

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DAVIS WRIGHT TREMAINE LLP
865 S. FIGUEROA ST.
SUITE 2400
LOS ANGELES, CALIFORNIA 90017-2566
TELEPHONE (213) 633-6800
FAX (213) 633-6899

ALONZO WICKERS IV (State Bar No. 169454)
alonzowickers@dwt.com
KAREN A. HENRY (State Bar No. 229707)
karenhenry@dwt.com

Attorneys for Defendants
GAWKER MEDIA, LLC; GAWKER NEWS,
LLC; GAWKER SALES, LLC; and MARK
EBNER

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ERIC DANE and REBECCA
GAYHEART,

Plaintiffs,

vs.

GAWKER MEDIA, LLC; GAWKER
NEWS, LLC; GAWKER SALES, LLC;
and MARK EBNER,

Defendants.

Case No. CV09-06912 GW (SHx)

**DEFENDANTS' NOTICE OF
MOTION AND MOTION TO
STRIKE PORTIONS OF
PLAINTIFFS' COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES**

[Fed. R. Civ. P. 12(f)]

Date: December 14, 2009

Time: 8:30 a.m.

Courtroom: 10

[Request for Judicial Notice with Exhibit
A; Declaration of Karen A. Henry with
Exhibit B; Certification and Notice of
Interested Parties; Defendants Gawker
Media, LLC's, Gawker News, LLC's,
and Gawker Sales, LLC's Corporate
Disclosure Statements Filed
Concurrently]

[[Proposed] Order Granting Motion to
Strike Lodged Concurrently]

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on December 14, 2009 at 8:30 a.m., or as soon
3 thereafter as the matter may be heard before the Honorable George H. Wu of the
4 United States District Court for the Central District of California, in Courtroom 10
5 of the Spring Street Courthouse, located at 312 N. Spring Street, Los Angeles,
6 California 90012, defendants Gawker Media, LLC, Gawker News, LLC, Gawker
7 Sales, LLC, and Mark Ebner (collectively "Gawker"), will and hereby do move this
8 Court, pursuant to Federal Rule of Civil Procedure 12(f), for an order striking
9 Plaintiffs' demands for statutory damages and attorneys' fees from their complaint.

10 Specifically, Gawker asks the Court to strike the following portions of the
11 complaint:

12 1. **Claim (p. 4) – paragraph 21, lines 13-14:** "Alternatively, Plaintiffs
13 are entitled to recover an award of statutory damages for Defendants' willful acts of
14 copyright infringement."

15 2. **Claim (p. 5) – paragraph 23, lines 20-21:** "Plaintiffs are further
16 entitled to recover from Defendants an award of their attorneys' fees and costs."

17 3. **Prayer (p. 5) – paragraph 2, line 28:** "For statutory damages in an
18 amount at the discretion of the Court[.]"

19 4. **Prayer (p. 6) – paragraph 4, line 5:** "For attorneys' fees and costs of
20 suit herein incurred[.]"

21 5. **Claim (p. 4) – paragraph 16, lines 19-22:** "As alleged hereinabove,
22 in or around August 2009 Defendants began *willfully* reproducing, adapting,
23 distributing and performing the Video in the United States and around the world
24 despite Plaintiffs' unequivocal demands that they refrain from doing so."
25 (Emphasis added.) Gawker requests that this Court strike the word "willfully" from
26 this sentence.

27 Gawker moves to strike these portions of the complaint because a plaintiff
28 who alleges infringement of an unpublished work, like the videotape at issue here,

1 may recover statutory damages and attorneys' fees *only* if the work was registered
2 with the Copyright Office at the time that the alleged infringement commenced.
3 *See* 17 U.S.C. § 412(1). Because Plaintiffs' own allegations and information from
4 the face of their Copyright Registration Certificate establishes that Gawker's
5 alleged infringement of the tape commenced *before* they registered the tape with the
6 Copyright Office, Plaintiffs are not entitled to recover either statutory damages or
7 attorneys' fees in this action. Consequently, all references to statutory damages and
8 attorneys' fees are immaterial and impertinent under Rule 12(f), and should be
9 stricken from the complaint.

10 This Motion is based on this Notice; on the attached Memorandum of Points
11 and Authorities; on the concurrently-filed Request for Judicial Notice with Exhibit
12 A and any matters of which this Court may take judicial notice; on the concurrently-
13 filed Declaration of Karen A. Henry with Exhibit B; on all pleadings, files and
14 records in this action; and on such argument as may be received by this Court at the
15 hearing on this Motion.

16 This Motion is made following the conference of counsel that occurred on
17 October 16, 2009, pursuant to Local Rule 7-3. *See* Henry Decl. ¶¶ 2-4.

18
19
20
21
22
23
24
25
26
27
28

DATED: October 30, 2009

DAVIS WRIGHT TREMAINE LLP
ALONZO WICKERS IV
KAREN A. HENRY

By: _____ / s /
Karen A. Henry

Attorneys for Defendants
GAWKER MEDIA, LLC; GAWKER
NEWS, LLC; GAWKER SALES, LLC; and
MARK EBNER

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

1. SUMMARY OF ARGUMENT 1

2. A COURT MAY STRIKE A PRAYER FOR RELIEF AND RELATED ALLEGATIONS WHERE, AS HERE, A PLAINTIFF SEEKS DAMAGES THAT ARE NOT RECOVERABLE AS A MATTER OF LAW. 2

3. SECTION 412(1) FORECLOSES AN AWARD OF STATUTORY DAMAGES OR ATTORNEYS’ FEES TO PLAINTIFFS. 3

 A. The Complaint Shows That The Tape Was Unpublished At The Time Of The Alleged Infringement. 5

 B. The Tape Was Unregistered When Gawker Posted Portions Online. 6

4. BECAUSE PLAINTIFFS CANNOT RECOVER STATUTORY DAMAGES OR ATTORNEYS’ FEES, THE LANGUAGE IN THEIR COMPLAINT RELATING TO THOSE REMEDIES SHOULD BE STRICKEN. 6

5. CONCLUSION 8

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
1 <i>BJC Health Sys. v. Columbia Casualty Co.</i> , 2 478 F. 3d 908 (8th Cir. 2007).....	2, 3
3 <i>California ex rel. State Lands Comm'n v. U.S.</i> , 4 512 F. Supp. 36 (N.D. Cal. 1981)	3
5 <i>Cognotec Servs. Ltd. v. Morgan Guaranty Trust</i> , 6 862 F. Supp. 45 (S.D.N.Y. 1994).....	3, 7
7 <i>Curtis v. Benson</i> , 8 1997 WL 189135 (E.D. La. 1997).....	3
9 <i>Derek Andrew, Inc. v. Poof Apparel</i> , 10 528 F.3d 696 (9th Cir. 2008).....	4
11 <i>Duke University v. Elan Corp.</i> , 12 2006 WL 267185 (M.D.N.C. 2006).....	3
13 <i>Equine Legal Solutions v. Buntrock</i> , 14 2008 WL 111237 (N.D. Cal. 2008)	3
15 <i>Fantasy, Inc. v. Fogerty</i> , 16 984 F.2d 1524 (9th Cir. 1993) 17 <i>rev'd on other grounds</i> , 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 18 (1994)	passim
19 <i>Gerig v. Krause Publications</i> , 20 58 F. Supp. 2d 1261 (D. Kan. 1999).....	3, 4, 6, 7
21 <i>Holabird and Root Architects Engineers Interiors v. Physicians Management of Indiana</i> , 22 1994 WL 395126 (N.D. Ill. 1994)	3
23 <i>Johnson v. Metropolitan Sewer Dist.</i> , 24 926 F. Supp. 874 (E.D. Mo. 1996).....	3
25 <i>Los Angeles News Service v. Conus Comm'ns Co. Ltd. Partnership</i> , 26 969 F. Supp. 579 (C.D. Cal. 1997)	7
27 <i>McNabb Bennett & Associates v. Terp Meyers Architects</i> , 28 1987 WL 7817 (N.D. Ill. 1987)	3
<i>Michaels v. Internet Entertainment Group</i> , 1998 WL 882848 (C.D. Cal. 1998).....	4
<i>Parrino v. FHP</i> , 146 F. 3d 699 (9th Cir. 1998), <i>superseded by statute on other grounds</i> , <i>Abrego v. Dow Chem. Co.</i> , 443 F. 3d 676, 681 (9th Cir. 2006).....	5
<i>Singh v. Famous Overseas, Inc.</i> , 680 F. Supp. 533 (E.D.N.Y. 1988)	4, 6
<i>Tegg Corp. v. Beckstrom Elec. Co.</i> , 2008 WL 2682602 (W.D. Pa. 2008).....	5
<i>Tokidoki v. Fortune Dynamic</i> , 2009 WL 2366439 (C.D. Cal. 2009).....	5

1	<i>Warren v. Fox Family Worldwide</i> , 171 F. Supp. 2d 1057 (C.D. Cal. 2001)	5
2	<i>Wilkerson v. Butler</i> , 229 F.R.D. 166 (E.D. Cal. 2005)	2, 3
3	<i>Zito v. Steeplechase Films, Inc.</i> , 267 F. Supp. 2d 1022 (N.D. Cal. 2003)	1, 4, 5, 6
4		
5	<u>Statutes</u>	
6	17 U.S.C. § 412.....	3, 4, 5
7	17 U.S.C. § 412(1).....	1, 3, 4, 6
8	17 U.S.C. § 412(2).....	4
9	17 U.S.C. § 504.....	7
10	17 U.S.C. § 504(c)(2)	7
11	<u>Other Authorities</u>	
12	4 <i>Nimmer on Copyright</i> , § 13.08 at p. 13-285 (2007 ed. & 2008 Supp.).....	7
13	Hawes and Dietz, <i>Copyright Registration Practice</i> (2d ed.), §§ 23:9.1-23:9.2.....	5
14	<u>Rules</u>	
15	Federal Rule of Civil Procedure 12	5
16	Federal Rule of Civil Procedure 12(f)	passim
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		
28		

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **1.**

3 **SUMMARY OF ARGUMENT**

4 This motion presents a straightforward legal issue: can Plaintiffs recover
 5 statutory damages and attorneys' fees based on their claim that Gawker infringed
 6 the copyright in a videotape that – according to the complaint and Plaintiffs'
 7 Copyright Registration Certificate – was unpublished and unregistered when the
 8 alleged infringement commenced? The answer plainly is “no.” Section 412(1) of
 9 the Copyright Act makes clear that “no award of statutory damages or of attorney’s
 10 fees ... shall be made for ... any infringement of copyright in an unpublished work
 11 commenced before the effective date of its registration.” 17 U.S.C. § 412(1) Put
 12 simply, “*if a work is unpublished and unregistered at the time of infringement, no*
 13 *statutory damages or attorney’s fees are available[.]*” *Zito v. Steeplechase Films,*
 14 *Inc.*, 267 F. Supp. 2d 1022, 1026 (N.D. Cal. 2003) (emphasis added).

15 This rule bars Plaintiffs from recovering statutory damages or attorneys' fees
 16 in this action. Plaintiffs contend that Gawker’s alleged infringement commenced on
 17 August 17, 2009, when Gawker posted online a purportedly “highly personal and
 18 private” videotape showing Plaintiffs in “intimate moments and conversations.”
 19 Compl. ¶ 13. The tape was unregistered when the alleged infringement
 20 commenced; indeed, Plaintiffs’ Copyright Registration Certificate establishes that
 21 they did not register the work until August 19, 2009. *See* Henry Decl., Ex. A; *see*
 22 *also* Compl. ¶ 12. And the complaint shows that the tape was unpublished when
 23 Gawker posted a portion on its website. *Id.* ¶¶ 10, 12. Because the tape was
 24 unregistered and unpublished at the time of the alleged infringement, Plaintiffs
 25 cannot recover statutory damages or attorneys’ fees. 17 U.S.C. § 412(1); *Zito*, 267
 26 F. Supp. 2d at 1026. Accordingly, Plaintiffs’ prayers for statutory damages and
 27
 28

1 attorneys' fees and their allegations relating to these remedies should be stricken.
2 See Fed. R. Civ. P. 12(f).¹

3 2.

4 **A COURT MAY STRIKE A PRAYER FOR RELIEF AND RELATED**
5 **ALLEGATIONS WHERE, AS HERE, A PLAINTIFF SEEKS DAMAGES**
6 **THAT ARE NOT RECOVERABLE AS A MATTER OF LAW.**

7 Federal Rule of Civil Procedure 12(f) provides that a “court may strike from
8 a pleading ... any redundant, immaterial, impertinent, or scandalous matter.” Of
9 particular importance here, courts have defined “immaterial” matter to include
10 allegations that “ha[ve] no essential or important relationship to the claim for relief
11 or defenses pleaded.” *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993)
12 *rev'd on other grounds*, 510 U.S. 517, 535, 114 S. Ct. 1023, 127 L. Ed. 2d 455
13 (1994); *see also Wilkerson v. Butler*, 229 F.R.D. 166, 170 (E.D. Cal. 2005) (same).
14 Similarly, courts have defined “impertinent” matter to include allegations “that do
15 not pertain, and are not necessary, to the issues in question.” *Fantasy*, 984 F.2d at
16 1527; *Wilkerson*, 229 F.R.D. at 170. Courts enjoy “liberal discretion” to strike
17 “immaterial” and “impertinent” matters from pleadings. *BJC Health Sys. v.*
18 *Columbia Casualty Co.*, 478 F.3d 908, 917 (8th Cir. 2007).

19 The Ninth Circuit has emphasized that motions to strike under Rule 12(f)
20 serve an important purpose – specifically, “to avoid the expenditure of time and
21 money that must arise from litigating spurious issues by dispensing with those
22 issues prior to trial.” *Fantasy*, 984 F.2d at 1527; *see also Wilkerson*, 229 F.R.D. at
23 170. A district court may “properly grant [a] motion to strike for the purpose of
24 streamlining the ultimate resolution of the action and focusing the jury’s attention
25

26
27 _____
28 ¹ Gawker vigorously disputes the merits of Plaintiffs’ claim as well, and reserves its defenses to infringement.

1 on the real issues in the case.” *Fantasy*, 984 F.2d at 1528, citing *California ex rel.*
 2 *State Lands Comm’n v. U.S.*, 512 F. Supp. 36, 38 (N.D. Cal. 1981).

3 Under Rule 12(f), “[a] prayer for relief not available under the applicable law
 4 ... is properly the subject of a motion to strike.” *Johnson v. Metropolitan Sewer*
 5 *Dist.*, 926 F. Supp. 874, 875 (E.D. Mo. 1996). Such prayers are both “immaterial”
 6 and “impertinent” within the meaning of Rule 12(f). In *BJC Health*, for example,
 7 the court struck a prayer for punitive damages because the plaintiff had failed to
 8 allege fraud with the requisite particularity. 478 F.3d at 916-917. Without proper
 9 allegations of fraud, the court held that the plaintiff could not possibly recover
 10 punitive damages, and thus granted the defendant’s motion to strike. *Id.* See also
 11 *Wilkerson*, 229 F.R.D. at 172 (striking claim for punitive damages that “add[ed]
 12 nothing to further [the plaintiff’s] ... cause of action”).

13 Applying these principles, courts regularly have granted Rule 12(f) motions
 14 to strike prayers for statutory damages and attorneys’ fees in copyright-infringement
 15 action where, as here, those remedies were barred by Section 412. See, e.g., *Equine*
 16 *Legal Solutions v. Buntrock*, 2008 WL 111237, *1 n.1 (N.D. Cal. 2008); *Duke*
 17 *University v. Elan Corp.*, 2006 WL 267185, *4 n.4 (M.D.N.C. 2006); *Gerig v.*
 18 *Krause Publications*, 58 F. Supp. 2d 1261, 1268-1269 (D. Kan. 1999); *Curtis v.*
 19 *Benson*, 1997 WL 189135, *2 (E.D. La. 1997); *Cognotec Servs. Ltd. v. Morgan*
 20 *Guaranty Trust*, 862 F. Supp. 45, 52 (S.D.N.Y. 1994); *Holabird and Root*
 21 *Architects Engineers Interiors v. Physicians Management of Indiana*, 1994 WL
 22 395126, *2 (N.D. Ill. 1994); *McNabb Bennett & Associates v. Terp Meyers*
 23 *Architects*, 1987 WL 7817, *3 (N.D. Ill. 1987). The Court should do the same here.

24 3.

25 SECTION 412(1) FORECLOSES AN AWARD OF STATUTORY DAMAGES 26 OR ATTORNEYS’ FEES TO PLAINTIFFS.

27 Plaintiffs demand remedies – statutory damages and attorneys’ fees – that are
 28 not recoverable in this action as a matter of law. Section 412 of the Copyright Act

1 requires that a plaintiff who seeks to recover statutory damages or attorneys' fees
 2 for copyright infringement must meet certain prerequisites. Subject to narrow
 3 exceptions that are not relevant here, Section 412(1) provides that "no award of
 4 statutory damages or of attorney's fees ... shall be made for ... any infringement of
 5 copyright in an *unpublished work commenced before the effective date of its*
 6 *registration.*" 17 U.S.C. § 412(1) (emphasis added).² The Ninth Circuit has
 7 observed that Section 412 promotes an important policy; "by denying an award of
 8 statutory damages and attorney's fees where infringement takes place before
 9 registration, Congress sought to provide copyright owners with an incentive to
 10 register their copyrights promptly." *Derek Andrew, Inc. v. Poof Apparel*, 528 F.3d
 11 696, 700 (9th Cir. 2008).

12 Courts interpreting Section 412(1) consistently have recognized that "*if a*
 13 *work is unpublished and unregistered at the time of infringement, no statutory*
 14 *damages or attorney's fees are available[.]*" *Zito*, 267 F. Supp. 2d at 1026
 15 (emphasis added). As another court declared, "statutory damages and attorney's
 16 fees are not recoverable for infringement of unpublished, unregistered works."
 17 *Singh v. Famous Overseas, Inc.*, 680 F. Supp. 533, 535 (E.D.N.Y. 1988). *See also*
 18 *Gerig*, 58 F. Supp. 2d at 1269 (recognizing that Section 412(1) barred recovery of
 19 statutory damages and attorneys' fees with respect to three photographs that were
 20 unpublished and unregistered at time of alleged infringement); *Michaels v. Internet*
 21 *Entertainment Group*, 1998 WL 882848, *1 n.2 (C.D. Cal. 1998) (holding that
 22 plaintiff "cannot seek statutory damages or attorney's fees for infringement which
 23 occurred when the work was unpublished and unregistered").

24
 25
 26 _____
 27 ² Section 412(2) provides a different standard for an award of statutory
 28 damages or attorneys' fees for infringement of a *published* work. *See* 17 U.S.C.
 § 412(2). Because Plaintiffs allege that they had not published the tape at the time
 of the purported infringement, however, Section 412(2) is irrelevant.

1 These cases confirm that “[t]o recover statutory damages or attorney’s fees
 2 for the infringement of an unpublished work, the effective date of registration must
 3 be prior to the commencement of the infringement.” Hawes and Dietz, *Copyright*
 4 *Registration Practice* (2d ed.), §§ 23:9.1-23:9.2. This rule defeats Plaintiffs’
 5 prayers for statutory damages and attorneys’ fees, because the allegations in the
 6 complaint and the information on the face of the Copyright Registration Certificate
 7 demonstrate that the videotape was both unpublished and unregistered on August
 8 17, 2009, when the alleged infringement purportedly commenced.³

9 **A. The Complaint Shows That The Tape Was Unpublished At The Time Of**
 10 **The Alleged Infringement.**

11 For purposes of Section 412, a work is “published” *only* when it is distributed
 12 or publicly displayed *with* the copyright owner’s permission. *Zito*, 267 F. Supp. 2d
 13 at 1026. In other words, the act that constitutes the alleged infringement cannot be
 14 deemed to “publish” an otherwise unpublished work. *Id.*

15 Here, Plaintiffs do not allege that they ever published the work. To the
 16 contrary, they emphasize their efforts to “maintain the confidentiality of the
 17

18
 19 ³ When ruling on a motion to strike under Rule 12(f), a court may consider
 20 not only the plaintiff’s allegations, but also material that properly is the subject of
 21 judicial notice. *See Fantasy*, 984 F.2d at 1528 (granting motion to strike and
 22 explaining that “requests for judicial notice ... could properly be considered by the
 23 court in ruling on the motion to strike”). This Court may take judicial notice of
 24 Plaintiffs’ Certificate of Registration from the Copyright Office. *See, e.g., Warren*
 25 *v. Fox Family Worldwide*, 171 F. Supp. 2d 1057, 1062 (C.D. Cal. 2001) (taking
 26 judicial notice of copyright registration certificates); *Tokidoki v. Fortune Dynamic*,
 27 2009 WL 2366439, *6 (C.D. Cal. 2009) (taking judicial notice of certificate of
 28 registration from U.S. Patent & Trademark Office). The Ninth Circuit also has
 recognized that a court hearing a Rule 12 motion may consider “document[s] the
 authenticity of which [are] not contested, and upon which plaintiff’s complaint
 necessarily relies[,]” even if those materials are not attached to the complaint.
Parrino v. FHP, 146 F.3d 699, 706 (9th Cir. 1998), *superseded by statute on other*
grounds, Abrego v. Dow Chem. Co., 443 F.3d 676, 681 (9th Cir. 2006). *See also*
Tegg Corp. v. Beckstrom Elec. Co., 2008 WL 2682602, *6 (W.D. Pa. 2008)
 (considering certificate of registration from Copyright Office in connection with
 Rule 12 motion, even though documents were not attached to complaint). This
 doctrine provides an independent basis for the Court to consider the Certificate of
 Registration, even though it is not attached to the complaint. *See Compl.* ¶ 11.

1 Video[,]” which allegedly “depicts intimate moments” of a “highly personal and
2 private nature.” Compl. ¶¶ 10, 12.

3 Moreover, under *Zito*, Plaintiffs cannot argue that any alleged acts by Mr.
4 Ebner or by Gawker constituted publication of the tape. Plaintiffs expressly allege
5 that Mr. Ebner acted “without Plaintiffs’ permission” when he supposedly
6 “delivered [the tape] to Gawker,” and that Gawker posted portions of the tape
7 “without authorization from Plaintiffs[.]” *Id.* ¶¶ 12, 13. Thus, neither Ebner nor
8 Gawker could have published the tape within the meaning of the Copyright Act.
9 *Zito*, 267 F. Supp. 2d at 1026.

10 Under these circumstances, the tape plainly was unpublished at the time that
11 the alleged infringement commenced on August 17, 2009.

12 **B. The Tape Was Unregistered When Gawker Posted Portions Online.**

13 There is no doubt that the tape also was unregistered on August 17. While
14 Plaintiffs allege that they “timely” registered the tape with the Copyright Office,
15 their Certificate of Registration establishes that the effective date of registration was
16 August 19, 2009 (Ex. A) – *two days after the alleged infringement supposedly*
17 *commenced.*

18 Because the alleged infringement commenced before the unpublished tape
19 was registered, Plaintiffs are prohibited – *as a matter of law* – from recovering
20 statutory damages or attorneys’ fees. *See* 17 U.S.C. § 412(1); *Zito*, 267 F. Supp. 2d
21 at 1026; *Singh*, 680 F. Supp. at 535; *Gerig*, 58 F. Supp. 2d at 1269.

22 **4.**

23 **BECAUSE PLAINTIFFS CANNOT RECOVER STATUTORY DAMAGES**
24 **OR ATTORNEYS’ FEES, THE LANGUAGE IN THEIR COMPLAINT**
25 **RELATING TO THOSE REMEDIES SHOULD BE STRICKEN.**

26 As explained above, Rule 12(f) authorizes a court to strike “immaterial” and
27 “impertinent” matter from a complaint. Because Plaintiffs cannot recover statutory
28 damages or attorneys’ fees, the language in their complaint relating to these items of

1 damages is “immaterial” – it simply has “no essential or important relationship” to
 2 their copyright-infringement claim. *See Fantasy*, 984 F.2d at 1527; *Gerig*, 58 F.
 3 Supp. 2d at 1268-1269; *Cognotec* 862 F. Supp. at 52. The Court, therefore, should
 4 strike the following passages from the complaint in their entirety:

- 5 • **Claim (p. 4) – paragraph 21, lines 13-14:** “Alternatively, Plaintiffs
 6 are entitled to recover an award of statutory damages for Defendants’
 7 willful acts of copyright infringement.”
- 8 • **Claim (p. 5) – paragraph 23, lines 20-21:** “Plaintiffs are further
 9 entitled to recover from Defendants an award of their attorneys’ fees
 10 and costs.”
- 11 • **Prayer (p. 5) – paragraph 2, line 28:** “For statutory damages in an
 12 amount at the discretion of the Court[.]”
- 13 • **Prayer (p. 6) – paragraph 4, line 5:** “For attorneys’ fees and costs of
 14 suit herein incurred[.]”

15 The Court also should strike the word “willfully” from paragraph 16 of the
 16 complaint. The legal import of this word is apparent: “willful” infringement is a
 17 prerequisite for enhanced statutory damages under the Copyright Act. *See* 17
 18 U.S.C. § 504(c)(2) (“[i]n a case where the copyright owner sustains the burden of
 19 proving, and the court finds, that infringement was committed willfully, the court in
 20 its discretion may increase the award of statutory damages to a sum of not more
 21 than \$150,000”). No other purpose is served by the inclusion of this allegation in
 22 the complaint.⁴ But since Plaintiffs are not entitled to recover statutory damages,
 23 language in their complaint characterizing Gawker’s alleged conduct as “willful” is
 24 immaterial and impertinent.

25 _____
 26 ⁴ *See Los Angeles News Service v. Conus Comm’ns Co.*, 969 F. Supp. 579,
 27 584 (C.D. Cal. 1997) (while “[d]irect infringement does not require intent or any
 28 particular state of mind, ... [p]ursuant to Section 504 of the Copyright Act, the
 Court may increase the award of statutory damages where the Court finds that the
 infringement was willful”).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Striking these portions of the complaint will fulfill Rule 12(f)'s policy of "avoid[ing] the expenditure of time and money that must arise from litigating spurious issues[.]" *Fantasy*, 984 F. 2d at 1527. Unless stricken, Plaintiffs' improper prayers for relief may lead to irrelevant discovery and unnecessary discovery disputes, may produce costly and time-consuming motion practice regarding matters that should not be a part of the lawsuit in the first place, and may impede any attempt to resolve the dispute informally.

5.

CONCLUSION

During the meet-and-confer process, Gawker asked Plaintiffs to stipulate that they cannot seek statutory damages or attorneys' fees for the alleged infringement of the unpublished, unregistered tape. Henry Decl. ¶¶ 2-4. Because Plaintiff declined to do so, court intervention is required. Given the allegations in the complaint, and the information on the face of Plaintiffs' Copyright Registration Certificate, it is clear that Plaintiffs are not entitled to these remedies. Thus, under Rule 12(f), Gawker respectfully asks the Court to strike those portions of the complaint relating to statutory damages and attorneys' fees.

DATED: October 30, 2009

DAVIS WRIGHT TREMAINE LLP
ALONZO WICKERS IV
KAREN A. HENRY

By: _____ / s /
Karen A. Henry

Attorneys for Defendants
GAWKER MEDIA, LLC; GAWKER
NEWS, LLC; GAWKER SALES, LLC; and
MARK EBNER