it is ungrounded, that, because the statute grants express exclusive rights to a plaintiff, that a plaintiff must plead not only the conduct which interferes with the plaintiff's exclusive rights, but also the legal conclusion of exactly which legal right. Those facts are adduced during proper case development. When a right is exclusive, it is violated by any impinging act.

Moreover, neither Defendant nor the court below provided authority for the proposition that the formality of a legal conclusion of which exclusive copyright right was impinged must be specifically pleaded. The Copyright Act does not require "magic words" to plead under the "notice pleading" standard embodied in F.R.Civ.P 8(a) or F.R.Civ.P. 8(e), but only that a plaintiff come forward with "a short and plain statement of the claim showing that the pleader is entitled to relief." [App. Br., at 16]

---

ters are in the book, and particularly when the parties actually know what is the subject-matter of the dispute.

> **It is certainly taken by necessary inference favorable to Plaintiffs that, if Plaintiffs cannot get their medical data by the acts of Defendant, then Defendant has interfered with all Plaintiffs' exclusive rights.**

[App. Br., at 18] Additionally, the Notice of Demand for Data Backup, for which a backup copy was refused, clearly demonstrates interference with Plaintiffs' right to copy its medical data. [Complaint, App. A18; DDE 1; Notice of Demand for Data Backup, App. A36, DDE 4; App. A47, DDE 9; App. Br. at 6, 8, 11]

Also, apart from the Magistrate Judge requiring new pleading formalities as a matter of law, Defendant and the court below, taking averments out of their context, assert that Plaintiffs' use of the word "against directive" in one particular averment is fatal to the pleading, which it clearly is not. The standard of review is not to assess magic words or only one specific part of one averment, such as whether it is "against directive" or "without authorization," but, the court is required simply to examine the pleading, exhibits and documents of record. For example, neither the Defendant nor the court below read the "directive" clause with proper inferences in light of, among others averments, the context of Complaint paragraphs 12 – 15, exhibits and documents of record. Indeed:

> **Defendant has conceded all essential facts: Defendant is holding Plaintiffs' patient medical data and refuses to give it.**

[App. Br., at 11] As stated above, the Magistrate Judge does not even address that salient point of fact, which is the crux of the controversy.

The exclusive rights are the sword of a plaintiff, but are now a substantive and procedural shield of the defendant, through a new pleading requirement. [Brief in Opposition, App. A54; DDE 8.]

Moreover, and notwithstanding that, as otherwise required by Fed.R.Civ.P. 8(e), Defendant challenges Plaintiffs' pleaded facts regarding the subject-matter; to wit, the "office procedures, patient information, operational rules and related data." [Complaint, App. A19, ¶6, DDE1] These are facts. These are not conclusions of law, nor is Plaintiffs' claim in any manner a "fishing expedition" for facts, such as in the Twombly and Iqbal line of cases.[8]

> **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). Quite simply, there is no failure of understanding as to the issues in the case or the subject-matter at issue. The dismissal by the Magistrate Judge, particularly in light of the required inferences in favor of Plaintiffs, is clearly error. [App. Br., at 16] To say it in the vernacular: "Everyone in this case knows exactly what everyone is talking about."

Defendant pleads the first 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 second 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 withheld Plaintiffs' medical data from Plaintiffs; Plaintiffs do not yet know if Defendant is copying the medical data, distributing it, performing it,

[8] Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L.Ed 2d 868 (2009). In essence, this case is more of the antithesis of the Twombly line of cases, as the parties and the subject-matter are assured, and known, from the Complaint, exhibits, and documents of record. [Complaint and Exhibits, DDE 1; Demand for Data Backup, App. A36, DDE 4]

displaying it, etc. [Complaint, App. A18, ¶¶10-11, 14, DDE 1; App. Br., at 17]

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 Defendant is doing with Plaintiffs' medical data as a legal conclusion within one of the statutory rights, even though Defendant has the medical data and discovery has not yet occurred.

If Defendant withholds Plaintiffs' medical data without permission, but does no more than that act, and, even if it 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.

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.

5. Pendent Jurisdiction.

As stated, Plaintiffs asserted two copyright counts. The count for declaratory relief does not rest on any registration requirement, but is grounded in Defendant's threat of enforcement of its registered copyright

interest. Therefore, there are two separate counts that support federal judiciability, not merely the infringement count.

6. Declaratory Relief.

At page 23 of its Brief, Defendant attempts to argue that the letters from Defendant's legal counsel should not put Plaintiffs in reasonable apprehension of a threat of enforcement. For this assertion, Defendant quotes a small part of one letter from Defendant's legal counsel. However, the reference is out of context and not forthright, as Defendant argues that the letter itself does not use the term "copyright." Indeed, the attorney letters reiterate termination proprietary claims by Defendant and reference the "Agreement," which itself expressly states a claim for "copyrights" in the second paragraph. [Complaint, Exhibit 1, A26; Exhibit 2, A30 ("would be in violation of the parties' Agreement" and "threat to my client's proprietary rights"] Accordingly, Defendant's reference is misleading as stated, although, when reviewed in full substance, is supportive of Plaintiffs' claim for declaratory relief for the reasons previously mentioned in Appellants' Brief. [App. Br., at 22; see also, id., fn. 14 (Defendant's own admission in motion practice)]

The statement in the Opinion of the Magistrate Judge regarding Plaintiffs instituting a claim based upon Defendant's copyright is ungrounded pursuant to the law of declaratory relief. Declaratory relief exists exactly to resolve issues by a plaintiff that are derived from a claim being made by the defendant; declaratory relief is, by its very nature, the resolution of a claim that would be or could be instituted by another. Federal court is the proper forum to declare that Plaintiffs will not violate Defendant's copyright by any form of self-help in taking Plaintiffs' medical data. [Complaint, ¶18, App. A21; DDE 1] The law cit-

ed regarding anticipated defenses is inapplicable to the claim as made by Plaintiff in Count I. [App. Br. 22][9] The dispute grounding Plaintiffs' Declaratory Relief count 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. Certainly, Plaintiffs' rights regarding its medical data created and stored in The Cloud are of crucial importance to Plaintiffs and their patients. Aetna Life Ins. Co. of Hartford, Conn. v. Haworth, 300 U.S. 227 57 S.Ct. 461, 81 L.Ed. 617 (1937).

7. Waiver of Cited Authority.

To the extent that Plaintiffs can understand the assertion of waiver by Defendant, Defendant apparently argues that there is a substantive waiver because Plaintiffs used descriptive subheadings in the Argument. The argument is without merit; Plaintiffs' Table of Authorities is provided, referencing respective uses. With the understanding that Plaintiffs assert a case of first impression on the precise question on appeal, and without any contradictory citations by Defendant on the precise question presented, Plaintiffs cited the law applicable to the matters it raised.[10]

---

[9] Defendant's Motion to Dismiss did not request the dismissal of Count I. [App. Br., at 21.]

[10] Defendant states, at the end of its footnote 6, that there is no rule of Civil Procedure that permits the filing of the Notice of Demand for Backup. However, the Federal Rules of Civil Procedure do not prevent such a filing, and the Notice of Demand for Backup was accepted by the Clerk. Plaintiffs rely upon that record. This filing was made by Plaintiffs to isolate the plain fact that Plaintiffs cannot get their medical data, also refused by Defendant, even for a backup, and even though expressly stated in the agreement. [App. Br. 6, 8, 18; Complaint, Exhibit 1, I. License ("You are authorized to make one copy of the Content solely for backup purposes."); DDE 1] Nevertheless, Defendant waived any challenge by failing to move the court below to strike off the filing; accordingly, Defendant has waived the claim and the document was properly of record for con-

Defendant further stretches to claim a waiver for Plaintiffs' use of the defined term "The Cloud" in its argument. The substance of the claim, the review and the questions, are the same by any other name or defined term in the argument, whether called "hosting services," "web cloud hosting," "web hosting" or "cloud services." Use of the term "The Cloud" simply does not change the substance of the argument, and the review of this Court is to documents of record and is plenary for a motion to dismiss. [App. Br., at 13.]

8. Conclusion.

The Magistrate Judge clearly erred by failing to acknowledge or address the salient fact that gives rise to the case and controversy. With admitted jurisdiction over the case, the Magistrate Judge failed to interpret the Copyright Act in a manner to do justice, and opined in a matter that creates an absurd result that was not intended by Congress. The Magistrate Judge further erred by failing to provide Plaintiffs with a right to be heard, by failing to consider the Notice of Demand for Backup or the Motion for Special Scheduling Order to permit Plaintiffs with a full and fair opportunity to obtain a copyright registration.

Plaintiffs' request for relief is clear and convincing, and the ruling below should be reversed and the case remanded.

Respectfully submitted,

Date: December 6, 2014

/s/Gregg R. Zegarelli/
Gregg R. Zegarelli
PA I.D. #52717
mailroom.grz@zegarelli.com

---

sideration by failure of Defendant. [Id.] Moreover, the filing was made exactly for the forthright reason it was filed: to make a public record for review that Defendant simply refuses to provide Plaintiffs' medical data, even for disaster control, a further infringement on Plaintiffs' rights.

Counsel for Appellants

Z E G A R E L L I
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

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.

Date: December 6, 2014

/s/Gregg R. Zegarelli/
Gregg R. Zegarelli
PA I.D. #52717
mailroom.grz@zegarelli.com

Counsel for Appellants

Z E G A R E L L I
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, Gregg Zegarelli, certify that this Brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because it contains 4,482 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.

Date: December 6, 2014

/s/Gregg R. Zegarelli/
Gregg R. Zegarelli
PA I.D. #52717
mailroom.grz@zegarelli.com

Counsel for Appellants

Z E G A R E L L I
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

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 December 6, 2014, anti-virus document verification.

Date: December 6, 2014

/s/Gregg R. Zegarelli/
Gregg R. Zegarelli
PA I.D. #52717
mailroom.grz@zegarelli.com

Counsel for Appellants

Z E G A R E L L I
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

The undersigned certify that on this date ten (10) true and correct copies of **Appellants' Reply Brief [Corrected]** 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 (with a copy of the redlined corrections for convenience):

Christopher S. Channel, Esq.
Leech Tishman Fuscaldo & Lampl
1800 Frick Building
Pittsburgh, PA 15219-3423, USA

Date: December 6, 2014

/s/Gregg R. Zegarelli/
Gregg R. Zegarelli
PA I.D. #52717
mailroom.grz@zegarelli.com

Counsel for Appellants

Z E G A R E L L I
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