

1 K. Tom Kohan, Esq.; SBN: 225420  
2 **KOHAN LAW FIRM**  
3 445 South Figueroa Street, 27<sup>th</sup> Floor  
4 Los Angeles, California 90071  
5 Telephone: (310) 349-1111  
6 Fax: (213) 612-7715  
7 Email: [tom@kohanlawfirm.com](mailto:tom@kohanlawfirm.com)

8 Ezra Sutton, Esq.  
9 **Ezra Sutton & Associates, P.A.**  
10 900 Route 9 North  
11 Plaza 9, Suite 201  
12 Woodbridge, New Jersey 07095  
13 Telephone: (732) 634-3520  
14 Facsimile: (732) 634-3511  
15 Email: [esutton@ezrasutton.com](mailto:esutton@ezrasutton.com)

16 *Attorneys for Defendants*

17 **UNITED STATES DISTRICT COURT**  
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 NEWEGG, INC., a Delaware Corporation,

20 Plaintiff,

21 v.

22 EZRA SUTTON, P.A., a New Jersey  
23 Professional Corporation; and EZRA  
24 SUTTON, an individual,

25 Defendants.

Case No.: 2:15-cv-01395-TJH-JC

**DEFENDANTS'**  
**MEMORANDUM**  
**IN OPPOSITION TO**  
**PLAINTIFF'S MOTION FOR**  
**PARTIAL SUMMARY**  
**JUDGMENT**

Date: June 6, 2016  
Time: UNDER SUBMISSION  
Before: Hon. Terry J. Hatter, Jr.  
Crtrm: 17

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1 Defendants Ezra Sutton, P.A., and Ezra Sutton (collectively “Defendants”)  
2 respectfully submit this Memorandum of Law, and the Declaration of Ezra Sutton  
3 (“Sutton Decl.”) in opposition to Plaintiff Newegg, Inc.’s, (“Newegg” or “Plaintiff”)  
4 “Motion for Partial Summary Judgment.”  
5

6 **I. INTRODUCTION**

7 As explained below, the conduct of which Plaintiff complains – the inclusion of  
8 parts of Plaintiff’s brief in Defendants’ filed brief on behalf of their client Sakar  
9 International, Inc. – is clearly fair use. A finding of fair use follows inescapably from the  
10 fact that Defendants made a transformative use of Plaintiff’s publicly available, non-  
11 confidential, fact-driven court filing in a manner that has no adverse impact on any  
12 market for Plaintiff’s brief or on Plaintiff’s incentive to file and use its brief.  
13  
14

15 Accordingly, Newegg’s summary judgment motion should be denied.  
16

17 **II. RELEVANT FACTS**

18 1) In the case of *AdjustaCam, LLC v. Newegg, Inc.*, No. 10-329 (E.D. Tex.  
19 2012), Plaintiff Newegg and Sakar International, Inc. (represented by the Defendants in  
20 this case) were the last two remaining co-defendants (from the original 22 defendants)  
21 that together prevailed over the plaintiff AdjustaCam LLC to invalidate AdjustaCam’s  
22 patent in suit. As a result, Newegg and Sakar worked together to file briefs in the  
23 district court for recovering their respective attorney’s fees. See Sutton Declaration,  
24 Paragraph 2.  
25  
26  
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28

1           2)     In the case of *AdjustaCam, LLC v. Newegg, Inc.*, Nos. 2013-1665, 2013-  
2 1666, 2013-1667 (Fed. Cir. 2015), Defendants used Plaintiff Newegg’s Draft Brief as a  
3 template for filing an appeal brief on behalf of Sakar International, Inc. See Sutton  
4 Declaration, Paragraph 3.  
5

6           3)     Parts of Plaintiff’s Draft Brief were derived from the District Court briefs.  
7 Parts were factual and legal. Parts also apply to Sakar. Defendants revised and added  
8 new parts and sections to Newegg’s Draft Brief. See Sutton Declaration, Paragraph 4.  
9

10          4)     Defendants added new sections to Defendants First Brief, and substantial  
11 revisions were made. See Sutton Declaration, Paragraph 5.  
12

13          5)     Defendants moved to withdraw Defendants First Brief, and filed a  
14 shortened, revised appeal brief on behalf of Sakar. See Sutton Declaration, Paragraph 6.  
15

16          6)     There was no copyright infringement because the accused brief was  
17 withdrawn, and not used. See Sutton Declaration, Paragraph 7.

18          7)     Defendants then filed a Second and Revised Brief that did not copy  
19 Newegg’s Brief. Substantial revisions were made. See Sutton Declaration, Paragraph 8.  
20

21          8)     It is Defendants’ position that there is no copyright infringement because in  
22 the case of *AdjustaCam, LLC v. Newegg, Inc.*, Nos. 2013-1665, 2013-1666, 2013-1667  
23 (Fed. Cir. 2015), Defendants were permitted to adopt Plaintiff’s alleged copyrighted,  
24 opening appellate brief by reference, as a matter of law, pursuant to Rule 28(i) of the  
25 Federal Rules of Appellate Procedure (FRAP). In fact, Defendants did in fact use this  
26 procedure when it filed its appellate reply brief for which Plaintiff did not object to. See  
27  
28

1 Sutton Declaration, Paragraph 9.

2 9) It is also Defendants' position that there is no copyright infringement  
3 because the foregoing facts qualify as a "Fair Use" defense which has been addressed in  
4 detail in Defendants' opposition memorandum. See Sutton Declaration, Paragraph 10.  
5

6  
7 **Lack of Damages and Attorney's Fees**

8  
9 10) Plaintiff Newegg registered its alleged copyrighted brief after Defendants  
10 allegedly copied Plaintiff's brief and incorporated into Defendants' brief (prepared for  
11 their client Sakar). See Sutton Declaration, Paragraph 11.  
12

13 11) Other than filing its brief on the PACER system, Plaintiff Newegg never  
14 published their alleged copyrighted brief. See Sutton Declaration, Paragraph 12.  
15

16 12) Defendants acted "without malice" and in "good faith," since Newegg and  
17 Sakar were co-defendants working together to prove that Adjustacam acted in bad faith  
18 to justify an award of attorney's fees. See Sutton Declaration, Paragraph 13.  
19

20 13) Defendants acted in the good faith belief that both parties were on the same  
21 side trying to win the same motion and that they acted innocently. See Sutton  
22 Declaration, Paragraph 14.  
23

24 14) Plaintiff has not sustained any damages because Defendants immediately  
25 withdrew the allegedly infringing brief and retracted it from the Court filings, so that it  
26 no longer exists in the Court's records. See Sutton Declaration, Paragraph 15.  
27  
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15) Plaintiff cannot objectively prove that it is entitled to actual damages . . . because Plaintiff cannot show that the fair market value of this brief(s) has been diminished and Plaintiff is not entitled to claim a lost license fee. See Sutton Declaration, Paragraph 16.

16) Any purported damages relating to Plaintiff’s alleged copyrighted brief(s) sought by the Plaintiff are limited due to the lack of any evidence by Plaintiff that they would have derived any profits, and are also limited by the apportionment theory based on the percentage of profits attributable to the alleged infringement of the allegedly copyrighted briefs. See Sutton Declaration, Paragraph 17.

17) Plaintiff has not stated any particularized facts establishing any damages that Plaintiff has sustained because of Defendants’ alleged copying. See Sutton Declaration, Paragraph 18.

**III. SUMMARY JUDGMENT STANDARDS**

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A genuine issue of material fact is one that could reasonably be resolved in favor of the nonmoving party and that could affect the

1 outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The  
2 evidence submitted by the nonmovant, in opposition to a motion for summary  
3 judgment, is to be believed, and all justifiable inferences are to be drawn in its  
4 favor. See *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1542  
5 (9th Cir.1989) (en banc)(“[A]ll justifiable inferences must be drawn in [the  
6 nonmovant's] favor.”) (citation omitted); *Keystone Retaining Wall Sys., Inc. v.*  
7  
8 *Defendantsrock, Inc.*, 997 F.2d 1444, 1449-50 (Fed.Cir.1993) (internal citations  
9 omitted)(quoting *Anderson*, 477 U.S. at 255).

#### 11 ARGUMENT

12  
13 Defendants – not Plaintiff – is entitled to summary judgment on Defendants’ fair-  
14 use defense. Thus, Plaintiff’s summary judgment motion should be denied.

#### 15 **IV. DEFENDANTS’ TRANSFORMATIVE USE OF PLAINTIFF’S BRIEF,** 16 **WITH NO PROSPECT OF MARKET HARM, IS FAIR USE.**

17  
18 As the Supreme Court has explained, “[f]rom the infancy of copyright protection,  
19 some opportunity for **fair use** of copyrighted materials has been thought necessary to  
20 fulfill copyright’s very purpose, ‘to promote the Progress of Science and useful Arts.’  
21 Art. I, sec. 8, cl. 8.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575-77 (1994)  
22 (citations omitted). The fair use doctrine is essential to prevent “rigid application” of  
23 copyright law protections from “stifl[ing] the very creativity which that law is designed  
24 to foster.” *Id.*

25  
26  
27 Section 107 of the Copyright Act instructs courts to evaluate invocations of fair  
28 use on a case-by-case basis by considering the following non-exclusive list of factors:

- 1 (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- 2 (2) the nature of the copyrighted work;
- 3 (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- 4 (4) the effect of the use upon the potential market for or value of the copyrighted work.

5  
6 Courts have emphasized that these factors should be construed so as to advance the  
7 underlying objectives of copyright law. As noted above, “[t]he ultimate test of fair use...  
8 is whether the copyright law’s goal of ‘promoting the Progress of Science and useful  
9 Arts,’ U.S. Const., art. I, § 8, cl. 8, would be better served by allowing the use than by  
10 preventing it.” *Castle Rock Entm’t, Inc. v. Carol Publ’g Grp., Inc.*, 150 F.3d 132, 141  
11 (2d Cir. 1998) (other quotation omitted).

12  
13  
14 The conduct of which Defendants are accused plainly falls into the zone protected  
15 by fair use. On an uncontested record as to the material facts that underly a fair-use  
16 analysis here, the statutory factors weigh heavily in Defendants’ favor. Also, the  
17 underlying purposes of copyright law thus clearly would be advanced rather than  
18 threatened by a finding of fair use.

19  
20  
21 Analysis of the factors below compels the conclusion that they balance in  
22 Defendants’ favor and thus, Defendants’ use is fair.

23  
24 **A. Factor One: The Nature and Purpose of the Use**

25 **1. Defendants’ Use was Transformative**

26 **Although a transformative use weighs heavily in favor of fair use, the**  
27 **Supreme Court has held that a transformative use is not required for a finding of**  
28

1 **fair use.** *Campbell*, 510 U.S. at 579; *see also Sony Corp. of Am. v. Universal City*  
2 *Studios, Inc.*, 464 U.S. 417, 453 n.40 (1984).

3 The “central purpose” of the first-factor inquiry is to determine “whether the new  
4 work merely **supersede[s]** the objects of the original creation... or instead adds  
5 **something new**, with a further purpose or different character, **altering the first** with  
6 new expression, meaning, or message”; it is to determine “whether and to what extent  
7 the new work is transformative.” *Campbell*, 510 U.S. at 579 (quotations omitted). By  
8 generating value beyond that inhering in the original, the goal of copyright “is generally  
9 furthered” by transformative works. *Campbell*, 510 U.S. at 579.

10 Here, Defendants added transformative elements to Plaintiff’s alleged  
11 copyrighted brief, such as (See paragraphs 5, 7, and 8 of Sutton Declaration):

12 1) Defendants added new sections to Defendants First Brief, and substantial  
13 revisions were made.

14 2) Defendants moved to withdraw Defendants First Brief, and filed a  
15 shortened, revised appeal brief on behalf of Sakar.

16 3) Defendants then filed a Second and Revised Brief that did not copy  
17 Newegg’s Brief. Substantial revisions were made.

18 *See White v. W. Pub. Corp.*, 29 F. Supp. 3d 396, 399 (S.D.N.Y. 2014)(“West and  
19 Lexis’s processes of reviewing, selecting, converting, coding, linking, and identifying  
20 the documents “**add[ ] something new**, with a further purpose or different character”  
21 than the original briefs.”)(*citing Campbell*, 510 U.S. at 579); *Authors Guild, Inc. v.*  
22  
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1 *Hathitrust*, No. 11 CV 63551 (HB), 2012 WL 4808939, at \*11 (S.D.N.Y. Oct. 10, 2012)  
2 (“A transformative use may be one that actually changes the original work.”)

3  
4 Also, the commercial nature of the use is not legally significant; it is “only one  
5 element of the first factor enquiry into its purpose and character,” *Campbell*, 510 U.S. at  
6 584, and **the fact that a use is commercial does not bar a finding of fairness.** *Id.*  
7 Indeed, “the Supreme Court has discounted the force of commerciality in applying a fair  
8 use analysis[.]” *Kane v. Comedy Partners*, No. 00 Civ 158 (GBD), 2003 WL 22383387,  
9 at \*3 (S.D.N.Y. Oct. 16, 2003). As the Supreme Court has noted, if “commerciality  
10 carried presumptive force against a finding of fairness, the presumption would swallow  
11 nearly all of the illustrative uses listed in the preamble paragraph of § 107, including  
12 news reporting, comment, criticism, teaching, scholarship, and research, since these  
13 activities ‘are generally conducted for profit in this country.’” *Campbell*, 510 U.S. at  
14 584 (citation omitted). The commercial nature of a transformative use carries little  
15 weight where, as in this case, the factors considered together point toward fair use.  
16  
17  
18

19 Thus, the first statutory factor weighs heavily in favor of fair use.  
20

21 **B. Factor Four: The Effect of the Use on the Potential Market for or**  
22 **Value of the Copyrighted Work**

23 Defendants’ use of Plaintiff’s brief had no impact on the actual or any potential  
24 market for Plaintiff’s brief. **(As pointed out to this Court, Defendants had the**  
25 **complete legal right to adopt every word of Plaintiff’s brief under Rule 28(i) of the**  
26 **Federal Rules of Appellate Procedure.)**  
27

28 The fourth statutory fair-use factor requires an assessment of “the effect of

1 [Defendants'] use upon the potential market for or value of the copyrighted work." 17  
2 U.S.C. § 107(4). The primary focus of this factor is on whether the Defendants' work  
3 functions as a substitute for the plaintiff's work and thus reduces the value of the  
4 existing market for that work. *See e.g. NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 482  
5 (2d Cir. 2004) (asking "whether the secondary use usurps the market of the original  
6 work").  
7  
8

9 Also relevant under the fourth factor is whether the Defendants' activity might  
10 erode the value of a "potential" market for the plaintiff's work.

11 A copyright owner's failure to adduce any evidence of harm to the actual or  
12 potential **market for the copyrighted work weighs heavily in favor of fair use**. In  
13 *Blanch*, the fact that the plaintiff admitted she had "never licensed any of her  
14 photographs for use in works of graphic or other visual art" and that the defendant's use  
15 of her photograph in a painting "did not cause any harm to her career or upset any plans  
16 she had" for the photograph led the court to conclude that the fourth factor "greatly"  
17 favored the Defendants. 467 F.3d at 258; *see also id.* at 262 (Katzmann, J., concurring)  
18 ("[T]he fourth factor of the fair-use analysis dramatically favors Koons, in that Blanch  
19 **failed to show that Koons' use of her work actually harmed her in any way[.]**");  
20 *Leibovitz v. Paramount Pictures Corp.*, 137 F.3d 109, 116 n.6 (2d Cir. 1998)  
21 ("Leibovitz has not identified any market for a derivative work that might be harmed by  
22 the Paramount ad. In these circumstances, the defendants had no obligation to present  
23 evidence showing lack of harm in a market for derivative works."); *Swatch Group*  
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1 *Mgmt. Servs. Ltd. v. Bloomberg L.P.*, No. 11 Civ. 1006 (AKH), 2012 WL 1759944, at  
2 \*5 (S.D.N.Y. May 17, 2012) (finding fair use where “[n]othing in the record suggests  
3 any market effect stemming from defendant’s use of such a limited portion of the  
4 recording of the Earnings call.”).<sup>1</sup>

6 Here, Plaintiff has failed to identify any adverse effect whatsoever on any actual  
7 or any potential market for its brief arising from its use by Defendants. *White v. W. Pub.*  
8 *Corp.*, 29 F. Supp. 3d 396, 400 (S.D.N.Y. 2014)(“[Plaintiff] admits that he lost no  
9 clients as a result of West’s and Lexis’s usage.... Furthermore, **no secondary market**  
10 **exists in which White could license or sell the briefs to other attorneys**, as no one  
11 has offered to license any of White’s motions, nor has White sought to license or sell  
12 them. Although White argues that Lexis and West impede a market for licensing briefs,  
13 the Court finds that no potential market exists because the transactions costs in licensing  
14 attorney works would be prohibitively high. Thus on net, the fourth factor weighs in  
15 favor of defendants and a finding of fair use.”) (*citing Blanch v. Koons*, 467 F.3d 258  
16 (2d Cir. 2006) (finding that this factor “greatly favor[ed]” the alleged infringer where  
17 the copyright holder had “never licensed any of her photographs for use in works of  
18 graphic or other visual art”)).

---

24 <sup>1</sup> See also *A.V. ex rel. Vanderhuy v. iParadigms*, 562 F.3d 630, 643 (4th Cir. 2009)  
25 (**finding fair use** where each of the plaintiffs conceded that the defendant’s use of their  
26 school papers had not “impinged on the marketability of their works or interfered with  
27 their use of the works”); *Nunez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 25 (1st Cir.  
28 2000) (noting lack of evidence of a market for sale of modeling photographs to  
newspapers to illustrate controversy and that plaintiff did “not suggest that he ever tried  
to sell portfolio photographs to newspapers”).

1 Thus, the fourth statutory factor tilts in favor of fair use.

2 **C. Factor Two: The Nature of the Copyrighted Work**

3 The second fair-use factor considers the nature of the plaintiffs' copyrighted  
4 work. U.S.C. § 107(2). The law "generally recognizes a greater need to disseminate  
5 factual works than works of fiction or fantasy." *Harper & Row, Publ'rs, Inc. v. Nation*  
6 *Enters.*, 471 U.S. 539, 563 (1985). As the Second Circuit stated in *Am. Geophysical*  
7 *Union v. Texaco*, 60 F.3d 913, 925 (2d Cir. 1994) with respect to scientific articles,  
8 "[t]he manifestly factual character of the... articles precludes us from considering [them]  
9 as 'within the core of the copyright's protective purposes.'" (citations omitted); *see also*  
10 *New Era Publ'ns Int'l v. Carol Publ'g Grp.*, 904 F.2d 152, 157-58 (2d Cir. 1990)  
11 (finding that factor two favored fair use where copied work, a biography, was, on  
12 balance, factual or informational); *Maxtone Graham v. Burtchaell*, 803 F.2d 1253, 1263  
13 (2d Cir. 1986) (finding collection of verbatim interviews to be "essentially factual in  
14 nature," favoring fair use).

15 Although even nonfiction works may have creative elements that are entitled to  
16 some weight under factor two, *see, e.g., Peter Letterese & Assocs., Inc. v. World Inst. of*  
17 *Scientology Enters., Int'l*, 533 F.3d 1287, 1300 (11th Cir. 2008), the straightforward,  
18 functional presentation of fact and law in Plaintiff's brief places it on the less creative  
19 end of the nonfiction spectrum and, accordingly, tips factor two in favor of fair use.  
20 Here, the brief at issue is a "functional presentation[] of fact and law, and this cuts  
21 towards finding in favor of fair use." *White v. W. Pub. Corp.*, 29 F. Supp. 3d 396,  
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1 399 (S.D.N.Y. 2014)

2 Thus, the second factor thus favors fair use.

3 **D. Factor Three: The Amount and Substantiality of the Use**

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5 The third fair-use factor looks at the amount and substantiality of the portion used  
6 in relation to the copyrighted work as a whole. 17 U.S.C. § 107(3). **Copying an entire**  
7 **work “does not preclude a finding of fair use.”** *White v. W. Pub. Corp.*, 29 F. Supp.  
8 3d 396, 399 (S.D.N.Y. 2014)(“[C]ourts have concluded that... copying [entire works]  
9 does not necessarily weigh against fair use because copying the entirety of a work is  
10 sometimes necessary to make a fair use of the image.”)(citing *Bill Graham Archives v.*  
11 *Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d Cir.2006)). Rather, the Supreme Court  
12 has explained, “the extent of permissible copying varies with the purpose and character  
13 of the use.” *Campbell*, 510 U.S. at 586-87; see also *Sony*, 464 U.S. at 449-50 (because  
14 time-shifting “merely enables a viewer to see such a work which he had been invited to  
15 witness in its entirety free of charge, the fact that the entire work is reproduced... does  
16 not have its ordinary effect of militating against a finding of fair use”).

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21 Where, as here, the transformative purpose of the copying necessitates the use of  
22 the entire work, the third factor does not weigh against a finding of fair use. See, e.g.,  
23 *Bill Graham Archives*, 448 F.3d at 613 (finding that copying of the entire work “does  
24 not necessarily weigh against fair use because copying the entirety of a work is  
25 sometimes necessary to make fair use” of the work). See part A1 above.

26  
27  
28 In view of the necessity of Defendants copying, factor three is in Defendants’

1 favor.

2 **V. IN THE ALTERNATIVE, DEFENDANTS ARE ENTITLED TO**  
3 **JUDGMENT ON PLAINTIFF'S CLAIMS FOR ACTUAL DAMAGES,**  
4 **STATUTORY DAMAGES, AND ATTORNEY'S FEES**

5 As demonstrated above, Defendants are entitled to judgment, and a concomitant  
6 dismissal of the complaint as to it, on its fair-use defense. Even if the Court were to  
7 deny that relief, however, the record is ripe for the Court now to rule, as a matter of law,  
8 on the availability of various remedies were Plaintiff to secure a favorable liability  
9 ruling. Specifically, it is now clear that Plaintiff has failed to prove any actual damages  
10 arising out of the asserted infringement and, is not eligible to receive statutory damages  
11 or attorneys' fees, and would not be entitled to injunctive relief.

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13  
14 **A. Plaintiff Cannot Show Any Actual Damages.**

15 Plaintiff cannot identify any actual damage it has incurred as a result of  
16 Defendants' conduct. Accordingly, Defendants are entitled to judgment on Plaintiff's  
17 request for actual damages. *See Thornton v. J Jargon Co.*, 580 F. Supp. 2d 1261, 1276-  
18 77 (M.D. Fla. 2008) (granting summary judgment on plaintiff's claim for actual  
19 damages where it was undisputed that the plaintiff never licensed the allegedly infringed  
20 work for any fees and also failed to provide any evidence of benchmark licenses).  
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24 **B. Plaintiff Is Not Eligible to Receive Statutory Damages or Attorneys'**  
25 **Fees.**

26 Plaintiff cannot satisfy the statutory prerequisites for eligibility for an award of  
27 statutory damages and attorneys' fees. Section 412 of the Copyright Act provides in  
28 relevant part that "no award of statutory damages or of attorney's fees... shall be made

1 for (1) any infringement of copyright in an unpublished work commenced before the  
2 effective date of its registration; or (2) any infringement of copyright commenced after  
3 the first publication of the work and before the effective date of its registration, unless  
4 such registration is made within three months after first publication of the work.” 17  
5 U.S.C. § 412. Plaintiff cannot meet the **first prong** of section 412 because part of  
6 Plaintiff’s brief was copied by Defendants and incorporated into Defendants’ brief  
7 (prepared for their client Sakar) before the Plaintiff’s brief was registered. Plaintiff  
8 cannot meet the **second prong** of section 412 because – notwithstanding their public  
9 availability at the courthouse in which they were filed and from PACER – the brief has  
10 not been “published” for purposes of section 412.  
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14 “Publication” is defined in section 101 of the Copyright Act as “the distribution  
15 of copies... of a work to the public by sale or other transfer of ownership, or by rental,  
16 lease, or lending.” 17 U.S.C. § 101. One or more of these acts must have occurred prior  
17 to commencement of the infringement for section 412(2) to apply, but none of these acts  
18 has taken place.  
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21 Plaintiff’s very limited acts of distribution do not constitute publication as  
22 required by section 412(2). *See, e.g., Grundberg v. Upjohn Co.*, 137 F.R.D. 372, 388  
23 (D. Utah 1991) (“**[P]lacement of documents in court files and offering documents**  
24 **into evidence, even though this may provide access to the public, does not**  
25 **constitute publication under the copyright laws.”). Courts distinguish between**  
26 “general” and “limited” publication, and the definition of “publication” in section 101  
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28

1 corresponds to “**general**” **publication**. See *Penguin Books U.S.A., Inc. v. New*  
2 *Christian Church of Full Endeavor, Ltd.*, 288 F. Supp. 2d 544, 555 (S.D.N.Y. 2003);  
3 *Shoptalk, Ltd. v. Concorde-New Horizon Corp.*, 168 F.3d 568, 590 (2d Cir. 1999). In  
4 contrast, “[l]imited” publication, which involves the communication or distribution of a  
5 work to a “definitely select group,” for a “limited purpose,” and “without the right of  
6 diffusion, reproduction, distribution or sale,” is **not a “publication”** within the meaning  
7 of section 101. *Warner Bros. Entm’t Inc. v. X One X Prods.*, 644 F.2d 584, 593 (8th  
8 Cir. 2011); see also *Soc’y of the Holy Transfiguration Monastery, Inc. v. Archbishop*  
9 *Gregory of Denver*, 689 F.3d 29, 45 (1st Cir. 2012).

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14 Publicly filing a document with a governmental entity is at best a **limited**  
15 **publication**; it is not a general one that satisfies section 412(2). See *Danielson, Inc. v.*  
16 *Winchester-Conant Properties, Inc.*, 322 F.3d 26, 36 (1st Cir. 2003); *Grundberg*, 137  
17 F.R.D. at 388; see also *RPM Mgmt., Inc. v. Apple*, 943 F. Supp. 837, 841-42 (S.D. Ohio  
18 1996); *Kunycia v. Melville Realty Co., Inc.*, 755 F. Supp. 566, 574 (S.D.N.Y. 1990);  
19 *East/Defendants Venture v. Wurmfeld Assocs., P.C.*, 722 F. Supp. 1064, 1066 (S.D.N.Y.  
20 1989); 1 M.B. & D. Nimmer, *Nimmer on Copyright*, § 4.10 at 4-52 (2012) (“[P]lacing a  
21 work in a public file... clearly does not constitute an act of publication.”).

## 22 **VI. CONCLUSION**

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26 Based on all of the foregoing, Plaintiff’s summary judgment motion should be  
27 denied, and summary judgment should be awarded granted in Defendants’ favor for  
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