

C.A. Nos. 08-55075 and 08-55126

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JULES JORDAN VIDEO, INC.,  
a California corporation, et al.

Plaintiffs, Appellees and Cross-Appellants,

v.

144942 CANADA, INC.,  
a Canadian corporation  
d/b/a KAYTEL VIDEO DISTRIBUTION, et al.

Defendants, Appellants and Cross-Appellees.

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Appeal From The United States District Court  
For The Central District Of California  
Honorable S. James Otero, Judge Presiding  
U.S.D.C. No. CV 05-0517 SJO,  
consolidated with CV-05-06771-SJO and CV 05-06769

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**CROSS-APPELLANTS' REPLY BRIEF**

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## INTRODUCTION

Gaspar and JJV are the only possible owners of the film copyrights and both are plaintiffs in this case. Kaytel has never asserted any ownership interest in the copyrights, but nevertheless hopes to annul the jury's \$2.5 million copyright infringement award against it with the most hypertechnical of arguments.<sup>1</sup> On the one hand, Kaytel argues, Gaspar has no standing because his films were works for hire for JJV (his "employer"), so his registration of the copyrights in his own name was void. On the other hand, Kaytel argues, JJV also has no standing because it didn't register the copyrights in its own name. The result, says Kaytel: It escapes all liability, despite the jury's verdict.

That can't be right. In fact, it's wrong under the controlling work-for-hire principles of the 1976 Copyright Act. Kaytel has not even tried to show otherwise. Thus, the district court erred when it overrode the jury and granted Kaytel's motion for judgment as a matter of law ("JMOL") on the copyright claims.

Tellingly, Kaytel ignores the fact that the jury found that Gaspar's films were not works for hire. This finding accorded with the jury instructions and was not clearly erroneous. Gaspar's testimony established that his creative work on

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<sup>1</sup> "Gaspar" refers to the plaintiff Ashley Gaspar, "JJV" refers to the plaintiff Jules Jordan Video, Inc., and "Kaytel" refers collectively to the defendants 144942 Canada, Inc. dba Kaytel Video Distribution, Alain Elmaleh and Leisure Time Video Canada, Inc.

the films was his, not JJV's, and that he, as JJV's sole owner, intended to retain the copyrights for himself. Whether Gasper's proof was "concocted for trial," as the district court thought, was a credibility issue for the jury, and the jury alone, to decide. This is even more true since this Court must view all the evidence in Gasper/JJV's favor—a review standard also wholly ignored by Kaytel.

Applying the governing work-for-hire factors laid out by the Supreme Court—once again ignored by Kaytel—leads to the inescapable conclusion that it was not unreasonable for the jury to find that Gasper was an independent contractor, not an employee. That finding makes perfect sense because Gasper was the dominant employee and 100% owner of JJV and the sole creative force behind the films.

Thus, Gasper's registration of the copyrights was proper and gave him standing; his written assignment of four of the copyrights to JJV gave it standing. Even if the film copyrights should have been registered by JJV, this Court should still reverse. Under this Court's precedents, an innocent and non-prejudicial registration error does not result in Kaytel escaping liability for infringement.

Finally, regardless of the outcome of the work-for-hire issue, both Gasper and JJV had standing to sue as beneficial copyright owners.

In any event, the purported failure of Gasper and his personal corporation to comply strictly with the technicalities of copyright ownership should not provide a safe harbor for Kaytel, a willful counterfeiter.

The district court also erred in awarding Gasper \$0 for attorneys' fees incurred by his non-lead counsel, mistakenly concluding that there was no evidence of the reasonableness of those fees. There was such evidence, and it was unrebutted. Kaytel's brief barely mentions the issue and asserts that it will soon become moot because it anticipates a reversal on its appeal—essentially waiving any responsive argument.

This Court should reverse the JMOL and reinstate the judgment on the copyright claims. The denial of any attorneys' fees for non-lead counsel should be reversed with directions to award reasonable fees.

## ARGUMENT

### I. GASPER’S COPYRIGHTS IN THE FILMS AND HIS ASSIGNMENT OF FOUR OF THOSE COPYRIGHTS TO JJV WERE VALID AND PROVIDED STANDING TO BOTH PLAINTIFFS.

#### A. Kaytel Ignores The Governing Standard Of Review For JMOL.

The district court could not set aside the jury’s verdict and grant JMOL in Kaytel’s favor on Gasper’s and JJV’s copyright claims unless, “under the governing law, there can be but one reasonable conclusion as to the verdict” and “only if ‘there is no legally sufficient basis for a reasonable jury to find for that party on that issue.’” *Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir. 2001) (internal citation omitted). On de novo review of the JMOL, this Court, like the district court, must view the evidence in the light most favorable to the aggrieved parties, Gasper and JJV, and cannot make credibility determinations or weigh the evidence, but instead ““must accept the jury’s credibility findings consistent with the verdict.”” *Id.* (internal citation omitted). Although the ultimate determination of whether the films were works for hire is reviewed de novo, the factual finding below cannot be disturbed unless clearly erroneous. *Aymes v. Bonelli*, 980 F.2d 857, 860-61 (2d Cir. 1992).

In its Appellants’ Response and Reply Brief (“RR”), Kaytel ignores these principles and instead tries to construe the facts in its favor. And it goes so far as to completely ignore the jury’s factual finding on work for hire. The issue was

clearly put to the jury. Kaytel cross-examined Gasper about the work-for-hire issue, argued it to the jury in closing and did not object when the district court instructed the jury on work-for-hire requirements. (SER 75:9-24, 82:9-11, 83:22-23, 84:24, 85:20-22, 86:11-25, 123-24, 130.) Kaytel cannot now ignore the jury's subsequent determination that JJV and Gasper owned the copyrights in question, which necessarily meant that they were not works for hire.

**B. Kaytel Did Not And Cannot Carry Its Burden To Show That JJV/Gasper's Copyrights Were Invalid.**

Because Gasper registered copyrights for these 13 films, the burden shifted to Kaytel to prove the invalidity of the copyrights—namely that they were works for hire. *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1144 (9th Cir. 2003).

**1. Kaytel's reliance on 1909 Copyright Act work-for-hire principles is misplaced; the law has changed.**

Kaytel tries to carry its burden by relying on outmoded work-for-hire principles. Citing two 1909 Copyright Act cases, *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298 (9th Cir. 1965) and *Twentieth Century Fox Film Corp. v. Entm't Distrib.*, 429 F.3d 869 (9th Cir. 2005), Kaytel argues that when one person engages another, whether as independent contractor or employee, to produce an artistic work, a presumption arises that the copyright belongs to the engaging party. (RR 41-42.) Kaytel is wrong for at least three reasons.

First, the 1909 Copyright Act did not contain a statutory work-for-hire provision. Instead, this Court interpreted the 1909 Act to mandate that a work for hire exists if “it was created at the ‘instance and expense’ of the engaging party.” *Twentieth Century*, 429 F.3d at 877. Our case does not come under the 1909 Act, but rather the 1976 Copyright Act, which has a different work-for-hire test. Thus, the instance and expense test doesn’t apply here.

Second, Kaytel mischaracterizes the 1909 Act *Lin-Brook* presumption. The presumption applied only after the instance and expense test had been met. *Twentieth Century*, 429 F.3d at 881. That test hinged on whether the hiring party had the right to control or supervise the artist’s work. *Id.* at 877. But JJV had no right to control or supervise how Gasper made his films. (SER 122:4-5, 125-28.) Thus, even if that test were applicable, it wouldn’t cover Gasper, so one would never even make it to the point of invoking the presumption.

Third, *Lin-Brook* and *Twentieth Century* held that the work-for-hire doctrine covered not only employees, but also independent contractors. *Twentieth Century*, 429 F.3d at 877. However, the 1976 Act—the one that governs here—specifically provides that if an artist is determined to be an independent contractor, there is no work for hire. 17 U.S.C. § 101.

The law that actually governs here, the 1976 Copyright Act, defines a “work made for hire” as “a work prepared by an employee within the scope of his or her employment.” 17 U.S.C. § 101. Thus, Kaytel had to show *both* that Gasper was

an “employee” of JJV *and* that he created these films within the “scope” of his employment.

As we next explain, Kaytel made neither showing.

**2. Gasper was not JJV’s “employee” for purposes of works for hire.**

The United States Supreme Court has held that in distinguishing an employee from an independent contractor for purposes of a work for hire, federal “principles of general common law of agency” apply, and it has laid out a number of factors courts must consider in making that determination. *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751, 109 S. Ct. 2166, 2178, 104 L. Ed. 2d 811 (1989) (“*Reid*”). Those factors are:

[W]e consider [a] the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are [b] the skill required; [c] the source of the instrumentalities and tools; [d] the location of the work; [e] the duration of the relationship between the parties; [f] whether the hiring party has the right to assign additional projects to the hired party; [g] the extent of the hired party’s discretion over when and how long to work; [h] the method of payment; [i] the hired party’s role in hiring and paying assistants; [j] whether the work is part of the regular business of the hiring party; [k] whether the hiring party is in business; [l] the provision of employee benefits; and [m] the tax treatment of the hired party.

*Id.* at 751-52, 109 S. Ct. at 2178-79. None of these factors is alone determinative.

*Id.* at 752, 109 S. Ct. at 2179.

- a. The *Reid* factors favor the conclusion that Gasper was an independent contractor for producing films; Kaytel ignores *Reid* and resorts to misstating the facts to rebut this conclusion.**

Tellingly, Kaytel's brief hardly mentions *Reid*, and then only offhand in discussing another case. (RR 46.) Kaytel certainly never attempts to apply the *Reid* factors. This is probably with good reason, since on balance those factors show Gasper was an independent contractor for his creative work on the films. This is particularly true when the evidence is viewed, as it must be, in favor of JJV/Gasper and of the jury's verdict.

JJV had no right to control the manner and means by which the films were made; Gasper had complete creative control over his films. (SER 122:4-5, 125-28.) Gasper decided his upcoming projects, the shooting schedule, and where and how to shoot the films. (SER 128-29, 140.) Indeed, Gasper's creative work as producer, director, writer, and cameraman required special skill, for which he received numerous awards. (SER 126, 174:3, 190-91).

Although Gasper performed work for JJV (the company he owned), and received a monthly salary with tax deductions, his salary only compensated him for administrative work and his performance in the films. (SER 124-26, 128-29.) His creative work as producer, director, writer, and cameraman was not compensated in his salary. (SER 124-26.) In fact, Gasper's creative work on the

Jules Jordan film franchise long predates the existence of the JJV company.

(SER 119, 138, 170, 191.)

Kaytel doesn't address all the *Reid* factors. Moreover, Kaytel's arguments depend on repeated misconstruction of the facts. At best, this violates the rule that the facts must be viewed in JJV/Gasper's favor; at worst, Kaytel is baldly misstating the record:

- Kaytel claims that the films were produced by JJV and all persons who performed services were paid JJV employees. (RR 36, 39, 43, 45, 49.) In fact, it was Gasper who produced the films and the performers were all paid as independent contractors, not employees. (ER 1092:5-7; SER 126.)
- Kaytel argues the license agreement with co-plaintiff John Stagliano, Inc. ("JSI") to distribute the films was only between JJV and JSI. (RR 44.) In actuality, Gasper testified that the oral agreement was between him and JSI. (ER 1101:18-1102:9 ["It was a handshake deal . . . between myself and John Stagliano"]; *accord* SER 132:2-4, 267.)
- Kaytel says all film revenues were paid to JJV. (RR 44.) The actual testimony was that JSI paid royalty checks to both JJV and Gasper. (SER 132-36.)
- Kaytel claims, without record cites, that there was no agreement between JJV and Gasper over who owned the copyrights. (RR 47.) In fact, there was testimony that Gasper and JJV reached an oral agreement that he

would own the film copyrights. (SER 141:7-12.) This agreement is buttressed by the fact that Gasper, not JJV, registered the copyrights. (SER 167.)

- Kaytel alleges that Gasper registered the copyrights in his name solely because he wanted to make sure the films were his property if JJV went under. (RR 36, 51-52.) What Gasper actually said was that he registered the copyrights primarily because he was “the creative force behind the movies.” (ER 1093:4-6; *see also* 1094:7-1095:6.)
- And when Kaytel argues that certain facts are undisputed (RR 45), it conspicuously fails to provide any record cites.

Beyond misconstruing the facts, Kaytel misconstrues the law as well.

Contrary to Kaytel’s arguments (RR 46-47), *Aymes v. Bonelli*, 980 F. 2d 857, is on point. Kaytel misconstrues *Aymes* to mean that how someone was treated for tax purposes is the determinative *Reid* factor. (RR 46.) Far from it. *Aymes* simply said that five of the factors are generally more important for determining whether plaintiff was an employee or an independent contractor: right to control, skill required, employee benefits, tax treatment, and right to assign projects. 980 F. 2d at 861. Given that three of those more important factors favored plaintiff (skill, tax, benefits), the court held that on balance the plaintiff was an independent contractor. *Id.* at 864. Similarly here, most of these five factors favor Gasper: JJV had no right to control how these films were produced; JJV had no right to assign Gasper specific projects; and making these films required a special skill.

Furthermore, *Aymes* involved an employer and employee fighting for control over copyright rights, and each had a respectable right to the intellectual property. This case involves a third-party counterfeiter (Kaytel) who has no right to the intellectual property at all, yet is claiming work for hire so that it can escape liability for violating copyright. Given that difference, it makes even more sense than in *Aymes* to construe the *Reid* factors in Gasper's favor.

Kaytel's mantra is that since JJV treated Gasper as an employee for tax purposes, he must be an "employee" for all purposes, including works for hire. But simply saying it over and over (RR 36, 47) does not make it so. In a case cited by Gasper (Appellees' Principal and Response Brief ("AOB") 57) but ignored by Kaytel, *Respect, Inc. v. Comm. on the Status of Women*, 815 F. Supp. 1112 (N.D. Ill. 1993), the court held that even though plaintiff teacher was treated as an employee for tax purposes, plaintiff's book on abstinence for students was not a work for hire. "Well before [defendant] came onto the scene, [plaintiff] was an experienced teacher who was at the forefront of abstinence education" and that it "was [plaintiff] and not [defendant] who was responsible for the books' content and flavor." *Id.* at 1118.

Likewise here, Gasper was an acclaimed director well before JJV came onto the scene, and he was solely responsible for the films' creative content. (SER 122:4-5, 125-28, 191.) Therefore, his treatment for tax purposes does not automatically transform him into an employee for purposes of work for hire.

**b. The creative nature of Gasper’s work favors independent contractor status.**

The nature of Gasper’s work—filmmaking—also undercuts Kaytel’s claim that his films are works for hire. *M & A Assocs., Inc. v. VCX, Inc.*, 657 F. Supp. 454 (E.D. Mich. 1987) is directly on point. In *M & A Associates*, David Buckley wrote, directed and produced an adult film under the auspices of a company owned solely by him but, contrary to Kaytel’s assertion (RR 47), “there was no contract by which the rights to the film were transferred from [the company] to Buckley” and no copyright was registered. *Id.* at 457. At best, there were written minutes that reflected an oral understanding between him and the company as to who owned the copyright. *Ibid.* The court held that Buckley’s film was not a work for hire, and thus he owned the copyright, because he, not the company, “was the motivating force in producing the film. He exercised complete control of the corporation, which served as his mere alter ego. There simply was no supervision of his work other than his own.” *Id.* at 459.

Similarly here, Gasper was not supervised by JJV; he was the sole “creative force” behind the creative work in devising and producing these films. (SER 122:4-5, 125-28, 169-70.) And just like the filmmaker in *M & A Associates*, Gasper had an oral agreement with JJV that he would own the copyrights. (SER 122:4-5, 141:7-12.) Indeed, Gasper’s case for copyright is stronger because he *did* register the copyrights in his name. (SER 167.)

Kaytel makes light of the distinction between Gasper's creative work as a filmmaker and his administrative work for JJV, calling it "schizophrenic." (RR 47-48.) In fact, the distinction makes perfect sense. Creative professionals often set up companies to handle the administrative aspects of commercializing their work, but still keep their creative work separate. Courts have recognized this distinction between administrative and creative work in making work-for-hire determinations, especially in non-traditional employment situations such as Gasper's.

For example, in *Weinstein v. Univ. of Ill.*, 811 F. 2d 1091 (7th Cir. 1987) (cited at AOB 59, but not addressed by Kaytel's brief), the court reversed a finding that a professor's academic article was a work for hire and held that even if professors are motivated to publish articles to obtain tenure at the university, their primary motivations are creative and scholastic. 811 F. 2d at 1093-94. By contrast, the court explained, a work for hire may make sense "when applied to administrative duties" and documents or works created as part of those duties. *Id.*

Likewise here, if as part of his administrative duties for JJV, Gasper created some written protocols or other copyrighted material, those might be considered works for hire. But here Gasper's creative work is at issue, not his administrative work.

Kaytel maintains that it makes no sense for Gasper to provide his creative services for free. (RR 39.) But he didn't. Gasper was the sole beneficiary of any profits generated by his films. Moreover, Gasper's ownership of the copyrights to

his films has substantial value. In addition, Gasper's ability to control and further his creative legacy carries significant intangible as well as tangible value.

Kaytel also relies heavily on the district court's conclusion that the distinction between Gasper's creative and administrative work was "concocted at trial" to avoid the work-for-hire provision of the 1976 Act. (RR 38, 39, 48, 51.)

This reliance is misplaced for multiple reasons. First, on a motion for JMOL, it was not the district court's place to decide whether Gasper concocted anything. That was the jury's sole function.

Second, in actuality Gasper/JJV have been consistent throughout this litigation that the films were not works for hire, because Gasper was not an employee for his creative services. Gasper registered the copyrights in his, not JJV's name, the films were not signified as works for hire on the copyright applications, they were not called works for hire in the complaint, and Gasper was consistent in his trial testimony that they were not works for hire. (ER 2395-2400, 2407-10, 2417-22, 2433-36, 2445-50, 2127-62; SER 123-24, 130, 167-68.) Calling Gasper's claim a concoction for trial belies the evidence, even more so when one views the evidence through the required filter—in a light most favorable to JJV/Gasper.

Third, if anything, it was Kaytel that concocted this issue at trial. Kaytel raised a host of copyright standing issues before trial, in motions in limine, in the Amended Pretrial Conference Order and in its trial brief, but made no mention of work for hire. (ER 295-442, 1693-1783, 2588; Clerk's Record, Docket No. 267.)

It wasn't until all the trial testimony had been given and the jury had been instructed that Kaytel unearthed the argument in its post-trial JMOL motion that Gasper lacked standing because the films were works for hire. (SER 106-07.) The district court overreached by rewarding Kaytel's eleventh-hour gambit.

Kaytel further argues that JJV must have owned the copyrights because the film jackets were marked as copyrighted in the name of JJV. This fact does not relate in any way to any of the enumerated *Reid* factors. Even if it did, this is only one fact for the jury to consider among all the facts concerning copyright ownership, not a dispositive fact justifying JMOL on copyright ownership.<sup>2</sup>

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<sup>2</sup> In addition, because Gasper's films were created and copyrighted after 1989, the Berne Convention applies, and no copyright notice was required at all under the Berne Convention. *Bryce & Palazzola Architects and Assocs. v. A.M.E. Group*, 865 F. Supp. 401, 405 (E.D. Mich. 1994). Since no notice was required at all, an erroneous notice could hardly cause the copyright to be invalidated.

Even if pre-Berne Convention law applied, the 1976 Act expressly states that for works not subject to the Berne Convention, misidentification of the copyright owner in a copyright notice does not affect "the validity and ownership of the copyright." 17 U.S.C. § 406(a). And, even under the 1909 Act, which imposed a forfeiture of copyright for misnaming of the copyright owner in the copyright notice, the rule is eased where, as here, the actual copyright owner was an alter ego of the named owner. *Judscott Handprints, Ltd. v. Washington Wallpaper Co.*, 377 F. Supp. 1372, 1379 (E.D.N.Y. 1974) (two corporations shared same officers, directors and shareholders). In any event, "the principal purpose of the [former] statutory provisions [was] to inform the public that copyright is claimed." *Goodis v. United Artists Television, Inc.*, 425 F. 2d 397, 403 (2d Cir. 1970). Kaytel was on notice that copyright was claimed, whether the copyright notice named Gasper or his wholly owned corporation, JJV.

**3. Gasper’s creative work on the films was not within the scope of his employment with JJV.**

Kaytel completely ignores the second requirement of the work-for-hire test—“scope of employment”— where courts once again look to federal common law agency principles. *Reid*, 490 U.S. at 739-40, 109 S. Ct. at 2172-73; *Avtec Sys., Inc. v. Peiffer*, 21 F.3d 568, 571 (4th Cir. 1994). More specifically, Kaytel had to show that *all* of the following conditions apply to Gasper’s conduct:

- (a) It was the kind of work he was employed to perform;
- (b) It occurred substantially within authorized time and space limits;
- © It was actuated, at least in part, by a purpose to serve the master.

*Id.* (citing Restatement (Second) of Agency § 228 (1958)).

**a. The scope of employment factors favor Gasper.**

Gasper was only employed by JJV to perform in the films and to do administrative work as JJV’s president. (SER 124-26, 128-29, 140, 165.) He was not employed to use his creative skills in writing, producing and directing the films. (*Id.*) Although Gasper did much of his work during his authorized work hours with JJV, his primary motivation for the creative work was not a desire to serve JJV but rather to further his own creative impulses and ambitions. (*See* SER 191.) Under such circumstances, Gasper’s creative filmmaking was not within the scope of his employment by JJV.

Case law—once again unaddressed by Kaytel—supports this conclusion. In *City of Newark v. Beasley*, 883 F. Supp. 3 (D.N.J. 1995) (cited at AOB 60), a

police officer and his police department employer fought over who owned the copyrights to written materials the officer had created for an educational program aimed to deter juvenile car theft, and designed for use by many different cities. In ruling that this was not the kind of work for which the officer was employed, the court emphasized that the department exercised essentially no control over his creation of the materials and that he did not rely on knowledge gained through his employment in preparing the materials. *Id.* at 8.

Likewise here, Gasper honed his creative talents long before JJV existed, and the company exercised no control over his creative decisions. (SER 122:4-5, 125-28, 190-91.) JJV did not have to persuade him to create these films. He began his career as a video store clerk, “saved up money to buy photography equipment and video equipment” and then started shooting films. (SER 191.) His creative motivations were fueled by his own creative ambitions, not aimed at solely furthering JJV’s interests.

**b. As sole owner and dominant employee of JJV,  
Gasper’s creative work on JJV films was not a work  
for hire.**

Kaytel also fails to address the reality that Gasper’s employment status with JJV must be understood in light of the fact that Gasper was the dominant employee/owner of JJV. (SER 165-66.) He was not a film director hired by an outside company to create films on a one-time basis. Instead, Gasper is the creative force behind the Jules Jordan franchise of films (which predates JJV), and

he established JJV as a company to handle the administrative, marketing and distribution aspect of his products. (SER 122:4-5, 165-66.) As Gasper explained, “it’s kind of an interesting situation because I am Jules Jordan Video and I’m Ashley Gasper. Ashley Gasper was creating the movies for Jules Jordan Video, but I was not an employee in that sense that it was a work for hire.” (ER 1095:10-13; *see also* SER 133:20-22 [“I mean it was understood that I owned the movies and I would get paid whether it was a corporation or if it was me individually”].)

Both courts and commentators have concluded that traditional work-for-hire principles should apply differently in non-traditional employment situations like the one here. *See Williams v. Weisser*, 273 Cal. App. 2d 726, 734-35, 78 Cal. Rptr. 542, 546-47 (1969) (full-time professor not employee for work for hire: “[A] rule of law developed in one context should not be blindly applied in another where it violates the intention of the parties and creates undesirable consequences”); 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 5.03[B][1][a][v] (2008) (“dominant employees” might be viewed differently in a work-for-hire analysis: “What if the human being who creates a work is nominally employed by a corporation, but the latter in fact serves as a vessel for the former?”).

In fact, in *M & A Associates*, the court held that since the dominant employee there “exercised complete control of the corporation” and “was the motivating force in producing the film,” he should be considered the copyright

owner even if he was nominally employed by the corporation while making his film. *M & A Assocs.*, 657 F. Supp. at 459.

Since Gasper owns 100% of JJV and since he had complete creative control over the films both before and after JJV was incorporated, it is equally nonsensical to view his intellectual property as a JJV work for hire.

**C. Gasper’s Assignment Of Copyrights In Four Films To JJV Was Valid.**

Assuming that Gasper owned the original copyrights because they were not works for hire, JJV acquired copyright standing through Gasper’s written assignment to JJV of his copyrights in four of the subject films (SER 168).

17 U.S.C. § 204(a). Kaytel does not contend otherwise.

**D. Even If Gasper’s Films Were Works For Hire, Any Error In The Registrations Was Inadvertent And Would Not Authorize Kaytel To Freely Counterfeit His Films.**

Kaytel glosses over the authorities from this Court and the principle that even if the films were works for hire, inadvertent registration application errors, including those as to authorship, do not invalidate a copyright, but merely necessitate that the copyright owner cure the error. In granting JMOL, the district court never gave JJV/Gasper the opportunity to cure. That was improper, particularly since a jury had already found that Kaytel had infringed copyrights that could only be owned by either Gasper or JJV.

**1. The standard for misnomers in registration applications is very forgiving.**

“In this circuit . . . we have held that ‘inadvertent mistakes on registration certificates do not invalidate a copyright and thus do not bar infringement actions, unless . . . the claimant intended to defraud the Copyright Office by making the misstatement.’” *Lamps Plus, Inc.*, 345 F.3d at 1145. “A party seeking to establish a fraud on the Copyright Office, and thereby rebut the presumption of copyright validity, bears a heavy burden.” *Lennon v. Seaman*, 84 F. Supp. 2d 522, 525 (S.D.N.Y. 2000).

Kaytel has not come close to carrying that heavy burden. Kaytel argues repeatedly that Gasper lied by claiming the films were not works for hire. (RR 48, 49, 51, 52.) Repeating a false charge often does not make it true. First, the previous analysis shows that Gasper was right that the films were not works for hire. (See § I.B., *infra*.) Second, he was consistent in claiming that he was the author. Third, Kaytel fails to mention that the distributor JSI prepared, signed and submitted the copyright registration applications, and that Gasper never consulted an attorney regarding the applications. (ER 1092:12-24, 2395-96; SER 120-21.) The fact that Gasper had a good-faith belief that the films were not works for hire is not evidence that he was trying to defraud the Copyright Office. Such a claim would be preposterous, indeed, since JJV, the only party that could potentially be harmed by an erroneous registration, is solely owned and dominated by Gasper.

Kaytel’s authorities don’t help it either. To the contrary, they reinforce the point that there is no basis for invalidating Gasper’s copyrights. Kaytel quotes *Embassy Software Corp. v. eCopy, Inc.*, 592 F. Supp. 2d 225 (D.N.H. 2009) for the proposition that an invalid registration nullifies a federal court’s subject matter jurisdiction (RR 50), without quoting the next sentence in the opinion: “[M]ost errors or mistakes in a copyright registration application will be inadvertent or immaterial, and thus will not invalidate the application (or any resulting certificate).” 592 F. Supp. 2d at 229 (citation omitted). In fact, in *Embassy Software* the court concluded the copyright registration should not be invalidated, even though the corporation filing the application had been administratively dissolved at the time of the registration, because it was “not clear” that the registration “was false or erroneous to begin with, let alone knowingly or materially so.” *Id.* at 230. Kaytel’s reliance on, at best, innocent and technical errors by a layperson like Gasper should get no better treatment from this Court.

Equally unhelpful is Kaytel’s favorite case, *Morgan, Inc. v. White Rock Distilleries, Inc.*, 230 F. Supp. 2d 104 (D. Me. 2002) (cited at RR 37, 50, 52). There, in declaring plaintiffs’ copyright registration invalid, the court relied on the fact that plaintiffs had admitted that the photographs were works for hire, but had nonetheless filed multiple inconsistent pleadings regarding copyright ownership. *Id.* at 108-09. Kaytel calls these facts “virtually identical” to Gasper’s situation. (RR 37.) Hardly. Gasper has never admitted that the films were works for hire and his pleadings have consistently argued they are not. Moreover, *Morgan* arose

in the First Circuit and it does not address the principle of liberal forgiveness of registration errors that reigns in this Circuit.

Kaytel goes so far as to rely on an opinion that has been vacated. Kaytel cites *Raquel v. Education Mgmt. Corp.*, 196 F.3d 171 (3rd Cir. 1999) (RR 50), but the United States Supreme Court granted certiorari from that opinion and then summarily vacated the judgment.<sup>3</sup> 531 U.S. 952, 121 S. Ct. 376, 148 L. Ed. 2d 289 (2000).

## **2. Forgiveness covers authorship errors.**

In fact, Kaytel does not seriously counter the several cases JJV/Gasper cited in their opening brief that show that this principle of liberal forgiveness covers authorship errors similar to the purported error here. (AOB 64-65, citing *Thomas Wilson & Co. v. Irving J. Dorfman Co.*, 433 F. 2d 409, 412 (2d Cir. 1970) (erroneous registration of copyright in name of corporation's president rather than corporation is "minor"); *Morelli v. Tiffany & Co.*, 186 F. Supp. 2d 563, 565-66 (E.D. Pa. 2002) (jewelry designer's registration of copyrights in his name, rather than his solely-owned company's name was erroneous, but inadvertent and

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<sup>3</sup> Even if *Raquel* were good law, it would only bolster Gasper/JJV's case. In *Raquel*, plaintiff was the author of a song that defendant, under license from plaintiff, used in a commercial and music video. Plaintiff, through counsel, registered a copyright as an audiovisual work for the commercial and video. 196 F.3d at 173-74. The court held that since plaintiff was not the author of the commercial and video, the misstatement in the application was material as it would have resulted in rejection if plaintiff had been accurate. *Id.* at 177. By contrast, Gasper's application was done without the help of counsel (ER 1092:12-24), and if he had listed JJV as the author, the application would not have been rejected, so any error was immaterial.

immaterial); *Testa v. Janssen*, 492 F. Supp. 198, 201 (W.D. Pa. 1980) (errant registration of copyright in their names by assignees of rights to a song did not block claim because no prejudice accrued to defendants and error did not affect underlying validity of plaintiffs' copyright).

If there was a registration error here, it was inadvertent and immaterial. Moreover, Kaytel did not argue and cannot show that it was prejudiced by the registration. (SER 90-110.) Would it not have counterfeited these DVDs if JJV had registered the copyright? Would its asserted defenses to the copyright infringement claim, which were rejected by the jury, have been any different? Without any prejudice affecting Kaytel, it makes no sense to declare the copyright invalid and block the plaintiffs' suit here.

At worst, then, the copyrights are owned by JJV and (as a plaintiff here) it had the claim as legal owner, not Gasper.

**E. Gasper And JJV Also Have Standing As Beneficial Copyright Owners Because Of Their Royalty Interests.**

Regardless of whether the films were works for hire, Gasper and JJV also have standing to pursue Kaytel's copyright violations as beneficial copyright owners. This is yet another of several arguments ignored or given short shrift by Kaytel.

A contingent right to royalties based on sales of the works is a recognized form of beneficial ownership under section 501 of the 1976 Act. 17 U.S.C. § 501(b); *Cortner v. Israel*, 732 F. 2d 267, 270-71 (2d Cir. 1984) (composers for

hire still have standing because they retained royalty interest); *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69, 74 (S.D.N.Y. 1982) (transfer of legal title to copyrights in exchange for royalty percentage creates beneficial ownership).

Jules Jordan movies were manufactured and distributed by JSI under an oral distribution license agreement between JSI and Gasper. (SER 170-71, 267.) Under the deal, Gasper/JJV would receive 65% of the gross sales of any Jules Jordan title. (SER 271.) JSI did, in fact, send royalty checks to both Gasper and JJV. (SER 132-36.) Under section 501, this royalty interest gave JJV and Gasper standing as beneficial owners.

Kaytel relies on *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136 (9th Cir. 2003) to argue that a creator of a work for hire has no beneficial interest, but the quote Kaytel cites does not appear on the pages cited, nor anywhere else in the opinion. (RR 49.) Moreover, in *Warren* plaintiff had entered into several agreements explicitly making his creation a work for hire. *Id.* at 1140. Gasper, on the other hand, never signed any agreements making the films work for hire—thus *Warren* has limited relevance.

In short, the district court overstepped its authority in granting JMOL on all copyright claims. The facts, viewed in a light most favorable to Gasper and JJV and governed by the applicable law, fully support those claims.

\* \* \* \* \*

This Court should reverse and reinstate the plaintiffs' copyright judgment.

**II. KAYTEL HAS EFFECTIVELY WAIVED ANY ARGUMENT THAT THE TRIAL COURT’S DENIAL OF FEES INCURRED BY GASPER’S NON-LEAD COUNSEL WAS CORRECT.**

The district court deducted almost \$240,000 from Gasper’s attorneys’ fees award on his right of publicity claim on the grounds that Gasper had not offered any evidence that non-lead counsel’s hourly rates were reasonable. (ER 1, 4, 7.) The court reduced the award of fees for non-lead counsel to \$0. (*Ibid.*) That was an abuse of discretion, because Gasper had submitted undisputed declarations, both from lead counsel and from an expert, as well as other evidence, showing that the fees for non-lead counsel were reasonable. (AOB 67-71.)

**A. Kaytel Falsely Asserts That Gasper Presented No Evidence To Support The Reasonableness of Non-Lead Counsel’s Billing Rates.**

Kaytel’s response is scant, at best. It argues that the district court was right, because Gasper submitted “no evidence” that provided “support for the rates charged by associate lawyers.” (RR 53, citing ER 522.) This is untrue. ER 522—Kaytel’s only cite—does not support its position. ER 522 is but one page of Gasper’s lead counsel’s declaration, which lists his rates, his experience, and his associates’ rates. The very next page of lead counsel’s declaration (ER 523)—not cited by Kaytel—states that counsel’s associates’ rates are “reasonable and well below the market rates in this judicial district for litigation attorneys and paralegals with their experience and skill levels.” (ER 523.) Gasper

has cited a host of other evidence—including the declarations of other lead counsel, an expert declaration, the amount involved and results obtained, counsel’s experience, reputation, and ability, and the agreed-upon billing rate—that the district court should have considered before fixing non-lead counsel’s reasonable billing rate at zero dollars per hour. (AOB 69-71.)

In short, Kaytel’s statement that “no such evidence was presented” is patently false.

**B. Kaytel Has Abandoned Any Argument That The Evidence Does Not Support the Reasonableness of Non-Lead Counsel’s Billing Rates.**

Rules 28(a)(9) and 28(b) of the Federal Rules of Appellate Procedure require that briefs of both appellants and appellees include arguments that contain the “[party’s] contentions and the reasons for them, with citations to the authorities and parts of the record on which the [party] relies.” Fed. R. App. P. 28(a)(9), 28(b). In keeping with this mandate, courts “require contentions to be accompanied by reasons.” *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (holding that party forfeited issues that were not accompanied by legal argument). Hence, “[i]ssues raised in a brief which are not supported by argument are deemed abandoned.” *Kohler v. Inter-Tel Techs.*, 244 F.3d 1167, 1182 (9th Cir. 2001) (declining to review appellant’s assertions unsupported by argument); *Kuba v. I-A Agric. Ass’n*, 387 F.3d 850, 855 n.5 (9th Cir. 2004) (same for appellees).

The simple assertion that a reasonable judge could have made the ruling (which is, at bottom, all that Kaytel asserts as to the reasonableness of the district court’s attorney’s fee ruling) “is not an argument, let alone a developed argument.” *Arredondo v. Ortiz*, 365 F.3d 778, 781 (9th Cir. 2004). Because Kaytel did not support its contentions on the attorneys’ fees award with reasoning or argument, it should be deemed to have abandoned any defense of the district court’s ruling. Moreover, having presented no alternative grounds for affirmance, Kaytel has waived any argument that the court should have affirmed the denial of non-lead counsel’s fees on some other ground than that stated by the court. *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1110 n.1 (9th Cir. 2000) (en banc), reversed on other grounds 535 U.S. 391, 122 S. Ct. 391, 152 L. Ed. 2d 589 (2002) (failure to raise alternative grounds for affirmance waives any such argument even if raised in a later brief).

**CONCLUSION RE: CROSS-APPEAL**

This Court should reverse the district court's grant of JMOL to Kaytel with directions to reinstate Gasper and JJV's almost \$2.85 million copyright judgment. This Court should also reverse the trial court's deduction of \$238,063.20 from Gasper's fee award and also award the plaintiffs their attorneys' fees incurred on appeal.

Dated: May 1, 2009

Respectfully submitted,

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By \_\_\_\_\_ s/

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed.R.App. 32(a)(7)© and Circuit Rule 32-1

for Case Nos. 08-55075 and 08-55126

I certify that pursuant to Fed. R. App. P. 32 (a)(7)© and Ninth Circuit Rule 32-1, the attached **CROSS-APPELLANTS' REPLY BRIEF** is proportionately spaced, has a typeface of 14 points or more and contains 6,974 words.

Dated: May 1, 2009

\_\_\_\_\_  
s/  
Jens B. Koepke

**CERTIFICATE OF SERVICE**  
When All Case Participants are Registered for the  
Appellate CM/ECF System

I hereby certify that on May 1, 2009, I electronically filed the foregoing **CROSS-APPELLANTS' REPLY BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/  
\_\_\_\_\_  
Jens B. Koepke