

Case Nos. 17-56006, 17-56417, 17-56419

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TRESONA MULTIMEDIA, LLC, an Arizona limited liability company,
Plaintiff-Appellant,

v.

BURBANK HIGH SCHOOL VOCAL MUSIC ASSOCIATION, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Central District of California
Civil Case No. 2:16-cv-04781-SVM-FFM

TRESONA MULTIMEDIA, LLC'S MOTION FOR STAY OF MANDATE

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I. Introduction

Pursuant to Fed. R. App. P. 41(d), Plaintiff-Appellant Tresóna Multimedia, LLC (“Tresóna”) respectfully moves the Court for a stay of mandate pending the filing and disposition of a Petition for Writ of Certiorari in the United States Supreme Court. The mandate is scheduled to issue on May 22, 2020, and a petition for certiorari in this case is due August 13, 2020. This case presents a substantial question concerning judicial interpretation of the doctrine of divisibility, codified in 17 U.S.C. § 201 of the Copyright Act—an important issue which greatly affects copyright owners. Good cause for a stay exists because, absent a stay, the parties and the court will be required to spend resources litigating an issue that may prove moot if the petition is granted, namely, the remanded issue regarding 17 U.S.C. § 505 fees by virtue of the merits determination by this Court. The significance of the divisibility issue coupled with the burden on the court system justifies a stay of mandate in this matter.

II. BACKGROUND

Tresóna brought this action for copyright infringement against Appellees, alleging that they infringed copyrights to certain musical works to which Tresóna holds an exclusive ownership interest. The district court ruled that Tresóna lacked standing as to three of the four works at issue on summary judgment, pursuant to *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137 (9th Cir. 2008), and

dismissed the claim of infringement as to the fourth song—“Magic”—on, *inter alia*, qualified immunity grounds. The district court denied Appellees’ request for attorney’s fees, noting that Tresóna’s legal positions, in particular in attempting to reverse *Sybersound*, were “not unreasonable.” *Tresóna Multimedia, LLC v. Burbank High School Vocal Music Ass’n*, 2017 WL 10438476, at *2 (C.D. Cal. Aug. 17, 2017). This Court affirmed the district court’s findings as to Tresóna’s lack of standing pursuant to *Sybersound*, but dismissed the infringement claim as to “Magic” solely on fair use, an issue not reached by the lower court. Premised largely on its fair use finding, the Court reversed the district court’s denial of attorney’s fees. Following this Court’s denial of a timely petition for panel rehearing and rehearing en banc, the mandate in this case is due to issue on May 22, 2020 absent a stay. *See* Fed. R. App. P. 41(b).

III. ARGUMENT

a. Legal Standard for a Stay of Mandate

Pursuant to Fed. R. App. P. 41(d)(1), a stay of mandate pending the filing of a petition for writ of certiorari is appropriate where the “petition would present a substantial question” and there is “good cause for a stay.” The movant “need not demonstrate that exceptional circumstances justify a stay.” *Bryant v. Ford Moto Co.*, 886 F.2d 1526, 1528 (9th Cir. 1989), cert. denied, 493 U.S. 1076 (1990). Here, both requirements are met.

b. This Case Presents a Substantial Question Concerning Proper Interpretation and Administration of a Statute

The significant issue to be presented to the Supreme Court concerns the interpretation of the term “exclusive” within the Copyright Act, particularly in the context of the divisibility of copyright doctrine codified in 17 U.S.C. § 201. This Circuit’s reading of the term “exclusive” in the context of the divisibility doctrine prohibits a third party who has received exclusive rights or an assignment of its rights from a copyright co-owner from standing in the shoes of that copyright co-owner on an infringement claim. *See Sybersound*, 517 F.3d at 1145. *Sybersound* has been extensively criticized in the leading copyright treatises, including *inter alia* the treatises of David Nimmer and William F. Patry, and outright rejected in at least one court not bound by this Circuit, with criticism thereof noted in numerous other court decisions. That is because the term “exclusive” can apply to a divisible right and to a grant by only one co-owner, and its restricted interpretation to rights or grants by only 100% of the copyright owners of a work runs counter to the statutory divisibility scheme. Indeed, the interpretation of “exclusive” to connote the ability to prevent anyone else from exploiting a copyright fundamentally conflicts with the understanding that more than one party can possess the same “exclusive” right to exploit. *See Minden Pictures, Inc. v. John Wiley & Sons, Inc.*, 795 F.3d 997, 1004 (9th Cir. 2015).

Prominent industry groups have rallied in support of Tresona’s challenge to *Sybersound*, further demonstrating the substantial challenges presented by *Sybersound* to music creators and music rights organizations. The amicus brief in support of rehearing was filed by the National Music Publishers Association, Nashville Songwriters Association International, American Society of Composers, Authors and Publishers, and Broadcast Music Inc. These organizations are significant stakeholders within the music industry and their participation on this appeal speaks to the broad ramifications that this issue has on music creators and their rights holders.

Thus, notwithstanding this Court’s decision not to rehear the case, the issue presented remains a highly important question of statutory construction that affects the enforcement and administration of the Copyright Act, which is the type of issue ripe for review by the Supreme Court. *See* Sup. Ct. R. 10; *see also, e.g., Am. Broad. Cos. v. Aereo, Inc.*, 573 U.S. 431, 438 (2014) (granting certiorari even after denial of rehearing en banc in order to determine the proper reading of the “transmit clause” under § 101 of the Copyright Act); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160 (2010) (granting certiorari to determine whether Congress intended the registration requirement under 17 U.S.C. § 411(a) to be a “jurisdictional” requirement); *Mills Music Inc. v. Snyder*, 469 U.S. 153, 164 (1985) (granting certiorari to resolve important open question concerning the scope of the

derivative work exception to statutory termination under § 304 of the Copyright Act); *Watts v. Alaska*, 451 U.S. 259, 264 (1981) (granting certiorari to resolve interpretation of apparently conflicting statutes).

c. Good Cause Exists for a Stay of Mandate

There is also good cause for a stay of mandate pending the filing of a writ of certiorari. Indeed, the same reasons that compelled a stay pending the petition for rehearing compel a stay under these circumstances. While the mandate requires the parties to continue proceedings as to 17 U.S.C. § 505 attorney's fees, that issue is inextricably intertwined with the merits of this case, and may be rendered moot if the judgment is modified. Appellees will not be prejudiced given the narrow import of the mandate and the durational limit of the stay, *see* Fed. R. App. P. 41(d), and entering a stay will avoid a potentially conflicting lower court judgment, and the further use of resources on an issue that may otherwise be rendered moot.

DATED: May 21, 2020

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CERTIFICATE OF FILING AND SERVICE

I certify that on this 21st day of May, 2020, a copy of the foregoing Motion for Stay of Mandate was served on counsel of record via CM/ECF.

Respectfully Submitted,

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