

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

<hr/>		)	
WORLD WIDE VIDEO, LLC,		)	
		)	
	Plaintiff,	)	CIVIL ACTION
		)	NO. 08 CV 10391-RWZ
v.		)	
		)	
ANTHONY H. PAGOLA and YOKO ONO LENNON,		)	<b><u>ORAL ARGUMENT</u></b>
		)	<b><u>REQUESTED</u></b>
	Defendants.	)	
		)	
<hr/>		)	

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT ON THE  
PLEADINGS DISMISSING COUNTS II AND IV OF THE COMPLAINT  
BY DEFENDANT YOKO ONO LENNON**

Defendant Yoko Ono Lennon (the “defendant” or “Mrs. Lennon”) respectfully submits this memorandum of law in support of her motion for judgment on the pleadings dismissing the only two counts asserted against her in plaintiff’s complaint: Count II (for copyright infringement) and Count IV (for conversion). Both counts fail as a matter of law for the following reasons:

First, even accepting as true the allegations of plaintiff’s complaint (for purposes of this motion only), the complaint fails to allege any act of infringement by Mrs. Lennon, an essential element of a copyright claim. Plaintiff does not allege that Mrs. Lennon copied, displayed or distributed the work at issue (nor could the complaint so allege, as plaintiff well knows). The only conduct plaintiff alleges—that Mrs. Lennon received an assignment of rights in the work, recorded her interest and asserted her lawful right of ownership in the work—fails as a matter of law to constitute an “infringement.”

Second, even if Mrs. Lennon’s alleged conduct did amount to an infringement, each of plaintiff’s claims still would be barred as a matter of law by the Copyright Act’s three year statute of limitations. According to plaintiff’s complaint, Mrs. Lennon obtained her interest in

the work on May 17, 2002 and, shortly thereafter, recorded her interest in the Copyright Office on June 14, 2002, nearly six years before this action was filed, rendering time-barred any claim based on those events. Moreover, because—as plaintiff admits—Mrs. Lennon recorded her interest in the work on June 14, 2002, thereby placing the world on notice of her ownership claim, any competing claim of ownership on plaintiff’s part became time-barred no later than June 15, 2005, precluding plaintiff from recovery on any claim of copyright ownership or infringement.

Third, for similar reasons, plaintiff’s state law conversion claim also is time-barred.

### **BACKGROUND**

#### **A. The Lennon Videotapes And The Copyright Registration Of “Portrait.”**

The defendant, Yoko Ono Lennon, is the widow of John Lennon and is a musician, author and artist. Compl. ¶ 7. Her husband, the late John Lennon, also was a musician and a member of the Beatles. Id.

In February 1970, over a period of four days, Anthony Cox (“Cox”), Mrs. Lennon’s ex-husband, was permitted to shoot four days of video footage of Mrs. Lennon and John Lennon. See id. The original footage comprised 24 original reel-to-reel videotapes, as well as ten broadcast quality beta copies (collectively, the “Videotapes”). See id. ¶¶ 7, 9, 10.<sup>1</sup>

On August 9, 1983, Cox registered with the United States Copyright Office under PAU-552-133 twenty-four (24) minutes of the Videotapes, entitled “Portrait,” and described as “An

---

<sup>1</sup> Press reports indicate that the film that plaintiff seeks to publicly display shows “Lennon and Ono playing with Julian Lennon and Kyoko Cox, children from previous marriages”; suggests that John Lennon and Mrs. Lennon participated in creating the footage (“‘Everything was intentionally done. They wanted it out of focus . . . This is what John Lennon wanted,’ said [Ray] Thomas”); and shows John Lennon “composing ‘Remember,’ he’s hunched over an upright piano banging out chords and singing near-complete lyrics. Cox hands the camera to Yoko and plays air piano next to [John] Lennon, who isn’t fazed. The Beatle vamps for the camera and finishes the song.” Steven Rosenberg, “Film Gets Beatle Back To Where He Once Belonged,” Boston Globe, March 5, 2007 (copy attached at Affidavit of Jonathan M. Albano (“Albano Aff.”), Ex. G).

intimate look into the everyday lifestyle of John Lennon and Yoko Ono.” Compl., Ex. 1.<sup>2</sup> Plaintiff does not allege that any other copyrights to the Videotapes were registered with the United States Copyright Office.

On or about January 6, 1996, Cox executed a “Bill of Sale” to Lexon, Inc. (“Lexon”), a corporation controlled by Cox, with respect to his rights in the Videotapes and his copyright in Portrait. Id. ¶ 9 & Ex. 2.

**B. Cox Transfers His Limited Rights To World Wide Video, LLC.**

On or about January 30, 2000, Lexon (as seller) and John Fallon (“Fallon”) and Robert Grenier, Jr. (“Grenier”) (as buyers) entered into an Agreement for the Sale of Videotapes, a Bill of Sale for Rights and an Assignment of Copyright with respect to the Videotapes, Portrait and any rights therein owned by Lexon.<sup>3</sup> Compl. ¶ 10 & Ex. 3. On March 16, 2000, Fallon and Grenier assigned these interests to plaintiff World Wide Video, LLC (“WWV”). Id. ¶ 10 & Ex. 4. The complaint does not allege that WWV, Fallon or Grenier recorded the assignment with the United States Copyright Office.

---

<sup>2</sup> Although plaintiff alleges in paragraph 8 of its complaint that Cox “registered the copyright to the videotapes together with the documentary motion picture entitled ‘Portrait,’” Exhibit 1 to the complaint establishes that only the copyright in one videocassette (VHS) (24 min.) entitled “Portrait” was registered by Cox with the Copyright Office. Compl., Ex. 1. See also Catalog description for Portrait, United States Copyright Office’s on-line searchable database, available at [www.copyright.gov](http://www.copyright.gov).

<sup>3</sup> In the Agreement for Sale of Videotapes, attached to the Complaint at Exhibit 3, the following language in § 2 is crossed out with “wrong” written next to it (without any initials indicating any mutual assent of the parties to that deletion):

The Videotapes are sold to Buyer as collectible items only, and no copyright or other rights to or for the Videotapes or any part of their content, including reproduction, broadcast, publication or performance rights, is included in this sale. Seller expressly reserves the right to retain and use copies of the Videotapes.

Although not necessary for resolution of this motion for judgment on the pleadings, Cox’s copy of the Agreement has no such alteration, and Mrs. Lennon contends that Mr. Cox had no right to publicly display or commercially exploit the Videotapes or Portrait, thus precluding any such rights from passing to any subsequent purchaser such as plaintiff. See Counterclaim, ¶¶ 10-11, 16.

Thereafter, plaintiff alleges, a man named John Messina stole the Videotapes. Id. ¶ 12. Plaintiff sued Messina in Middlesex Superior Court for conversion and other claims. See id. ¶ 13 (A copy of the Complaint and Docket in *World Wide Video v. Messina*, Docket No. MICV 2000-2578, is attached hereto at Albano Aff., Exs. A and B.) In April 2001, plaintiff entered into a settlement agreement in which Messina agreed to return a set of copies of the Videotapes and “use his best efforts to obtain the original set of 24 tapes.” Compl. ¶ 15.

**C. World Wide Video, LLC Enters Into An Agreement To Find A Buyer For The Videotapes And Rights It Purchased.**

Plaintiff alleges that in June 2001 defendant Anthony Pagola (“Pagola”) approached Fallon and Grenier on behalf of Magellen Trading Company (“Magellen”), a Hong Kong corporation. Compl. ¶ 16. According to plaintiff, Pagola threatened to destroy the Videotapes unless WWV entered into an agreement with Magellen “for the purpose of finding a third party to purchase the tapes.” Id.

On June 12, 2001, WWV and Magellen entered into an agreement granting Magellen a six month period to find a party to purchase the Videotapes. Id. ¶ 17. The WWV-Magellen agreement provided that its subject was “approximately 9.75 hours of video tape of John Lennon shot by Anthony Cox in London in 1970,” and Cox’s related copyrights, and further provided that WWV desired to find a third party to purchase the Videotapes and rights, and that Magellen was authorized to seek out and find such a purchaser. See WWV-Magellen agreement, attached hereto at Albano Aff., Ex. C & Compl. ¶ 17. WWV, Magellen and Pagola subsequently agreed to extend the period in which Magellen had to find a buyer until June 1, 2002, and agreed to transfer Magellen’s rights thereunder to a company called Inner Vision, Inc. Compl. ¶ 19; Second Amendment to Agreement, attached hereto at Albano Aff., Ex. D.

**D. In June 2002, Mrs. Lennon Buys The Videotapes And Rights And Records This Transfer With The Copyright Office.**

On or about May 17, 2002, Mrs. Lennon entered into an Asset Purchase Agreement with Pagola, Inner Vision, Inc. and Magellen pursuant to which she purchased, inter alia, all rights, title and interest in the Videotapes and Portrait previously owned by Grenier, Fallon and WWV

for the sum of \$300,000 (Three Hundred Thousand Dollars). Compl. ¶¶ 22, 31. Exhibit A to the Agreement contained signatures that were verified by a notary (and which plaintiff now contends were forged). Id. ¶ 25. A copy of the Asset Purchase Agreement is attached hereto at Albano Aff., Ex. E.

On or about June 14, 2002, Mrs. Lennon, by her counsel, filed with the United States Copyright Office the Copyright Assignments and recordation fees establishing her ownership of the registered copyright of Portrait, and the transfer to her all rights, title and interest in the Videotapes and Portrait previously owned by WWV. See Compl. ¶¶ 22, 34. A true copy of the instrument is attached hereto at Albano Aff., Ex. F.

#### **E. The 2005 Attempted Public Display In New York.**

In April 2005, WWV alleges that it attempted to exhibit portions of the Videotapes—a film called “3 Days in the Life”—at The Global Entertainment Media Summit in New York for a showing on or about May 14, 2005. See Compl. ¶ 37.

On April 13, 2005, after Mrs. Lennon learned of this attempted display, her counsel sent an email to Mr. Steve Zuckerman stating that the “intended use of the Film could constitute willful infringement of our client’s copyright which infringement impose substantial damages and the imposition of attorney’s fees.” Id. ¶¶ 38, 39.

### **ARGUMENT**

#### **I. STANDARD OF REVIEW.**

“A motion for judgment on the pleadings is treated much like a Rule 12(b)(6) motion to dismiss.” Perez-Acevedo v. Rivero-Cubano, \_\_\_ F.3d \_\_\_, 2008 WL 650665, at \*1 (1st Cir. Mar. 12, 2008), citing Curran v. Cousins, 509 F.3d 36, 43-44 (1st Cir. 2007). The First Circuit has held that “to survive a Rule 12(b)(6) motion (and, by extension, a Rule 12(c) motion) a complaint must contain factual allegations that ‘raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true. . . .’” Id., quoting Bell Atlantic v. Twombly, \_\_\_ U.S. \_\_\_, 127 S.Ct. 1955, 1965 (2007) (internal citation omitted). Thus, to survive a motion to dismiss under Rule 12(b)(6) (or under Rule 12(c)), “a complaint must

allege ‘a plausible entitlement to relief.’” Rodriquez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92, 95 (1st Cir. 2007), quoting Bell Atlantic Corp., 127 S. Ct. at 1967.

On a Rule 12(c) motion, the Court may consider “‘documents the authenticity of which are not disputed by the parties; . . . documents central to plaintiffs’ claim; [and] documents sufficiently referred to in the complaint,’” including documents referenced to or attached to a defendant’s answer. Curran, 509 F.3d at 44 & n.5, quoting Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993); Beddall v. State Street Bank & Trust Co., 137 F.3d 12, 17 (1st Cir. 1998) (“When, as now, a complaint’s factual allegations are expressly linked to—and admittedly dependent upon—a document [offered by the movant] (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it . . .”).

Additionally, when deciding a motion based on an affirmative defense, the Court may consider matters outside the pleadings. See, e.g., Greene v. Rhode Island, 398 F.3d 45, 48-49 (1st Cir. 2005); In re Colonial Mortgage Bankers Corp., 324 F.3d 12, 16 (1st Cir. 2003). Two requirements must be satisfied: “the facts that establish the defense must be definitively ascertainable from the allegations of the complaint” and “review of the complaint, together with any other documents appropriately considered under [Fed. R. Civ. P. 12(c)], must ‘leave no doubt’ that the plaintiff’s action is barred by the asserted defense.” Id., citing Blackstone Realty L.L.C. v. FDIC, 244 F.3d 193, 197 (1st Cir. 2001).

## **II. THE COMPLAINT FAILS TO STATE A CLAIM FOR COPYRIGHT INFRINGEMENT.**

### **A. The Elements Of A Copyright Infringement Claim.**

Under 17 U.S.C. § 501(a), a plaintiff in a copyright infringement case bears the burden of proving “‘(1) ownership of a valid copyright, and (2) [unauthorized] copying of constituent elements of the work that are original’”, *i.e.*, violation of one of the exclusive rights enumerated in 17 U.S.C. § 106. Saenger Org., Inc. v. Nationwide Ins. Licensing Assoc., Inc., 119 F.3d 55, 59 (1st Cir. 1997), quoting Lotus Dev. Corp. v. Borland Int’l, Inc., 49 F.3d 807, 813 (1st Cir. 1995), aff’d by an equally divided court, 516 U.S. 233 (1996), reh’g denied, 516 U.S. 1167

(1996). See also Am. Jur. Copyright § 208 (“Infringement of copyright is the violation by anyone of any of the exclusive rights of the copyright owner as set forth by statute.”).

The exclusive rights set forth in the Copyright Act are:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

17 U.S.C. § 106 (emphasis added).

**B. The Complaint Does Not Allege That Mrs. Lennon Engaged In Any Infringing Act.**

Count II of the complaint alleges that Mrs. Lennon “infringed on [WWV’s] copyright rights” by:

(1) “[o]n or about May 17, 2002,” “purchasing a copyright that was not subject to the first sale by the copyright holder, World Wide Video,” Compl. ¶ 48;

(2) “[o]n or about June 2, 2002,” “recording a Certificate of Recordation asserting rights in World Wide Video’s copyright,” Compl. ¶ 49; and

(3) “[o]n or about April 13, 2005,” “seeking to enjoin World Wide Video’s lawful usage of its copyright rights” by sending a cease and desist letter. Compl. ¶¶ 50, 38, 39.

Even assuming *arguendo* that WWV was the lawful owner of the copyrights in the Videotapes and Portrait on the date of each of these alleged acts (which it was not), none of these alleged acts—purchasing or recording a copyright interest or sending a cease and desist letter—satisfies the requirements of an infringing act under § 501(a) and § 106.

“Infringement depends upon whether an infringing act, such as copying or performing, has occurred.” Latin Am. Music Co., Inc. v. The Archdiocese of San Juan of the Roman Catholic & Apostolic Church, 499 F.3d 32, 46 (1st Cir. 2007), cert. denied, 128 S.Ct. 1232 (2008), citing Venegas-Hernandez v. Asociacion de Compositores y Editores de Musica Latinoamericana (ACEMLA), 424 F.3d 50, 58-59 (1st Cir. 2005); see also CMM Cable Rep, Inc. v. Ocean Coast Prop., Inc., 97 F.3d 1504, 1513 (1st Cir. 1996), quoting Lotus Dev., 49 F.3d at 813 (a plaintiff “must first prove that the alleged infringer copied plaintiff’s copyrighted work as a factual matter”).

In Venegas-Hernandez, for example, the First Circuit held that no infringement occurred when a music publisher gave an unauthorized grant of a license to a third party to perform or copy a copyrighted song, but the plaintiff failed to prove that “the third party ever undertook an infringing act (for example, by performing or recording a copyrighted song).” 424 F.3d at 57; id. at 57-59 (Section 106’s language, affording the copyright owner “the exclusive rights to do and to authorize” certain acts, was meant to include abettors to acts of copyright infringement within the Act’s purview, not to create liability where no infringing act had in fact occurred). “[M]ost (perhaps all) courts that have considered the question have taken the view that a listed infringing act (beyond authorization) is required for a claim.” Id. at 57 (citation omitted); see also 3 Nimmer on Copyright, § 12.04[D][1] (“culpable participation in an infringement” limited “to those instances when such infringement has in fact occurred”).

Here, Mrs. Lennon is not alleged to have copied, made a derivative work from, distributed or publicly displayed or performed any portion of the Videotapes. Nor is she alleged to have “authorized” anyone else, who then in fact did so. Applying the plain meaning of the Copyright Act, plaintiff has not alleged that Mrs. Lennon has engaged in any of the “exclusive rights” under § 106 that would constitute a basis for copyright infringement under § 501(a). See Latin Am. Music Co., 499 F.3d at 46; Venegas-Hernandez, 424 F.3d at 58-59. Thus, the complaint fails to state any plausible entitlement for relief for copyright infringement against Mrs. Lennon and Count II should be dismissed.

This result is consistent with strong public policy interests underlying the Copyright Act. The explicit purpose of the Copyright Office’s extensive recordation system is to provide notice to the world—and “to protect licensees, assignees and/or bona fide purchasers for consideration by providing to them the true identity of the copyright owner, to enable such persons seeking permission to use a copyrighted work to contact the proper party.” Northern Songs, Ltd. v. Distinguished Prod., Inc., 581 F. Supp. 638, 640-41 (S.D.N.Y. 1984); see also 17 U.S.C. § 205. If transferring and recording a copyright interest by itself created liability for infringement, the statutory scheme of encouraging notice to the world of the ownership of a copyright would be turned on its head. See 17 U.S.C. § 205. Mrs. Lennon’s conduct in recording the transfer was consistent with the Copyright Act’s purpose, not an act of infringement.

Similarly, as in Latin Am. Music Co., plaintiff “ha[s] not cited authority to show that . . . threatening litigation [is an] infringing action[] under § 106.” 499 F.3d at 46-47. Any rule that “the dispatch of notice-of-infringement letters” is an infringing act would create both “a chilling effect on assertion of legal rights by holders of copyrights, patents, and trademarks,” Starline Optical Corp. v. Caldwell, 598 F. Supp. 1023, 1027 (D.N.J. 1984), and would result “in ‘blitzkrieg’ litigation, where suits would be filed without prior warning or attempt to settle suits . . .” Database Am., Inc. v. Bellsouth Adver. & Publ’g Corp., 825 F. Supp. 1195, 1213 n.30 (D.N.J. 1993) (declining to find personal jurisdiction based on cease and desist letter because to do so would discourage their use to resolve disputes), reconsideration denied, 825 F. Supp. 1216 (1993); cf. Starline, 598 F. Supp. at 1027 (“While plaintiffs here assert that defendant’s letters threaten suit, one may also regard such letters as attempting to produce out-of-court solutions.”). In short, nothing supports the radical conclusion that informing someone of a potential infringement prior to bringing suit is itself an infringement.<sup>4</sup>

---

<sup>4</sup> Exposure to liability—and the Copyright Act provides for awards of statutory damages and attorneys’ fees—for asserting one’s legal rights would be particularly inequitable in a case such as this one, where the original copyright did not contain any right to publicly display or commercially exploit the Videotapes, where none of the people on the Videotapes signed

(Footnote Continued on Next Page.)

In sum, as a matter of law, the conduct alleged of Mrs. Lennon—obtaining and recording a copyright interest and sending a cease and desist letter—does not constitute an infringing act under § 106 of the Copyright Act. Count II of the complaint therefore should be dismissed.<sup>5</sup>

### III. PLAINTIFF’S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

#### A. Count II, Plaintiff’s Copyright Claim, Accrued More Than Three Years Ago And Now Is Time-Barred.

No civil action may be maintained under the Copyright Act “unless it is commenced within three years after the claim accrued.” 17 U.S.C. § 507(b). “Under the Act, the cause of action accrues when a plaintiff ‘knows or has reason to know of the act which is the basis of the claim.’” Cambridge Literary Prop., Ltd. v. W. Goebel Porzellanfabrik G.m.b.H. & Co. KG., 510 F.3d 77, 81 (1st Cir. 2007), quoting Santa-Rosa v. Combo Records, 471 F.3d 224, 227 (1st Cir. 2006), cert. denied, 127 S.Ct. 2265 (2007). See also Roley v. New World Pictures, Ltd., 19 F.3d 479, 481 (9th Cir. 1994) (“A cause of action for copyright infringement accrues when one has knowledge of a violation or is chargeable with such knowledge.”). Thus, an action accrues under the Copyright Act when “a reasonably diligent person . . . would have been put on inquiry as to existence of a right . . .” Zuill v. Shanahan, 80 F.3d 1366, 1370 (9th Cir. 1996), cert. denied, 519 U.S. 1090 (1997), quoting Stone v. Williams, 970 F.2d 1043, 1048-49 (2d Cir. 1992) (“The duty of inquiry having arisen, plaintiff is charged with whatever knowledge an inquiry would have revealed.”), cert. denied, 508 U.S. 906 (1993). In addition, “[w]hen a [copyright] plaintiff has not been reasonably diligent in investigating ‘storm warnings’ or ‘suspicious circumstances,’ it may not invoke the discovery rule and instead will be deemed to have notice of its claims.”

---

(Footnote Continued from Previous Page.)

releases and where the Videotapes themselves contain performances of copyrighted songs owned by Mrs. Lennon.

<sup>5</sup> To the extent plaintiff’s copyright action is based on a claim of a copyright interest in any portion of the Videotapes other than the 24 minute “Portrait” registered with the Copyright Office, the claim would fail for the independent reason that copyright registration under § 411(a) is “a precondition for bringing a copyright infringement suit.” See, e.g., Johnson v. Gordon, 409 F.3d 12, 20 (1st Cir. 2005).

William A. Graham Co. v. Haughey, 484 F. Supp. 2d 324, 329 (E.D. Pa. 2007). See generally J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1255 (1st Cir. 1996) (“While discovery does not require that plaintiffs become fully aware of the nature and extent of the fraud, it is these ‘storm warnings’ of the possibility of fraud that trigger their duty to investigate in a reasonably diligent manner, and their cause of action is deemed to accrue on the date when they should have discovered the alleged fraud.”), cert. denied, 519 U.S. 823 (1996).

Here, the complaint was filed on March 11, 2008, and any purported act that accrued prior to March 11, 2005 would be barred under the Copyright Act’s three year statute of limitations. See 17 U.S.C. § 507(b).

**1. The June 14, 2002 Public Recordation Triggered The Three Year Statute of Limitations Period.**

As alleged in the complaint, “[o]n or about June 14, 2002, [Mrs. Lennon] recorded a Certificate of Recordation with the Copyright Office of the United States setting forth the transfer of the copyright to ‘Portrait.’” Compl. ¶ 34. (A copy of the Recordation is attached hereto at Albano Aff., Ex. F). The recordation also sets forth the transfer of the Videotapes and associated rights to Mrs. Lennon.

Plaintiff is charged with knowledge of the 2002 recordation. Much like recording a transfer of land at the Registry of Deeds, filing registrations and recordations at the United States Copyright Office serves as constructive notice to the world. See 17 U.S.C. § 205(c) (“Recordation of a document in the Copyright Office gives all persons constructive notice of the facts stated in the recorded document . . .”) (emphasis added); Saenger Org., Inc., 119 F.3d at 66 (“A copyright registration certificate issued by and filed with the Copyright Office thus serves to put the world on constructive notice as to the ownership of the copyright and of the facts stated in the registration certificate.”).

As the First Circuit has explained, “the Copyright Act’s protections are analogous to the protections that federal law affords patents,” and “[t]he United States Supreme Court has consistently held that the issuance of a patent and its recordation in the Patent Office constitutes

notice to the world of its existence.” Id., quoting Wise v. Hubbard, 769 F.2d 1, 2 (1st Cir. 1985). Cf. Margo v. Weiss, 1998 WL 2558, at \*5 (S.D.N.Y. Jan. 5, 1998) (holding cause of action for authorship accrues when copyright registered), aff’d, 213 F.3d 55 (2d Cir. 2000); Ackoff-Ortega v. Windswept Pac. Entm’t Co., 120 F. Supp. 2d 273, 280 (S.D.N.Y. 2000) (date Copyright Office “issued a supplementary registration” commenced limitations period), aff’d, 46 Fed. Appx. 663 (2d Cir. 2002); Peer Int’l Corp. v. Latin Am. Music Corp., 161 F. Supp. 2d 38, 54-55 (D.P.R. 2001) (“A copyright registration certificate issued by and filed with the Copyright Office serves to put the world on constructive notice as to . . . the facts stated in the registration certificate. . . . Defendants had constructive notice of Plaintiffs' ownership in this case.”). Because the world, and plaintiff, was on notice as of at least June 14, 2002 that Mrs. Lennon had purchased and recorded the transfer of any interest in Portrait and the Videotapes, the three year statute of limitations period for copyright claims began to run on that date.

Further, accepting the allegations in the complaint as true, any reasonably diligent person in plaintiff's position would be charged with knowledge of the transfer and public recordation with the United States Copyright Office. Cambridge Literary Prop., 510 F.3d at 81; Graham Co., 484 F. Supp. 2d at 336 (“[I]f storm warnings existed, and the [plaintiff] chose not to investigate, we will deem [it] on inquiry notice of [its] claims.”) (internal quotations and citations omitted; alterations in original); cf. Willsea v. Theis, 1999 WL 595629, at \*5 (S.D.N.Y. Aug. 6, 1999) (“[O]nce an author registers his copyright, any co-author exercising reasonable diligence should be aware that another person has claimed authorship and thus knows of his alleged injury.”).

By plaintiff's own admission, it first learned in the year 2000 that rare tapes of one of the most famous musicians of all time, John Lennon, and his equally famous wife, Yoko Ono, had been stolen from its custody. Shortly thereafter, plaintiff claims that it was approached by the defendant Pagola, who allegedly threatened to destroy the Videotapes unless plaintiff agreed that he could attempt to sell them to a third party. Plaintiff entered into such a marketing agreement, and then extended until June 1, 2002 the time within which the Videotapes could be shopped. Compl. ¶¶ 12-13, 16-19.

Despite plaintiff's actual knowledge that Pagola was actively trying to sell the Videotapes up until June 1, 2002, plaintiff failed either to check the Copyright Office to see if any third party purchaser had recorded an interest in the Videotapes or, perhaps even more astonishingly, failed to check with the one person most likely to have sufficient means and the desire to purchase the Videotapes—Lennon's widow, the owner of her late husband's copyright interests and a person who herself appears on the Videotapes.

As plaintiff admits, on June 14, 2002, Mrs. Lennon recorded the transfer with the United States Copyright Office. Compl. ¶ 34. On the same date, she also recorded the entire chain of title from Cox to Lexon to Fallon and Grenier to WWV (and, then, to Mrs. Lennon). A search of the Copyright Office's catalog (available on-line) under any number of easily identifiable terms would have promptly yielded evidence that these transfers were recorded in 2002, some two years after WWV says it realized the Videotapes were stolen, and one year after WWV authorized Pagola to try to find a buyer for the Videotapes and its rights. Alternatively, WWV could have obtained the same information from Mrs. Lennon, whom they chose not to contact. This is more than a failure to investigate "storm warnings" (itself enough to trigger the limitations period). See Graham Co., 484 F. Supp. 2d at 329; J. Geils Band, 76 F.3d at 1255. By plaintiff's own admission, it failed to check the Copyright Office to learn whether its own agreement with Pagola resulted in a transfer of ownership. Under these circumstances, the three year statute of limitations began to run no later than June 15, 2002, thus barring plaintiff's copyright claim.

**2. Each Alleged Act Of "Infringement" Is Barred By The Statute Limitations.**

**a. The Complaint's Alleged Acts Of "Infringement" In 2002 Are Time-Barred.**

Here, even a cursory review of the complaint shows that plaintiff alleges two acts of "infringement" that occurred more than three years before the filing of the complaint on March 11, 2008. First, plaintiff alleges an "infringement" occurred "[o]n or about May 17, 2002" when Mrs. Lennon "purchas[ed] a copyright that was not subject to the first sale by the copyright

holder, World Wide Video.” Compl. ¶ 48. Second, it alleges that “[o]n or about June 2, 2002” an infringement occurred by Mrs. Lennon “recording a Certificate of Recordation asserting rights in World Wide Video’s copyright.” *Id.* ¶ 49. (As correctly asserted elsewhere in the complaint, the recordation occurred on June 14, 2002, not June 2, 2002 as alleged in Count II.)

Even if the plaintiff contends it was not actually aware of these two events, plaintiff had constructive notice and/or should have known of these two acts based on the 2002 recordation. Thus, any alleged copyright infringement claim based on these two acts could have been brought no later than June 15, 2005. To the extent that the complaint filed on March 11, 2008 asserts a claim of infringement against Mrs. Lennon for these 2002 acts, it should be dismissed.

**b. The 2005 Alleged Act Of “Infringement” Also Is Barred By The Statute Of Limitations Because The Predicate Element Of Copyright Ownership Is Time-Barred.**

Plaintiff also claims that Mrs. Lennon committed an act of infringement “[o]n or about April 13, 2005,” “by seeking to enjoin World Wide Video’s lawful usage of its copyright rights.” Compl. ¶ 50; *see also id.* ¶¶ 38-39 (alleging that on April 13, 2005, Mrs. Lennon’s counsel advised that she had “acquired all rights” previously owned by plaintiff in the Videotapes). Because the complaint was filed nearly six years after Mrs. Lennon’s copyright recordation in June 2002—the date when plaintiff knew or should have known of Mrs. Lennon’s ownership claim—any claim of copyright ownership on the part of plaintiff is time-barred.

An essential element of any copyright infringement claim is proof of ownership of a valid copyright. *Saenger Org., Inc.*, 119 F.3d at 59. Where, as here, a claim involves disputes concerning both infringement and ownership, “the infringement claim is timely only if the corresponding ownership claim is also timely.” *Roger Miller Music, Inc. v. Sony/ATV Publ’g, LLC*, 477 F.3d 383, 389-90 (6th Cir. 2007). *See also Cambridge Literary Prop.*, 510 F.3d at 80-81 (plaintiff’s claim of ownership barred by three year statute of limitations); *Weber v. Geffen Records, Inc.*, 63 F. Supp. 2d 458, 464 (S.D.N.Y. 1999) (“No cause of action, whether or not brought under the Copyright Act, may be premised on a time-barred challenge to a copyright.”).

“A claim for copyright ownership is barred three years from the plain and express repudiation of copyright ownership.” Welles v. Turner Entm’t Co., 503 F.3d 728, 734 (9th Cir. 2007) (internal citation omitted). This three year statute of limitations, triggered when there is an “express repudiation of ownership,” precludes claims for copyright ownership (even when cast as a state law claim) and applies to cases “such as [between] those who transfer copyright ownership via contract.” Ritchie v. Williams, 395 F.3d 283, 288 n.5 (6th Cir. 2005) (internal citation omitted).

The standard of “express repudiation” is no different than the accrual standard for other copyright claims (or civil claims, for that matter); the limitations period commences when a plaintiff “knows or has reason to know of the act [*i.e.*, the repudiation] which is the basis for the claim.” See Santa-Rosa, 471 F.3d at 227, quoting Rodríguez-García v. Municipality of Caguas, 354 F.3d 91, 96-97 (1st Cir. 2004). However, unlike a claim for infringement, “[a] copyright ownership claim accrues only once, and if an action is not brought within three years of accrual, it is forever barred.” Roger Miller Music, Inc., 477 F.3d at 390 (internal citation omitted).<sup>6</sup>

Thus, the limitations period for copyright ownership claims operates “something like adverse possession to copyright ownership” because “[c]opyright, like real estate, lasts a long time, so stability of title has great economic importance.” Zuill, 80 F.3d at 1370 (“Because copyright ultimately serves the purpose of enriching the general public through access to creative works, it is peculiarly important that the boundaries of copyright law be demarcated as clearly as possible.”), quoting Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994). Statute of limitations

---

<sup>6</sup> In this sense, the statute of limitations as it pertains to copyright ownership differs from its application to infringement claims, the latter of which limits only a plaintiff’s remedy, not its underlying right. Thus, in an infringement case, the statute of limitations period accrues at the time of each infringing act, and a plaintiff is entitled to recover for acts that occur within the statute of limitations period. In the case of ownership, however, the statute of limitations period serves as a bar so that it “may give defendants repose.” Zuill, 80 F.3d at 1370-71, quoting 17 U.S.C. § 507(b) (“[n]o civil action shall be maintained . . . unless it is commenced within three years after the claim accrued.”); Ritchie, 395 F.3d at 288 n.5 (“the alternative approach (allowing infringement claims even though a free-standing ownership claim would be time-barred) leads to results that are ‘potentially bizarre’”), quoting 3 Nimmer on Copyright § 12.05[C].

protect important social interests in certainty, accuracy, and repose which “is especially true in the area of copyright, where certainty and repose are essential to the functioning of the copyright market.” Netzer v. Continuity Graphic Assoc., Inc., 963 F. Supp. 1308, 1318 (S.D.N.Y. 1997) (citation omitted). Indeed, the United States Supreme Court has stressed that “Congress’ paramount goal in revising the 1976 Act [was] enhancing predictability and certainty of copyright ownership.” Community for Creative Non-Violence v. Reid, 490 U.S. 730, 749 (1989).

There can be little doubt that Mrs. Lennon’s 2002 recordation was an “express repudiation” of plaintiff’s ownership claims. It was “an open[] and quite notorious[]” claim of ownership by Mrs. Lennon. See Cambridge Literary Prop., 510 F.3d at 91. Any review of the “facts stated in the recorded document” reveal the ownership transfer to Mrs. Lennon. See 17 U.S.C. § 205(c). Indeed, Mrs. Lennon’s recordation set forth the transfer of title and the various instruments used to accomplish this transfer. Albano Aff., Ex. F. See Netzer, 963 F. Supp. at 1315 (“[a]n express assertion of sole authorship or ownership will start the copyright statute of limitations running”); 2 Nimmer on Copyright § 7.25 (Section 205 “is relevant primarily to providing notification of transfers of copyright ownership; hence, it is interwoven with the inquiry over what constitutes constructive notice of ownership”).

The First Circuit recently held that where “[p]ublicly available documents in the Copyright Office and prior litigation cast doubt on . . . rights in [the work]”, including a “transfer document, recorded in accordance with 17 U.S.C. § 205 expressly nam[ing] [another] as owner of the copyright and describ[ing] an assignment of the copyright”, “[s]uch circumstances constituted a ‘plain and express repudiation’ of . . . purported co-ownership rights in [the work] sufficient to trigger the Copyright Act’s three-year statute of limitations.” Cambridge Literary Prop., 510 F.3d at 90-91 (emphasis added).

In that case, as here, the claimant “had every motivation to ascertain the existence and potential value of [its] rights”, “had counsel . . . to assist [it] in that task” and “readily available inquiries would have revealed numerous repudiations of the ‘rights.’” Id. at 90. Nonetheless,

because the claimant did nothing to assert her ownership interest in the face of repudiation of that interest, the subsequent purchaser of her interests (the plaintiff in the case), could not maintain a state law claim for accounting of unpaid royalties. It did not matter that the plaintiff had brought only a state law claim; copyright ownership was an element of that claim, and if it was not timely asserted under the Copyright Act's three year statute of limitations, the plaintiff could not claim copyright ownership. *Id.* at 91. See also Saenger Org., Inc., 119 F.3d at 66 (holding that “[o]n the undisputed facts of the case, therefore, [claimant] had constructive notice of [another’s] claim of exclusive ownership of the copyrights in [the work] as of November 1986, the effective date of registration for both works.”); Netzer, 963 F. Supp. at 1315-16 (holding placement of copyright notice that did not include plaintiff’s name constituted “[a]n express assertion of sole authorship or ownership” sufficient to start the limitations period on a co-authorship claim); Willsea, 1999 WL 595629, at \*5 (“[O]nce an author registers his copyright, any co-author exercising reasonable diligence should be aware that another person has claimed authorship and thus know of his alleged injury.”).

Applying this law to this situation, the June 14, 2002 recordation, placed in the public record nearly six years ago, was an “express repudiation” of plaintiff’s ownership interests. Because the recordation is notice to the world of the facts contained in it, plaintiff is charged with knowledge of its existence. See, e.g., Zuill, 80 F.3d at 1370 (“an unequivocal act of ownership starts the adverse possession statute of limitations running” in a copyright case and claim of ownership accrues when “a reasonably diligent person . . . would have been put on inquiry as to existence of a right . . .”), quoting Stone, 970 F.2d at 1048. Thus, plaintiff cannot establish a timely claim of copyright ownership as of March 14, 2008, the date it filed this action. As a result, plaintiff is precluded as a matter of law from pursuing any copyright claim against Mrs. Lennon.

Although plaintiff is fairly charged with constructive notice of the recordation, in this case, plaintiff also had actual knowledge, within the statute of limitations period, that its asserted ownership rights were threatened—and could have acted then to protect its interests by bringing

a timely claim for ownership. As alleged in the complaint, on or about April 13, 2005, after Mrs. Lennon's attorney notified the Globe Entertainment and Media Summit that Ono had "acquired all rights of John Fallon, Robert Grenier, Jr. and World Wide Video in and to all film and videotapes in such parties possession embodying John Lennon and Yoko Ono filmed by Anthony Cox in 1970," Compl. ¶ 38, "World Wide Video learned . . . that its copyright rights had been violated by the unauthorized sale of the film and copyright." *Id.* ¶ 40. The statute of limitations for its ownership claim did not expire until June 15, 2005, nearly two months later. Armed with this knowledge, certainly a reasonable person would seek out more information, check the Copyright Office registry, realize the statute of limitations was running and take action to protect its rights. Because plaintiff chose to take no action, its claim of copyright ownership is now time-barred. *See Zuill*, 80 F.3d at 1370-71 ("It is inequitable to allow the putative co-owner to lie in the weeds for years after his claim has been repudiated . . ."); *Netzer*, 963 F. Supp. at 1318 ("The copyright laws are designed to enhance the predictability and certainty of copyright ownership.").

**B. Count IV, The State Law Conversion Claim, Is Also Barred Under Its Three Year Statute Of Limitations.**

Plaintiff claims that Mrs. Lennon "converted World Wide Video's copyright rights and ownership rights in the videotapes by purchasing, and thereafter exercising dominion and control over the copyright and videotapes, without the Plaintiff's permission." Compl. ¶ 57. Plaintiff seek monetary damages, including "for the value of its converted property."<sup>7</sup> Compl. Prayer, Count IV.

The elements of the tort of conversion "require that a defendant be proved to have 'intentionally or wrongfully exercise[d] acts of ownership, control or dominion over personal

---

<sup>7</sup> If the conversion claim were based on allegations of unlawful distribution, performance or display of the work, the claim would be preempted by federal copyright law. *See, e.g.*, 17 U.S.C. § 301(a); *Quincy Cablesystems, Inc. v. Sully's Bar, Inc.*, 650 F. Supp. 838, 848-50 (D. Mass. 1986). To the extent the conversion claim is not entirely preempted, it is barred by the statute of limitations for the reasons discussed in this section.

property to which he has no right of possession at the time . . .” Bleicken v. Stark, 61 Mass. App. Ct. 619, 622 n.2, 813 N.E.2d 572, 576 n.2 (2004), quoting Abington Nat’l. Bank v. Ashwood Homes, Inc., 19 Mass. App. Ct. 503, 507, 475 N.E.2d 1230 (1985). As with other tort claims, a claim for conversion “must be brought within three years after the cause of action accrues.” Stark v. Advanced Magnetics, Inc., 50 Mass. App. Ct. 226, 232, 736 N.E.2d 434, 441 (2000), citing G. L. c. 260, § 2A (three year statute of limitations for tort claims).

“A cause of action in tort accrues on the date the plaintiff suffers injury or loss.” Nortek, Inc. v. Liberty Mut. Ins. Co., 65 Mass. App. Ct. 764, 770-71, 843 N.E.2d 706, 712 (2006) (conversion claim accrued date that defendant “liquidated that collateral and applied the proceeds to satisfy its version of the premium amounts due”); Stark, 50 Mass. App. Ct. at 232, 736 N.E.2d at 441 (“[T]he cause of action accrues at the time the plaintiff is injured.”) (citation omitted).

“Under the Massachusetts discovery rule, the running of the statute of limitations is delayed while ‘the facts,’ as distinguished from the ‘legal theory for the cause of action,’ remain ‘inherently unknowable’ to the injured party.” Saenger Org., Inc., 119 F.3d at 65 (emphasis in original), quoting Catrone v. Thoroughbred Racing Ass'ns of N. Am., Inc., 929 F.2d 881, 885 (1st Cir. 1991). “Under Massachusetts law, a fact is not inherently unknowable when it is a matter discoverable by examination of public records.” Wise, 769 F.2d at 2-3; Friedman v. Jablonski, 371 Mass. 482, 486, 358 N.E.2d 994, 997 (1976); Duco Assoc., Inc. v. Lipson, 11 Mass. App. Ct. 935, 935-36, 416 N.E.2d 555, 556 (1981).

The Massachusetts Appeals Court case Stark v. Advanced Magnetics, Inc. is instructive. There, a former employee of the defendant sued for conversion and various other claims, alleging that the defendant had wrongly claimed ownership over a patent. The Court rejected plaintiff’s claim as barred by the statute of limitations. It explained that defendant’s employees obtained a patent on September 13, 1988 “and that its issuance was a matter of public record on that date. As such, it serves as notice to the world of its existence.” 50 Mass. App. Ct. at 233, 736 N.E.2d at 442, citing Wise, 769 F.2d at 2. “To start the statute running, the plaintiff need not

know the full extent of his injury . . . All that is necessary is that an event or events have occurred that are reasonably likely to put the plaintiff on notice that he has been harmed.” Id.

Thus, like the defendant in Stark, because Mrs. Lennon recorded her ownership interests, asserting dominion and control over the Videotapes and rights thereto, on June 14, 2002, these facts were knowable to the plaintiff on that date—and the limitations period for the conversion claim was triggered. As more than three years passed between June 14, 2002 and March 11, 2008, the date the complaint was filed, plaintiff’s claim of conversion against Mrs. Lennon (Count IV) is time-barred under G. L. c. 260, § 2A, and should be dismissed.

**CONCLUSION**

For the foregoing reasons, defendant Yoko Ono Lennon respectfully requests that plaintiff’s claims against her, Counts II (Copyright Infringement) and Count IV (Conversion), be dismissed in their entirety, with prejudice, and that she be dismissed as a defendant in this action.

Respectfully submitted,

**YOKO ONO LENNON,**

By her attorneys,

/s/ Jonathan M. Albano

Jonathan M. Albano, BBO #013850

jonathan.albano@bingham.com

Carol E. Head, BBO #652170

carol.head@bingham.com

**BINGHAM MCCUTCHEM LLP**

150 Federal Street

Boston, MA 02110-1726

617.951.8000

Dated: April 15, 2008

**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on April 15, 2008.

/s/ Jonathan M. Albano, BBO #013850  
jonathan.albano@bingham.com