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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ROBERT J. LANG, NOBORU MIYAJIMA, MANUEL
SIRGO, NICOLA BANDONI, TOSHIKAZU
KAWASAKI, and JASON KU,

Plaintiffs,

Case No.: 11 CV 8821
(BSJ) (AJP)

-against-

SARAH MORRIS,

Defendant.

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**DEFENDANT'S REPLY MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

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I. PRELIMINARY STATEMENT

Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment ("Pls. Opp. Br.") (Dkt. # 66) fails to come forward with evidence or argument sufficient to establish any genuine issue of law or material fact as to the grounds on which Morris here seeks summary judgment: ownership, timeliness, and fair use. Plaintiffs concede that they have no document of transfer vesting them with legal ownership of copyright for the 13 crease patterns published as part of the book *Origami Design Secrets*, Pls. Opp. Br. at 5, and they offer only conclusory assertions and easily distinguishable authority in their attempt to remedy this glaring failure of proof under the guise of "beneficial ownership." As to timeliness, Plaintiffs ignore the overwhelming majority of cases in this District that apply the injury rule when calculating the statute of limitations for copyright actions, including this District's most recent decision on the subject: an August 4, 2012 ruling by Judge Sweet that applies the injury rule and explicitly declines to follow the *one* contrary Southern District authority on which Plaintiffs rely. Plaintiffs' attempt to salvage their untimely claims through the doctrine of equitable tolling is equally baseless, premised on decisions that flatly contradict the conclusions Plaintiffs seek to draw from them. Finally, Plaintiffs offer an incomplete response to Morris's fair use argument, neglecting even to acknowledge the statutory requirement that the court consider the harm to the Plaintiffs' market – of which there is no evidence here. They offer instead irrelevant digressions on the copyrightability of Plaintiffs' works (which Morris does not contest) and unsupportable allegations of bad faith. Indeed, Plaintiffs' opposition brief seems to have abandoned the law and the facts in its zeal to tar Morris with unfounded *ad hominem* attacks on her honesty and work ethic. These specious attacks should not distract this Court from concluding that, under well-settled legal principles, there are no genuine issues of material fact, and that Morris's motion for

summary judgment should be granted in all respects.

II. ARGUMENT

A. Plaintiffs Lack Standing as to Claims Regarding the Crease Patterns in *Origami Design Secrets*.

1. Plaintiffs are not the legal owners of the *ODS* Patterns.

Plaintiffs concede that “Dr. Lang is not currently in possession of a written transfer agreement validating his prior oral agreement with AK Peters,” Pls. Opp. Br. at 5, and thus Plaintiffs are not legal owners of copyright in any of the crease patterns published in *Origami Design Secrets* (the “*ODS* Patterns”). See 17 U.S.C. § 204 (requiring written transfer of ownership of exclusive rights); Defendant’s Memorandum in Support of Motion for Summary Judgment (“Def. MSJ Br.”) at 5 (Dkt. # 34); Morris Supplemental Memorandum of Law in Support of Motion for Summary Judgment (“Def. Supp. Memo.”) at 1-3 (Dkt. # 63).

2. Plaintiffs are not the beneficial owners of the *ODS* Patterns.

Plaintiffs now belatedly attempt to remedy their obvious lack of standing for the *ODS* patterns by claiming “beneficial ownership” of those designs.¹ As set forth in Morris’s Supplementary Memorandum of Law in Support of Motion for Summary Judgment, at 4-5 this attempt is untimely and ill-considered. It relies entirely on *Cortner v. Israel*, 732 F.2d 267 (2d

¹ Plaintiffs describe their new standing argument as having taken a “circuitous route” to arrive before this Court (Pls. Opp. Br. at 3). This is euphemism disguised as understatement. Plaintiffs filed a Complaint, an Amended Complaint, and conducted extensive discovery under a representation that they were legal owners of the copyright in the *ODS* patterns. When they realized they were not, they submitted an Amended Complaint to this Court purporting to attach a transfer document they had obtained from Taylor & Francis at the eleventh hour, (Dkt. # 27 at Ex. A) but in fact the document did not exist at that time (*id.* at Ex. C). When the document did eventually emerge, *after* the close of discovery, Plaintiffs forced Morris to move to re-open discovery to inquire about it. (Minute entry, July 6, 2012). When Morris did so, and discovered that the document did not in fact transfer the necessary rights to convey standing in this case, Plaintiffs effectively said “never mind” and contacted the undersigned *after summary judgment briefs had been filed* to change their theory of standing yet again. Jacobson Dec., Ex. E (Dkt. # 72). For the reasons set forth in Def. MSJ Br. at 4, this argument should be rejected as untimely.

Cir. 1984) and its progeny, but the discussion of the issue in *Cortner* was transparently *dicta* because the claimant in that case was found to have *legal* title to the works in question.

Accordingly, Judge Winter issued an unusually pointed concurrence in *Cortner*, stating:

I strongly object to the inclusion in the opinion of the discussion of whether these particular plaintiffs have a sufficient beneficial interest in the original copyright to allow them to bring infringement actions. The discussion is entirely unnecessary to the ruling on the judgment and is thus gratuitous *dicta*. To purport to rule on this question is particularly inappropriate since this issue is hotly contested and has no governing precedent in this court. It is also a complex issue of some importance, involving the interrelationship of two pieces of legislation enacted some sixty-seven years apart and governing the rights of many authors of intellectual property. I by no means suggest that Judge Mansfield's decision reaches an erroneous conclusion, but, should the issue arise again, I shall not regard myself as bound by anything said in the present case.²

Every case cited by Plaintiffs with respect to beneficial ownership rests on this explicitly inconclusive foundation, with no other “governing precedent” in this or any other Circuit. The Plaintiffs’ other cited cases from the *Cortner* line are equally inapposite. *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69 (S.D.N.Y. 1982), engaged in no analysis of the issue and involved a songwriter (Barry Manilow) who was not merely a royalty recipient but the *sole shareholder* of the corporate entity involved; Plaintiff Lang has no such connection with either AK Peters or Taylor & Francis. The remarks in *Silberman v. Innovation Luggage, Inc.*, 2003 WL 1787123 (S.D.N.Y. 2003), are, like *Cortner* itself, *dicta* because the plaintiff was held to be the legal owner of copyright. *Author’s Guild v. Google, Inc.*, _ F.R.D. _, 2012 WL 1951790 (S.D.N.Y. 2012), involved a different issue, *i.e.*, the associational standing of a group to sue on behalf of its members, and did no more than repeat the *Cortner dicta* in passing.

The cases cited by Morris, on the other hand, *Manning v. Miller Music Corp.*, 174 F. Supp. 192 (S.D.N.Y. 1959), and *Hearn v. Meyer*, 664 F. Supp. 832 (S.D.N.Y. 1987), actually analyze the issue and make clear that the mere right to receive royalties does not *per se* give rise

² *Id.* at 272-273.

to beneficial ownership. Plaintiffs' criticism of *Manning* as an outdated, pre-1976 Act case is unfounded because the statutory recognition of beneficial ownership in the 1976 Act was intended as a continuation of prior law, see *Cortner* at 271 (1976 codification "follows the law established by the courts under the 1909 Act") (quoting 3 *Nimmer on Copyright* 12.02). *Hearn*, citing Judge Winter's concurrence in *Cortner*, emphasizes that courts must look to the "full array" of rights retained by an author, not just to the right to receive royalties, and stresses that beneficial ownership only results from a "close and rather unusual relationship between" the legal and beneficial owner. *Hearn*, 664 F. Supp. at 843.

Moreover, it is undisputed that Plaintiff Lang asked for, *and was refused*, the right to sue for infringement when he approached the legal owner, Taylor & Francis, for a written transfer in May 2012. *See* Plaintiffs' Response to Defendant Morris's Statement of Undisputed Facts at 18. (Dkt. # 69). Plaintiffs cite no case in which a would-be plaintiff has ever had standing to sue where the legal owner has specifically declined to grant standing when requested. Plaintiffs here are flagrantly asking this Court to re-write Dr. Lang's attorney-negotiated agreement with the legal owner, Taylor & Francis, to give him rights that the legal owner consciously chose not to convey. There is no precedent whatsoever authorizing the Court to do so.

B. Twenty of Plaintiffs' Claims Are Time-Barred Under 17 U.S.C. § 507(b).

1. The injury rule applies.

Plaintiffs mistakenly claim that, when it comes to calculating the statute of limitations in copyright infringement actions, the injury rule "seems to be abandoned both in the Southern District and generally." Pls. Opp. Br. at 10. This argument is utterly belied by the Southern District's most recent decision on the point, Judge Sweet's August 5, 2012 ruling in *Bill Diodato Photography, LLC. v. Avon Products, Inc.*, 2012 U.S. Dist. LEXIS 110988 (S.D.N.Y. Aug. 5, 2012). In *Bill Diodato*, Judge Sweet considered *and*

rejected the precise argument made by Plaintiffs' here, *i.e.*, that the injury rule is no longer applied in this District in light of the 2011 decision in *Psihoyos v. John Wiley & Sons, Inc.*, 2011 U.S. Dist. LEXIS 120204 (S.D.N.Y. Oct. 14, 2011). Even as he recognized the lone contrary decision in *Psihoyos*, Judge Sweet last month applied the injury rule, recognizing "strong precedent" and the overwhelming weight of authority in the Southern District:

Although neither the Supreme Court nor the Second Circuit has addressed this particular question, "the majority of courts in this Circuit have most recently concluded that a copyright claim accrues at the time of infringement, rather than at the time of discovery." *Harris v. Simon & Schuster, Inc.*, 646 F. Supp. 2d 622, 630 (S.D.N.Y. 2009); *see also Belair v. MGA Entm't, Inc.*, 831 F. Supp. 2d 687, 694 (S.D.N.Y. 2011); *Broadvision Inc. v. Gen. Elec. Co.*, No. 08 Civ. 1478 (WHP), 2009 U.S. Dist. LEXIS 45862, 2009 WL 1392059, at *6 (S.D.N.Y. May 5, 2009); *Med. Educ. Dev. Servs. Inc. v. Reed Elsevier Grp., PLC*, No. 05 Civ. 8665 (GEL), 2008 U.S. Dist. LEXIS 76899, 2008 WL 4449412, at *10 (S.D.N.Y. Sept. 30, 2008); *Vasquez v. Torres-Negron*, No. 06 Civ. 619 (CM), 2007 U.S. Dist. LEXIS 57872, 2007 WL 2244784, at *7 (S.D.N.Y. July 11, 2007); *Roberts v. Keith*, No. 04 Civ. 10079 (CSH), 2006 U.S. Dist. LEXIS 8959, 2006 WL 547252, at *3 (S.D.N.Y. Mar. 7, 2006); *Chivalry Film Prods v. NBC Universal, Inc.*, No. 05 Civ. 5627 (GEL), 2006 U.S. Dist. LEXIS 1177, 2006 WL 89944, at *1 (S.D.N.Y. Jan. 11, 2006). Given this District's strong precedent establishing the statute of limitations in copyright infringement actions to accrue at the point of infringement, rather than the point of discovery, this Court will apply the "injury rule" in analyzing the timeliness of the Complaint's copyright infringement cause of action.

Bill Diodato, supra, at *8-9.

Moreover, Plaintiffs' contrary *Psihoyos* decision is based on an errant and unduly narrow reading of the Supreme Court's decision in *TRW v. Andrews*, 534 U.S. 19 (2001). In *TRW*, the Supreme Court held that the "discovery rule" was only to be applied in cases involving fraud, concealment or when "the cry for [a discovery rule] is loudest," as in latent disease and medical malpractice cases. 534 U.S. at 27. Otherwise, the text, structure and history of the relevant statute should determine whether the injury or discovery rule should apply. *Psihoyos* engaged in no analysis or discussion of the text, structure or history of the Copyright Act; it merely applied the discovery rule on the mistaken belief that such rule was the default, to be applied automatically

unless the statute expressly called for an injury rule. As this Court recognized in *Auscape International v. National Geographic Society*, 409 F. Supp. 2d 235, 247-248 (S.D.N.Y. 2004) (Kaplan, J.), however, *TRW* establishes no such default preference for a discovery rule, and the legislative history of the Copyright Act clearly demonstrates that an injury rule was contemplated by Congress when it enacted the statute.

Accordingly, the injury rule applies in this action and all claims that accrued more than three years prior to the commencement of the action, *i.e.*, before December 5, 2008, are time-barred. As shown on Exhibit A to the Declaration of Julie Ahrens dated September 10, 2012, (Dkt. # 70) the result is that 20 of the 25 infringement claims alleged in the First Amended Complaint are precluded under 17 U.S.C. § 507(b).³ Where defendants meet “the initial burden of showing an absence of infringement during the limitations period” plaintiffs may avoid summary judgment on limitations grounds “only by coming forward with admissible evidence sufficient to raise a genuine issue of fact.” *Auscape*, 409 F. Supp. 2d at 242. Plaintiffs have failed to present such evidence and their time-barred claims must fail.⁴

³ The record shows that the sales of certain Morris works entitled “Dragon [Origami]” and “Calypste Anna [Origami],” alleged in Section IV of the Plaintiffs’ brief, did not occur. As Morris explained in a letter to Plaintiffs’ counsel dated Aug. 21, 2012 (Jacobson Dec., Ex. Y (Dkt. # 72)) and further sets forth here in her accompanying Supplemental Declaration, the Dragon work at issue was sold but the transaction was later cancelled, and the 122 cm x 122 cm Calypste Anna was commissioned but was never made. Accordingly, no sales of these works have taken place.

⁴ Plaintiffs, at 7-9 of their brief, attempt to raise factual disputes concerning the exhibition and sale dates of the Morris works “Angel [Origami]”, “Rockhopper [Origami]” and “Rhino Beetle [Origami]”. As noted in Def. MSJ Opp. Br. at 4 (Dkt. # 67), Morris does not contend that Plaintiffs’ claims concerning “Rockhopper [Origami]” (Claim 20) or “Angel [Origami]” (Claim 25) are time-barred. Plaintiffs’ claim regarding the work “Rhino Beetle [Origami]” is premised on a factual assertion (concerning a post-2008 loan of the work) that Plaintiffs have not set forth in their Rule 56.1 statement. It is undisputed that the sale of this work occurred in August 2008, and any claim regarding that sale is therefore time-barred. Further, Defendants object to any consideration of Exhibit J of the Jacobson declaration (Dkt. # 72), which contains attorney-client

2. The evidence establishes no basis for tolling.

The court should reject Plaintiffs' arguments seeking to toll the statute of limitations. There is no basis for tolling in this case because (a) Morris at no time engaged in fraudulent concealment of her actions, and (b) Plaintiffs' unsuccessful and improper attempt to pursue their claims in California prior to bringing this case in New York was a self-inflicted delay, caused by no extraordinary circumstances beyond Plaintiffs' control. *See* Def. MSJ Br. at 15-16. As to fraudulent concealment, Plaintiffs' own cited authority, *Peck v. United States*, 470 F. Supp. 1003, 1019 (S.D.N.Y. 1979), establishes that "mere failure to disclose the existence of a cause of action does not constitute concealment" (collecting cases).

There is absolutely no basis in the record for Plaintiffs' repeated assertion that they were misled in any way by the use of the words "found" and "traditional" in press releases put out by Morris's galleries (press releases they admit they never even saw until after they became aware of the alleged infringement). *See* Miyajima Tr. 72:22-73:3; Ku Tr. 125:11-14; Lang Tr. 276:5-277:19. All the evidence compels the opposite conclusion. In their efforts to show bad faith where there is none, Plaintiffs resort to inventing a new meaning for the term "found" that has no basis in the record and is inconsistent with Morris's testimony. *Compare* Pls. Opp. Br. at 15 (stating, without citation, that found means "ownerless") *with* Morris Tr. at 136:24-137:16 (explaining that "found" has a well-established meaning in the art world). Indeed, Plaintiffs have *themselves* admitted that Morris's "Origami" paintings can fairly be described as being based on "found" crease patterns." *See* Pls. MSJ Br. at 21. There is simply no evidence of intent to deceive.

privileged communication that was inadvertently produced in discovery and that the undersigned identified as such under Rule 26(b) (5) (B) in a letter on June 13, 2012, attached as Exhibit A to the accompanying Second Supplemental Declaration of Robert W. Clarida. Plaintiffs' disregard of this objection is regrettable.

As to the California action, Plaintiffs again rely on a lone outlier in support of their position, *L.A. Printex Industries, Inc. v. At Last Sportswear, Inc.*, 2009 WL 1285923 (S.D.N.Y. 2009), which is inconsistent with the other cases on which it purports to rely. *L.A. Printex* is correct that equitable tolling is left to the “sound discretion” of the court, but that discretion is not unconstrained. As Morris demonstrated, Def. MSJ Br. at 16 n.7, equitable tolling is “applied only in rare and exceptional circumstances,” *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000) (internal quotation omitted), and is only proper where the plaintiff can “demonstrate a causal relationship between the extraordinary circumstances on which the claim for equitable tolling rests and the lateness of his filing, a demonstration that cannot be made if the petitioner, acting with reasonable diligence, *could* have filed on time notwithstanding the extraordinary circumstances.” *Valverde v. Stinson*, 224 F.3d 129, 134 (2d Cir. 2000) (emphasis added). As Plaintiffs’ own cited authority of *Veltri v. Building Serv. 32B-J Pension Fund*, 393 F.3d 318, 322 (2d Cir. 2004) observes, tolling is only appropriate when the plaintiff is “prevented” from timely filing. *See also Abbas v. Dixon*, 480 F.3d 636, 642 (2d Cir. 2007). Therefore, absent some *external* obstacle, the “American common law rule is that generally the filing of a prior judicial action does not toll the statute of limitations.” *Rodriguez-Garcia v. Caguas*, 354 F.3d 91, 93 (1st Cir. 2004). Plaintiffs have not come forward with evidence to show any such *external* obstacle to filing a timely action in a proper forum.⁵

⁵ *L.A. Printex*, while it cites to *Veltri* and *Abbas*, does not even discuss the requirement in these Second Circuit cases that the plaintiff be “prevented” from timely filing. It is undisputed that the only obstacles to timely filing here were the tactical decision of Plaintiffs’ counsel to bring the claim in an improper forum in California, and counsel’s choice not to transfer the case to New York once the absence of personal jurisdiction became apparent. *Compare Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 467 (1962) (tolling appropriate to preserve earlier filing date if plaintiff transfers action). These voluntary, tactical decisions by Plaintiffs’ counsel are not a proper basis for tolling. *Link v. Wabash R.R. Co.*, 370 U.S. 626, 633-34 (1962) (“Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the

C. Morris's Works Are Fair Use.

Morris demonstrated in her opening brief that each fair use factor favors her and therefore her works are non-infringing as a matter of law. *See* 17 U.S.C. § 107; Def. MSJ Br. at 17-25.

1. Plaintiffs misstate the law and ignore the facts regarding transformation.

Morris provided detailed evidence establishing the transformative meaning of her works and showing that her work caused Plaintiffs no market harm. *See* Def. MSJ Br. at 6-10, 17-25. In response, Plaintiffs misstate the law regarding transformation and argue that a different purpose cannot establish transformation. Pls. Opp. Br. at 21. Plaintiffs' contention flatly ignores the Supreme Court and Second Circuit's teachings regarding the inquiry under the first factor: "The central purpose of this investigation is to see ... whether the new work ... adds something new, with a further purpose or different character, altering the first with new expression, meaning or message" *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (internal quotations omitted); *Blanch v. Koons*, 467 F.3d 244, 255 (2d Cir. 2006) ("The question is whether [the defendant] had a genuine creative rationale for borrowing [the plaintiff's] image."). Plaintiffs instead rely on an entirely inapposite case, *Infinity Broad. Corp. v. Kirkwood*, 150 F.3d 104 (2d Cir. 1998), which involved a defendant who sold wholesale retransmissions of plaintiff's "unaltered" radio broadcasts. *Id.* at 108. There the court found a "total absence of transformativeness in [defendant's] acts of retransmission." *Id.* at 109.

No such facts exist here. The extensive record evidence establishes Morris created new works of art with new meaning not found in Plaintiffs' crease patterns. Morris's works reference origami crease patterns as a symbol of a change and a potentially oppressive future and comment on the difficulty, or even impossibility, of the task of origami. *See* Def. MSJ Br. at 6-10, 17-20. Plaintiffs offer nothing to contradict Morris's explanation of her creative rationale.

acts or omissions of his freely selected agent"). Because *L.A. Printex* is inconsistent with this Supreme Court precedent, and the precedent of *Veltri* and *Abbas* in the Second Circuit, the higher authorities control.

The fact that both Morris’s paintings and the crease patterns can potentially be “visually experienced” and “appreciated by the viewer” (Pls. Opp. Br. at 21) does not rebut Morris’s showing of transformation. Any work in a visual medium is likely to be intended, in part, to have a pleasing appearance—but that alone cannot preclude fair use. Such an argument would defeat fair use in every case. *See, e.g., Blanch*, 467 F.3d at 244 (Koons’s collage and Blanch’s photograph were both visually experienced and appreciated by viewers); *Video-Cinema Films, Inc. v. CNN, Inc.*, 2001 WL 1518264 (S.D.N.Y., Nov. 28, 2001) (BSJ) (both the original and the accused works were intended to be appreciated by viewers); *Campbell*, 510 U.S. at 569 (both songs were created for listeners’ appreciation). The relevant question is whether the new work uses the original as raw material “in the creation of new information, new aesthetics, new insights and understandings.” *Blanch*, 467 F.3d at 252-53 (internal quotation omitted). None of Plaintiffs’ evidence rebuts Morris’s showing of transformation under this standard.

2. Plaintiffs concede lack of market harm.

Plaintiffs’ opposition brief wholly ignores the important fourth factor—effect on the market. As Morris explained in her opening brief, this factor overwhelmingly favors her because all three Plaintiffs admitted that they have suffered no market harm. *See* Lang Tr. 267:4-23; Ku Tr. 130:8-22; 134:5-15; Miyajima Tr. 79:16-18; 81:4-21; Def. MSJ Br. at 22-25. Plaintiffs’ failure to offer any evidence of market harm is fatal to their case. Where “the allegedly infringing use is not in competition with the copyrighted use, the fair use defense is ordinarily sustained.” *Video-Cinema Films*, 2001 WL 1518264 at *8 (internal citation omitted).

III. CONCLUSION

Based on the above reasons and authorities, Defendant Sarah Morris respectfully requests that Defendant’s motion for summary judgment be granted in all respects.

Dated: September 24, 2012

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By: _____ /s/

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