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No. 63648-1

**IN THE COURT OF APPEALS OF WASHINGTON,
DIVISION ONE**

TOUCH NETWORKS, INC.

Plaintiff-Appellee,

v.

GOGI DESIGN, LLC and HYUNSOOK CHUNG

Defendants-Appellants.

On appeal from King County Superior Court, No. 07-2-33454-8 SEA
The Honorable Mary I. Yu, Superior Court Judge

**REPLY BRIEF OF DEFENDANT-APPELLANT
GOGI DESIGN, LLC**

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I. ARGUMENT

A. With the Exception of Two Discovery Issues, The Issues Presented by this Appeal Are Subject to “De Novo” Review

The first argument section of TNI’s brief (“The Trial Court Followed Controlling State Law and Did Not Abuse its Discretion”) suggests that this appeal principally presents questions subject to “abuse of discretion” review. This is not correct, as the vast majority of the assignments of error presented in this appeal (Assignments of error Nos. 1-8, and 11) concern questions and conclusions of law, which are reviewed *de novo*. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wash.2d 873, 880, 73 P.3d 369 (2003). Only assignments of error Nos. 9 and 10, concerning pretrial discovery orders, are reviewed for manifest abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wash.2d 299, 339, 858 P.2d 1054 (1993).

B. The Nondisclosure Agreement Cannot Be Construed So as to Effect a Transfer of Copyrights in Any Work Product That Might Thereafter Be Generated by Defendants

TNI contends that the Nondisclosure Agreement is properly interpreted as effecting a transfer of intellectual property rights in any and all work product that Ms. Chung (or her successors) might generate during the course of any work relationship with TNI that might ensue, even though the contract does not make any reference to any work product, does not contain any language evidencing a transfer, and does not discuss consideration. TNI’s analysis fails in several fatal respects.

1. The Nondisclosure Agreement, Which Defines “Proprietary Information” as “Information Furnished or Made Available to Obligated Person by Company,” Says Absolutely Nothing About Any Work Product that May Be Generated by the “Obligated Person”

TNI completely ignores the definition of “Proprietary Information” contained in the contract. “Proprietary Information,” is defined, very simply, as all “information furnished or made available to Obligated Person ...by Company...”¹ In other words, “Proprietary Information” consists *solely* of whatever information was transmitted from TNI to Ms. Chung, and simply does not include information generated by Defendants, or transmitted by Defendants to TNI. Merging the definition of “Proprietary Information” into the intellectual property clause (§ 2), the clause provides that “Company is the sole owner of [the intellectual property rights] related to ...information furnished or made available to Obligated Person by Company.”²

TNI proposes an interpretation of this language that would also render it the owner of the intellectual property rights “related to” work performed by the Obligated Person or information or materials “furnished or made available” *to* the Company *by* the Obligated Person. The

¹ "Any and all information furnished or made available to Obligated Person (or his/her agents or employees) by Company, or its agents, either prior to or after the date of this Agreement, including but not limited to [a laundry list of items] and any and all other records and information, is Company's confidential, proprietary, trade secret information and any and all such information will hereafter be referred to as 'Proprietary Information.'"

² None of the intellectual property at issue in this case was *ever* transmitted by TNI to the Defendants. To the contrary, it was authored (or co-authored) by Defendants, and transmitted by Defendants to TNI.

intellectual property clause, however, is simply not that broad.

The only logical interpretation of this language is that the “Company” owns whatever intellectual property rights may exist in “information furnished or made available to the “Obligated Person” by the “Company.” This is consistent with the remaining language of ¶ 2, which provides that TNI is the owner of “Proprietary Information” (and nothing more than “Proprietary Information”), and that TNI does not grant a license to the Obligated Person to use “Proprietary Information.” It is also consistent with the overall purpose of the contract, which is designed to protect the “Proprietary Information” owned by “the Company,” and does not speak to, or even contemplate, any work product of the “Obligated Person,” which falls outside the definition of “Proprietary Information.” The contract says absolutely nothing about who would own intellectual property rights in work product that might later be generated by the “Obligated Person,” or in “information” that might be “furnished or made available” by the “Obligated Person” to the “Company.” If the parties had intended on effecting a transfer of intellectual property rights that would otherwise have been owned by the “Obligated Person,” one would have expected a “work for hire”³ clause, or, at least, much more explicit language referencing the work product to be generated by the Obligated

³ As noted in Gogi’s Opening Brief, TNI certainly knew how to draft such language. In its brief, TNI offers no explanation for the fact that, on September 27, 2007, TNI transmitted to Defendants a proposed letter agreement that Dr. Ombrellaro asked Ms. Chung to sign, individually and on behalf of Gogi, that stated that all design services performed for TNI were done “on a work for hire basis.” Exh. 288.

Person.⁴

2. TNI Confuses the Intellectual Property Clause With the Confidentiality Clause, Which is Broader in Scope

TNI, in its brief, contends that “[t]he words in the NDA in this case define ‘Proprietary Information,’ [sic] say that TNI retains its ownership of all ‘Proprietary Information’ and ‘information derived therefrom...’” Respondent’s Brief, at 8.

This is simply incorrect. The Nondisclosure Agreement provides that TNI owns “Proprietary Information,” but does *not* state that it owns “information derived therefrom.” TNI is confusing the confidentiality clause (¶ 1) with the intellectual property clause (¶ 2). The confidentiality obligations in ¶1 apply not only to Proprietary Information, but also to all information “derived therefrom.” The intellectual property rights, governed by ¶ 2, in contrast, apply only to “Proprietary Information.” Interpreting the scope of the intellectual property clause in ¶ 2 to be coextensive with the confidentiality clause in ¶ 1 would render entirely meaningless⁵ the words “or derived therefrom” in ¶ 1. This is an important distinction, as the Nondisclosure Agreement plainly mandates

⁴ Compare *NASCAR v. Scharle*, 356 F.Supp.2d 515, 520 (E.D. Pa. 2005) (“The Artist ... agrees to sell to Franklin and Franklin agrees to purchase from the Artist, all the right, title and interest, and all worldwide copyright rights, in and to certain works of art to be executed by the Artist as an independent contractor in accordance with this Agreement”).

⁵ See *Wagner v. Wagner*, 95 Wash.2d 94, 101, 621 P.2d 1279 (1980) (“An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective”).

that TNI owns “Proprietary Information” and intellectual property rights in Proprietary Information, but does *not* afford TNI ownership of information “derived from” Proprietary Information.

3. TNI Has No Explanation for the Fact that It Was Offered, and Expressly Declined to Purchase, “Usage Rights” in Defendants’ Work Product

Finally, TNI proffers no explanation for the fact that, just one week after the execution of the Nondisclosure Agreement, Ms. Chung offered TNI the option of paying a flat rate “Project Fee” that would include “full usage rights,” or simply paying hourly for design services, with no intellectual property rights included. Exh. 264. Notably, when offered the opportunity to acquire “usage rights,” Dr. Ombrellaro did not ask what the term meant, nor did he invoke the Nondisclosure Agreement the parties had executed a week earlier, nor did he otherwise explain that TNI, in its view, already owned the intellectual property rights to whatever works Ms. Chung might generate during the course of their relationship. Instead, he simply indicated that TNI would proceed on an hourly fee basis. *Id.* It should also be noted that Eastside Vascular, LLP, another entity run by Dr. Mark Ombrellaro, had elected to pay a “Project Fee” that included a “full usage buyout.” *See* Exh. 232; Chung, 4/30/09 at 117:5 to 120:9.

C. The Copyright Act Is Quite Relevant to this Action, Regardless of Whether Any of TNI's Claims Arise Under the Copyright Laws for Purposes of Federal Subject Matter Jurisdiction

TNI contends that the Copyright Act is somehow irrelevant to this action, merely because the federal district court held that there was no federal subject matter jurisdiction over this action. This is not even remotely correct. TNI has confused the question of federal subject matter jurisdiction⁶ with the application of federal law, which are distinctly different.

1. Section 204(a) of the Copyright Act Provides the Requirements for the Transfer of a Copyright

First and foremost, copyright law determines whether a transfer of a copyright has been effected. Although TNI is correct that a claim asserting copyright ownership solely by contract is not a claim arising under the Copyright laws for purposes of federal subject matter jurisdiction, it is nonetheless a claim that is controlled by a specific provision of federal law, Section 204(a) of the Copyright Act, which provides that “[a] transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of transfer is in writing and signed by the owner of the

⁶ Defendants removed this action to federal district court on the ground that Plaintiff's claims, although styled as state law claims, included, in substance, claims that Defendants' work product were “works for hire,” and claims that TNI was an author, or co-author, of Defendants' work product. *See* Notice of Removal, CP 10. The federal district court (Pechman, J.) disagreed, holding that TNI's complaint did not allege anything more than ownership on a contractual theory.

rights conveyed or such owner's duly authorized agent.” 17 U.S.C. § 204(a). Regardless of whether a claim asserting a transfer of copyright is litigated in federal or state court, the court must find that a transfer has met the requirements of § 204(a) in order to effect a transfer of a copyright. State courts considering alleged transfers of copyrights are required to follow the requirements of, and routinely do apply, Section 204(a). See, e.g., *Conwell v. Gray Loon Outdoor Marketing Group, Inc.*, 906 N.E.2d 805 (Ind. 2009) (state court finds that purported transfer of copyright did not meet requirements of Section 204); *Krapp v. McCarthy*, 121 Ohio App.3d 64, 698 N.E.2d 1049 (Ohio App. 1 Dist. 1997) (same); *PMC, Inc. v. Saban Entertainment, Inc.*, 45 Cal.App.4th 579, 52 Cal.Rptr.2d 877 (Cal. App. 2 Dist. 1996) (same).

As noted in Defendants’ Opening Brief, Section 204(a) requires the “parties who want to transfer copyright ownership to determine *precisely what rights are being transferred and at what price.*” *Konigsberg Intern. Inc. v. Rice*, 16 F.3d 355, 356 (9th Cir.1994) (emphasis added); *Effects Assocs., Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990) (same). This requirement is “more stringent than the common law statute of frauds.” *PMC, Inc.*, 45 Cal.App.4th at 591-92. Transfer of a copyright interest must be made expressly. *Gladwell Government Services, Inc. v. County of Marin*, 265 Fed. Appx. 624, 2008 WL 268268 (9th Cir. Jan. 28, 2008). *Accord Saxon v. Blann*, 968 F.2d 676, 680 (8th Cir. 1992) (“To transfer ownership of a copyright, the parties must state in writing that

they intend to transfer a copyright”). The transfer “must be a product of the parties' negotiations.” *Konigsberg Intern.*, 16 F.3d at 356.

In *Gladwell*, a case that neither the Superior Court⁷ nor TNI made any attempt to distinguish, the Ninth Circuit held that language providing that various information “collected, prepared, assembled, and/or made *by*” the designer⁸ “shall be the property of” the client “cannot operate to effect a copyright transfer as a matter of law.” *Id.* at *1. Similarly, in this case, the Nondisclosure Agreement does not come close to satisfying the requirements of Section 204(a) that a transfer be express, state the parties’ intention to *transfer* a copyright, state “precisely what rights are being transferred” and “at what price,” and that it be a “product of the parties’ negotiations.”

In the Superior Court’s findings of fact and conclusions of law, drafted by TNI’s counsel, there was no recognition of the requirements of Section 204(a), or even less, an attempt to articulate how the alleged conveyance satisfied those requirements nor to cite any precedent that was even remotely analogous. TNI’s counsel, and perhaps the Superior Court itself, appear to be under the very mistaken impression that, once this

⁷ The Superior Court’s Conclusions of Law do not contain *any* case citations. CP 117.

⁸ The opinion contains contradictory recitations of the contract language that render the opinion ambiguous as to whether the clause referred to materials collected, etc. by the client, or by the designer. If the clause referred to materials collected, etc. “by the client” it would be quite similar to the operative clause defining “Proprietary Information” in the Nondisclosure Agreement in this action. If it referred to materials collected, etc. *by the designer*, it would demonstrate that a clause even more favorable to the client would still not effect a copyright transfer that satisfies the requirements of Section 204(a).

action was remanded to state court, Section 204(a) somehow became irrelevant. This is simply not correct.

2. Defendants' Defenses and Gogi's Counterclaims Are Governed by the Copyright Act

Second, the existence, or lack thereof, of federal removal jurisdiction says nothing about whether federal law is implicated by defenses or counterclaims before the court. In considering whether removal jurisdiction exists, the federal court examines only the allegations of the plaintiff's complaint. *Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987). As noted by Judge Pechman, federal defenses are not to be considered, "even if even if the defense is the only question truly at issue in the case." Order Granting Motion to Remand, at 3 (*citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1, 10-13 (1983)). Similarly, federal counterclaims are irrelevant to the question of removal jurisdiction. *Takeda v. Northwestern National Life Ins. Co.*, 765 F.2d 815, 821 (9th Cir.1985) ("[R]emovability cannot be created by defendant pleading a counterclaim presenting a federal question").

In other words, the federal district court's determination that TNI's claims did not "arise" under the copyright laws was hardly a determination that there are no copyright issues in this case. In addition to the direct applicability of Section 204(a) of the Copyright act to TNI's claims, discussed above, Defendants' defenses and counterclaims are clearly governed by federal copyright law. Under the Copyright Act of 1976, the

copyright "vests initially in the author or authors of the work." 17 U.S.C. § 201(a). This underlying principal of copyright law is the basis for Defendants' principal defense to TNI's claims – i.e., that Gogi is the owner of the intellectual property, by virtue of copyright law. It is also the basis of Gogi's claims (Counts I-VII of Gogi's counterclaims) seeking a declaration that it is the owner of the copyrights at issue. It is also a predicate for Gogi's claims of copyright infringement, brought pursuant Section 501 of the Copyright Act.

D. TNI Has Offered No Explanation How Redesign Costs Could Possibly Be Proximately Caused by Any Breach of the Nondisclosure Agreement

The Nondisclosure Agreement memorializes two fundamental principles: (1) it provides that TNI owns all Proprietary Information, defined as information furnished by TNI to the "Obligated Person," and (2) prohibits certain disclosures to third parties of such information, or information derived therefrom. It does not, however, contain any language prohibiting the "Obligated Person" from asserting claims to works of intellectual property, particularly works that are created by the Obligated Person. Even if TNI were ultimately correct that the Nondisclosure Agreement established its ownership of the intellectual property, that would not somehow render it an independently actionable breach of the instrument to interpret the contract differently and file copyright applications as to disputed works. Neither TNI nor the Superior Court have indicated which clause in the Nondisclosure Agreement could

have been breached by this conduct, nor otherwise explained how this conduct could constitute a breach of the agreement.

It is well established that contract damages must be "proximately caused by the breach" of contract. *Citoli v. City of Seattle*, 115 Wash. App. 459, 476, 61 P.3d 1165 (2002). In this case, any redesign costs were incurred as a result of TNI's independent business judgment that the intellectual property was potentially impaired by a dispute over ownership of the intellectual property. The costs were not incurred as a result of any breach of the Nondisclosure Agreement. Notably, the courts have rejected claims for damages arising from allegedly fraudulent copyright applications,⁹ and neither the Superior Court nor TNI has ever cited a precedent in which this element of damages has ever been recovered in any court.

Finally, TNI's claim for redesign costs is entirely incongruous with its argument that the Nondisclosure Agreement affords TNI ownership of the intellectual property. According to TNI, the Nondisclosure Agreement mandates that TNI owns the copyrights to Gogi's work product, and, at the same time, also allows TNI to pay a third contractor to redesign that work product and sue Defendants for the costs thereof. If TNI owned the intellectual property, then why did it need to redesign any of it just because another party asserted a conflicting claim to it? If, for example, a

⁹ *Kwan v. Schlein*, 2008 WL 4755345 (S.D.N.Y. Oct. 30, 2008) ("there is no precedent supporting the use of a claim for fraud on the Copyright Office as an affirmative cause of action, rather than as a defense to a copyright certificate's validity"); *Ashton-Tate Corp. v. Ross*, 728 F. Supp. 597 (N.D. Cal. 1989).

designer wrongfully claimed that it owned the rights to the Boeing or Microsoft logos and somehow managed to obtain copyrights, would the rightful owners be permitted to *redesign* the logos and recover those costs from the designer? Of course not. Not only is such a claim completely unsupported by any legal precedent, it also defies logic.

E. The Presence, or Lack, of Copyright Notices is Irrelevant to the Question of Whether a Transfer Occurred in Accordance With Section 204(a)

Next, TNI contends that Defendants “acknowledged TNI’s copyright ownership” through the placement of copyright notices on certain of the intellectual property. Respondent’s Brief, at 11. There are several flaws with this contention.

First, and foremost, a copyright notice does not determine ownership of a work. Notably, TNI could not plausibly argue, and has not attempted to argue, that copyright notices on certain of the works constituted instruments of conveyance compliant with Section 204(a). It is well settled that copyright notices are not necessary to establish, and certainly do not establish, the ownership by any person of a copyright. Since amendments to the copyright laws in 1988, the publication of a copyright notice is optional, and is not a prerequisite to copyright protection. *PODS, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359, 1370 n.6 (11th Cir. 2007) (“notice of the copyright on the document is permissive, not mandatory”); *Norma Ribbon & Trimming, Inc. v. Little*, 51 F.3d 45, 48 (5th Cir.1995) (“[S]ince the Berne Convention Implementation Act of 1988 ... notice is no longer a

prerequisite to copyright protection.” (internal citation omitted)); *Gener-Villar v. Adcom Group, Inc.*, 530 F.Supp.2d 392, 408-09 (D. Puerto Rico 2007) (“Copyright notice is no longer required, nor a prerequisite to copyright protection”).

Second, the uncontradicted evidence is that the notices that appeared on certain of the intellectual property were drafted by TNI, and, were not drafted by Defendants, nor inserted on their initiative. Chung, 4/30/09, 186:1-13; Chung, 5/4/09, 5:2-20.

Third, when some of the same intellectual property was placed on Gogi’s website, and on a Gogi promotional flyer (that was received, without any complaint, by TNI and Eastside Vascular personnel), it contained a notice stating “Copyright 2007 Gogi Design, LLC.” Exh. 297 (Exh. 3, included therein); Chung, 4/30/09, 176:10 to 179:11. Similarly, drafts of certain of the intellectual property were conspicuously stamped “Property of Gogi Design.” *Se*, Exhs. 144, 149.

F. TNI Has Made No Serious Effort to Defend the Superior Court’s Inexplicable Judgment on TNI’s UTSA Claim

In defense of the judgment in its favor on its claim under the Uniform Trade Secrets Act, RCW 19.108.010 *et seq.* (the “UTSA”), TNI has offered nothing more than a few sentences of boilerplate, and has made no effort to actually address the demonstrable infirmities in the claim, including (1) that the claim (as presented at trial) was never pled, (2) that no damages or injunctive relief were awarded, which is required

under the UTSA, (3) and that there was no remotely plausible basis to find that the information at issue was a “trade secret” nor that it had been “misappropriated.”

G. Defendants, as the Substantially Prevailing Parties, Will Be Entitled to Trial Court and Appellate Attorney Fees, at Least With Respect to TNI’s Contract Claim

One principal that the parties apparently agree on is that the substantially prevailing party (if any) is entitled to attorney fees as a matter of law due to the fee-shifting provision in the Nondisclosure Agreement. *See* RCW 4.84.330; *Singleton v. Frost*, 108 Wash.2d 723, 742 P.2d 1224 (1987). This includes fees incurred at the appellate level. *See, e.g., Thompson v. Lennox*, 151 Wash. App. 479, 484, 212 P.3d 597 (2009).

For the reasons stated in Section IV(B)(5) of Gogi’s Opening Brief, which was devoted to the matter of attorney fees, Defendants will be entitled to an award of attorney fees incurred at the Superior Court and appellate levels, since Defendants are entitled to the entry of judgment in its favor on TNI’s contract claim.

It should also be noted that TNI has waived any argument in support of an award of attorney fees on its UTSA claim, or in defending Gogi’s copyright counterclaims, since the Superior Court denied its requests for fees as to those claims, and it has not filed a cross-appeal.

H. TNI Has Not Addressed Many of the Assignments of Error Discussed in Gogi's Opening Brief

Finally, we note that TNI has not addressed *at all* six of the eleven assignments of error addressed in this appeal.¹⁰

II. CONCLUSION

For the reasons stated above, and in its Opening Brief, Appellant Gogi Design, LLC respectfully prays that the Court (1) vacate the Superior Court's Judgment of June 2, 2009 to the extent that it grants judgment in favor of TNI on Counts I and II of its Complaint, and on Counts I-VIII, XVI and XX of Gogi's First Amended Counterclaims, (2) enter judgment in favor of Gogi on Counts I and II of TNI's Complaint, including an award of trial court and appellate attorney fees, and on Count VIII of Gogi's First Amended Counterclaims, (3) vacate the Superior Court's order of March 16, 2009 to the extent that it denied certain portions of

¹⁰ In these assignments of error, Gogi has alleged that the Superior Court erred in:

2. awarding injunctive relief to TNI for the further reason that Gogi had a possessory lien on the any TNI property in its possession;
4. holding the Defendants (a business entity, and a member thereof) jointly liable for a contractual obligation;
7. failing to enter a judgment reflecting its finding in favor of Gogi on Count VII of its First Amended Counterclaims;
9. denying, in substantial part, "Defendants' Motion to Compel Production of Documents," in which Defendants sought an order compelling the production of pertinent email correspondence and evidence pertaining to TNI's use of works authored by Defendants;
10. denying "Defendants' Motion for Discovery Sanctions," in which Defendants sought sanctions for the failure of Dr. Mark Ombrellaro to appear for a deposition as scheduled by the Court, and failure to notify Defendants' counsel (who had traveled cross country) until the day before the deposition that he would not be appearing; and
11. (apparently) finding Gogi in contempt of court, and ordering Gogi to turn over certain computer files that were, indisputably, never in its possession, custody or control, and awarding attorney fees against Gogi for allegedly not timely transferring those documents.

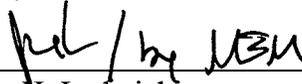
"Defendants' Motion to Compel Production of Documents" and direct the Superior Court to grant that all discovery requested in that motion, (4) vacate the Court's order of March 2, 2010 denying Defendants' Motion for Discovery Sanctions and direct the Superior Court to award sanctions to Defendants, (5) vacate the Superior Court's order of August 29, 2009 to the extent that it (a) directed Defendants to produce to TNI files that were never in their possession, custody or control, and (b) awarded attorney fees to TNI, and (6) direct the Superior Court to enter additional findings of fact and conclusions of law necessary to dispose of Counts I-VII, XVI and XX of Gogi's First Amended Counterclaims.

DATED THIS 23rd day of July, 2010.

Respectfully submitted,



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