

ORIGINAL

## In the United States Court of Federal Claims

No. 13-323C

April 25, 2014

FILED

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U.S. COURT OF  
FEDERAL CLAIMS

\* \* \* \* \*

JAMES L. DRIESSEN,

Plaintiff,

v.

UNITED STATES,

Defendant.

\* \* \* \* \*

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\* Pro Se Plaintiff; Motion to  
 \* Dismiss; Lack of Subject Matter  
 \* Jurisdiction; Failure to State a  
 \* Claim; Intellectual Property;  
 \* Copyright; Implied-in-Fact  
 \* Contract.

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James L. Driessen, Lindon, UT, pro se.

John Fargo, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., for the defendant. With him was Stuart F. Delery, Assistant Attorney General, Civil Division, Department of Justice.

## ORDER

HORN, J.

## FINDINGS OF FACT

Pro se plaintiff James L. Driessen filed a complaint in the United States Court of Federal Claims<sup>1</sup> stating "[t]his is a declaratory action asking the court to declare that

<sup>1</sup> Plaintiff filed his complaint naming the Library of Congress, James Hadley Billington, in his position at the Library of Congress, the United States Copyright Office, Maria A. Pallante, and Robert Kasunic, in their positions with the United States Copyright Office, as defendants. In this court, however, the only proper defendant is the United States, which plaintiff did not name as a defendant. Rule 10(a) of the Rules of the United States Court of Federal Claims (RCFC) (2013) states that "[t]he title of the complaint must name all the parties . . . , with the United States designated as the party defendant." RCFC 10(a); see also 28 U.S.C. § 1491(a)(1) (Supp. V 2011). The United States Supreme Court has indicated for suits filed in the United States Court of Federal Claims and its predecessors, "[i]f the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court." United States v. Sherwood, 312 U.S. 584, 588 (1941) (citation omitted). Stated differently, "the only proper defendant for any matter before this court is the United States, not its officers, nor any other individual." Stephenson v. United States, 58 Fed. Cl. 186, 190 (2003) (emphasis in original); see also United States v. Sherwood, 312 U.S. at 588; Hover v. United States, 113 Fed. Cl. 295, 296 (2013) ("As an initial matter, it is well settled that

Plaintiff is the owner of the exclusive right in copyright and thereby oblige the Copyright Office (hereafter 'Office') to perform a permissive registration under the copyright code." Plaintiff requests the court declare that he is "a lawful purchaser and owner of content media," and therefore, is entitled to "exclusive rights to lawful enjoyment, including displaying, viewing, and transmission of the same for home viewing, within the bounds of copyright law" and declare that there is "no physical or ethereal length of cord which [sic] too long which could prohibit such lawful enjoyment . . . within any distance." (emphasis in original). Plaintiff also alleges "that Congress has authorized the [Copyright] Office through the Library of Congress,<sup>[2]</sup> to provide means for permissive registration of *any* exclusive copyright." (emphasis in original). Further, plaintiff requests the court to "[r]emand the Plaintiff's request for registration of his exclusive rights to the [Copyright] Office, with proper instruction to the Office, ordering the Office to develop and implement the rules and fees for such permissive registration as required by law."

According to Mr. Driessen, Vibme, LLC (Vibme)<sup>3</sup> petitioned the Copyright Office and requested the Copyright Office commence rulemaking to establish a new system of registration using the "Circle Section" registration mark, which would address "consumer . . . ownership rights in first-sales of online digital media." The petition for rulemaking requested that the Copyright Office "clearly establish that consumers have ownership rights in first-sales of online digital media," and, "if it is determined that ownership rights for cloud media storage are mechanical or compulsory, then pursuant to its existing authority under 17 U.S.C. § 408, establish procedures for a preferred service provider to file an application for supplementary registration on behalf of consumers . . . ." The petition for rulemaking also outlined the reasons plaintiff suggested for creating a new system of registration, including "consumer demand for digital ownership – at least as it is marketed at present – is beginning to disappear." The petition for rulemaking stated "[i]t seems difficult to even understand the industry impetuous [sic] behind these perceived efforts to hide ownership from the

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the United States is the only proper defendant in the United States Court of Federal Claims."); Warren v. United States, 106 Fed. Cl. 507, 510-11 (2012) ("It is well settled that the United States is the only proper defendant in the Court of Federal Claims."); May v. United States, 80 Fed. Cl. 442, 444 ("Jurisdiction, then, is limited to suits against the United States."), aff'd, 293 F. App'x 775 (Fed. Cir. 2008).

<sup>2</sup> The Copyright Office is directed by the Register of Copyrights, who reports to the Librarian of Congress. See 17 U.S.C. § 701(a), (d) (2006).

<sup>3</sup> The petition for rulemaking was signed on behalf of Vibme by the President of Vibme, Maguerite A. Driessen. According to the website for Driessen Law, which can be accessed at <http://www.driessenlaw.com> (last visited Apr. 24, 2014), Marguerite A. Driessen is listed as of counsel to Driessen Law, as well as a "Driessen Law Consultant," and an Associate Professor of Law, Brigham Young University, J. Reuben Clark Law School. The website further indicates Ms. Driessen is "not a Utah attorney." The court notes that although Maguerite A. Driessen is listed as the President of Vibme, in his complaint, Mr. Driessen alleges that "[p]laintiff has previously petitioned the [Copyright] Office on behalf of his Company (Vibme LLC) for rulemaking."

consumer.” The petition for rulemaking also argued that, “[t]he personal media collection (as a concept) could actually assist in creating better bandwidth optimization.” The petition for rulemaking describes the potential consequences of not granting his petition, stating, “consumers feel they are left with no choice but to seek to satisfy that demand outside of industry channels.” The petition for rulemaking warned, “[i]f, however, we allow the fears and prejudices of industry content producers to dictate our path, the personal media collection will disappear as physical media sources become obsolete . . . .” The petition for rulemaking further warned that “attempts to deprive citizens of ownership have had grave, even violent consequences.”

Vibme then submitted a second petition to the Copyright Office titled “**PETITION FOR WAIVER OR SUSPENSION OF RULES (OR CONSOLIDATION MOTION IN THE ALTERNATIVE) RE: DOCKET 2011-07.**” (emphasis and capitalization in original). As explained by the Copyright Office, in a letter to Maguerite A. Driessen, Vibme “requested that the Copyright Office consolidate the rulemaking with [the] office’s rulemaking pursuant to 17 U.S.C. § 1201(a)(1)(C),” or, in the alternative, that the office “suspend the section 1201 rulemaking until the conclusion of the rulemaking” requested in Vibme’s prior petition. In the same letter to Maguerite A. Driessen, the Copyright Office denied the petitions for rulemaking. Subsequently, in a third petition, Vibme requested reconsideration of its proposals and a final notice.<sup>4</sup> A final decision by the Copyright Office denying the two petitions, as well as the request for reconsideration, was set forth in a subsequent letter to Mr. Driessen. As the Copyright Office noted in that final decision:

Under the copyright law, the exclusive rights in copyrighted works are set forth in sections 106 and 106A of the copyright law. Limitations to those exclusive rights are set forth in sections 107 through 122 of the copyright law. The first sale doctrine, which permits the owner of physical copies to transfer possession of the copy, is set out in section 109 of the copyright law. Section 109 clarifies that the first sale right is a limitation on the exclusive right of distribution. The first sale doctrine does not limit the exclusive right of reproduction. As the Office stated in its Section 104 Report to Congress, a report mandated by the Digital Millennium Copyright Act, the first sale doctrine is inapplicable when the disposition of a copy or phonorecord of a work implicates the reproduction right, as is the case when a copy or phonorecord of a work is transmitted over the Internet. See, [http://www.copyright.gov/reports/studies/dmca/dmca\\_study.html](http://www.copyright.gov/reports/studies/dmca/dmca_study.html). Thus, from the perspective of the Copyright Office, a fundamental premise in your rulemaking request is flawed.

...

Nowhere in section 109 is the Copyright Office authorized to establish a registration system for ownership rights in the first-sale of online digital media. Moreover, as explained in the Section 104 Report to Congress,

<sup>4</sup> The request for reconsideration was filed on behalf of Vibme by Mr. Driessen in his capacity as attorney for Vibme.



because the transfer of a copy or phonorecord online implicates the reproduction right, the first sale doctrine is generally inapplicable. See, [http://www.copyright.gov/reports/studies/dmca/dmca\\_study.html](http://www.copyright.gov/reports/studies/dmca/dmca_study.html).

In absence of express authorization from Congress, the Copyright Office finds no discretion to consider the matters advanced in your petitions. This decision constitutes final agency action on your requests.

Thereafter, Mr. Driessen filed an application to register his "material objects" with the Copyright Office. In his complaint plaintiff indicates that he "requested that the [Copyright] Office would grant the registration of exclusive first sale distribution rights,<sup>5</sup> with the fair use time-shifting, space-shifting, and place-shifting rights, joined with the transmitting for the private home viewing right from an authorized copy of . . . material objects." Plaintiff requested the Copyright Office to protect the following "media material objects:" "The Dark Side of the Moon (music album CD) – quantity 2," "Short Circuit (motion picture DVD) – quantity 2," and "The Outlaw Josey Wales (motion picture Bluray) – quantity 2." Plaintiff claimed that his company's patented technology helps make these specific copies "fully distinguishable from each other and from any other such authorized copy of the work, of which it is known that there are millions."<sup>6</sup> (emphasis in original). According to plaintiff, he "requested that the [Copyright] Office would determine procedures, policies, and fees for such registration, but was ignored," and, subsequently, was "finally denied a request for rulemaking."

After filing his various petitions and applications at the Copyright Office, plaintiff filed suit in the United States Court of Federal Claims. Defendant responded with a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim. Specifically, defendant claims that this court does not have jurisdiction to consider plaintiff's request for non-monetary requested relief, which is not a claim based on to a money mandating statute. Defendant also argues that plaintiff's claims should be dismissed for failure to state a claim upon which relief can be granted.

<sup>5</sup> Black's Law Dictionary defines the first-sale doctrine as "[t]he rule that the purchaser of a physical copy of a copyrighted work, such as a book or CD, may give or sell that copy to someone else without infringing the copyright owner's exclusive distribution rights. With regard to that physical copy, the copyright owner's distribution right is said to be exhausted. 17 USCA 109(a)." Black's Law Dictionary 711 (9th ed. 2009); see also Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1363 (2013) (discussing the common-law origin of the first sale doctrine).

<sup>6</sup> Plaintiff included the cover page of his patent, as well as a typewritten explanation of all the claims to this court as an exhibit to his response to defendant's motion to dismiss. According to plaintiff, the patent granted on May 7, 2013, US Patent No. 8,438,111, covers a technology that purports to perform "impairment, serialization, and recordation" of physical media copies.

## DISCUSSION

Plaintiff filed his complaint in this court pro se. When determining whether a complaint filed by a pro se plaintiff is sufficient to invoke review by a court, pro se plaintiffs are generally entitled to liberal construction of their pleadings. See Haines v. Kerner, 404 U.S. 519, 520-21 (requiring that allegations contained in a pro se complaint be held to “less stringent standards than formal pleadings drafted by lawyers”), reh’g denied, 405 U.S. 948 (1972); see also Erickson v. Pardus, 551 U.S. 89, 94 (2007); Hughes v. Rowe, 449 U.S. 5, 9-10 (1980); Estelle v. Gamble, 429 U.S. 97, 106 (1976), reh’g denied, 429 U.S. 1066 (1977). Defendant argues, citing Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 82 n.4 (2d Cir. 2001), that plaintiff, who is an attorney, should not be allowed the more lenient pro se status which is typically accorded to a non-attorney, pro se plaintiff. The court notes that plaintiff, although not a member of this court’s bar, is a member of the Utah bar.<sup>7</sup> The court agrees that a pro se plaintiff who is also a licensed attorney should not be accorded the extra protections allowed to one who is not trained in the law, especially in this case because, according to the information on the law firm website, Mr. Driessen “has become a recognized expert in the field of intellectual property.”

It is well established that “subject-matter jurisdiction, because it involves a court’s power to hear a case, can never be forfeited or waived.” Arbaugh v. Y & H Corp., 546 U.S. 500, 514 (2006) (quoting United States v. Cotton, 535 U.S. 625, 630 (2002)). “[F]ederal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press.” Henderson ex rel. Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011); see also Hertz Corp. v. Friend, 559 U.S. 77, 94 (2010) (“Courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it.” (citing Arbaugh v. Y & H Corp., 546 U.S. at 514)); Special Devices, Inc. v. OEA, Inc., 269 F.3d 1340, 1342 (Fed. Cir. 2001) (“[A] court has a duty to inquire into its jurisdiction to hear and decide a case.” (citing Johannsen v. Pay Less Drug Stores N.W., Inc., 918 F.2d 160, 161 (Fed. Cir. 1990))); View Eng’g, Inc. v. Robotic Vision Sys., Inc., 115 F.3d 962, 963 (Fed. Cir. 1997) (“[C]ourts must always look to their jurisdiction, whether the parties raise the issue or not.”). “The objection that a federal court lacks subject-matter jurisdiction . . . may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment.” Arbaugh v. Y & H Corp., 546 U.S. at 506; see also Rick’s Mushroom Serv., Inc. v. United States, 521 F.3d 1338, 1346 (Fed. Cir. 2008) (“[A]ny party may challenge, or the court may raise sua sponte, subject matter jurisdiction at any time.” (citing Arbaugh v. Y & H Corp., 546 U.S. at 506; Folden v. United States, 379 F.3d 1344, 1354 (Fed. Cir.), reh’g and reh’g en banc denied (Fed. Cir. 2004), cert. denied, 545 U.S. 1127 (2005); and Fanning, Phillips & Molnar v. West, 160 F.3d 717, 720 (Fed. Cir. 1998))); Pikulin v. United States, 97 Fed.

<sup>7</sup> It appears that plaintiff was part of a law firm bearing his name, Driessen Law, in Lindon, Utah. See Driessen Law, available at <http://www.driessenlaw.com> (last visited Apr. 24, 2014). According to the information available on the website, however, “Driessen law firm is dissolved” and is “taking no new cases.” See id.

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