

No. 20-17397

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

GREG KIHN, an individual;
RYE BOY MUSIC, LLC, a California Limited Liability Company,

Plaintiffs-Appellees,

v.

BILL GRAHAM ARCHIVES LLC, a Delaware Limited Liability Company, d/b/a
Wolfgang's Vault; NORTON LLC, a Nevada Limited Liability Company;
WILLIAM E. SAGAN, an individual,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of California, Oakland
Case No. 4:17-cv-05343-YGR
Hon. Yvonne Gonzalez Rogers

APPELLANTS' OPENING BRIEF
[PUBLIC VERSION -- REDACTED]

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CORPORATE DISCLOSURE STATEMENT

Appellants Bill Graham Archives, LLC, Norton LLC, and William Sagan (“Defendants”), by and through their attorneys, Winston & Strawn LLP, hereby disclose the following under Federal Rule of Appellate Procedure 26.1:

1. Norton LLC is the parent company of Bill Graham Archives, LLC; and
2. No publicly held corporation owns 10% or more of the stock of Norton LLC or Bill Graham Archives, LLC.

Dated: April 19, 2021

By: /s/ Michael S. Elkin
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INTRODUCTION

The District Court certified classes for claims and relief for which the class-action mechanism is inappropriate. It was clear error to allow Plaintiffs to expand a personal dispute with Defendants into an exceedingly rare and unmanageable copyright class action. Indeed, the District Court certified claims—anti-bootlegging claims and copyright claims, including efforts to enjoin further use of the works at issue (and thereby halt Defendants’ payment of royalties to many class members)—that neither this Court nor any other has *ever* certified for class-action treatment. This Court should reverse the certification order and remand this action to proceed on an individual basis.

Defendants have lawfully acquired legendary live music recordings, which they invested in, preserved and made available for the public to enjoy. Beginning with the collection and associated copyrights of the famous rock-concert promoter Bill Graham, and followed by many other historic collections, including the King Biscuit Flower Hour, Defendants have spent decades building their business. Plaintiffs, which include rock musician Greg Kihn and his publishing company, accepted payments for many years from Defendants, promoted Defendants’ recordings, and had meetings and recording sessions with Defendants. Plaintiffs belatedly sued Defendants for copyright infringement and anti-bootlegging claims not only on behalf of themselves, but seeking windfall damages on behalf of broad

and unspecified classes of all artists and composers with any claimed interest in Defendants' substantial collection of recordings.

Copyright cases are rarely certified as class actions because issues such as damages and standing/ownership necessarily implicate individual questions. This case presents additional complications for class certification because the named Plaintiffs' interactions with Defendants create unique defenses, making it a personal dispute that should be litigated on the merits of the individual claims. Importantly, this is not a low-stakes case in which class-action treatment is necessary to incentivize class members to litigate (assuming they even want to). Instead, the potential liability threatened from the named Plaintiffs' claims alone is over \$9 million plus fees. The District Court's Order certifying the classes compounds that potential liability exponentially into potentially billions of dollars in damages, at the expense of Defendants' due-process rights.

Defendants appeal the District Court's April 10, 2020 Order certifying classes in this case ("Order") because Plaintiffs failed to carry their burden of establishing any—let alone all—of the necessary prerequisites and requirements of Rule 23,¹ including because individual issues predominate and there is no commonality, numerosity, or typicality.

¹ This and all further statutory references to a "Rule" are references to the Federal Rules of Civil Procedure unless otherwise noted.

First, the predominate issues here require individualized inquiry and are not susceptible to class-wide resolution. For instance, licensing and consent inquiries will involve hundreds of separate agreements which each contain separate representations from separate third parties about the rights related to thousands of separate live-music recordings. These recordings feature countless performers, implicate thousands of other unknown rightsholders, and span many decades. Defendants also made extensive royalty payments for many years on these recordings per work based on usage, and thus the payments for each work varies in amount, length, and recipient, raising more individualized issues. Further, the District Court erred in finding that damages calculations are “straightforward,” and can be resolved on a class-wide basis, when the Copyright Act allows a jury to decide what is fair to award for each work (within an extraordinarily wide range of available statutory damages) based on numerous factors. The District Court also erred in finding that copyright ownership is capable of class-wide resolution through third-party records and copyright registrations. It is the plaintiffs’ burden in a copyright case to prove ownership over each individual work, and copyright registrations alone do not prove copyright ownership.

Second, the District Court found that a question untethered to any injury satisfied commonality—that class members’ works appeared on Defendants’ websites. But merely appearing on Defendants’ website does not specify a subset

of injured artists or composers. Under *Wal-Mart v. Dukes*, there must be a *common injury* suffered by class members, not merely a common factual characteristic among class members that is untethered to any injury. 564 U.S. 338 (2011).

Third, the District Court found numerosity was satisfied even though Plaintiffs failed to identify a single absent injured class member. That is not because these individuals are unknown to Kihn—indeed, Kihn interacts regularly with potential class members. Instead, Kihn declined to mention the case to them because he views this case as his personal battle that he does not want to drag others into. The District Court adopted Plaintiffs’ pure speculation that because the named Plaintiffs decided to sue Defendants, other performers or publishers should too.

Fourth, the District Court erred in finding that the proposed class representatives are typical of the class. Kihn personally toured Defendants’ facilities in 2010 and 2011; recorded songs at Defendants’ studios; and promoted Defendants’ business and live-music recordings through his blog and radio show. Plaintiffs also admittedly licensed the recordings at issue for many years, yet now claim that they did not know about the recordings they erroneously and belatedly now claim are “bootleg” recordings. These unique circumstances lead to individual defenses, including statute of limitations, estoppel, implied license and unclean

hands. Plaintiffs cannot properly serve as class representatives when they are not typical of potential class members.

Finally, the Court improperly certified a Rule 23(b)(2) class for injunctive relief, though no such class has ever been certified in a copyright case, and such relief would cut off benefits currently enjoyed by absent class members.

This Court should reverse the District Court's class certification Order and remand this case so that Plaintiffs may proceed only with their individual claims.

JURISDICTIONAL STATEMENT

Plaintiffs sued for copyright infringement and anti-bootlegging claims under the United States Copyright Act, 17 U.S.C. § 101, § 1101 *et seq.* The District Court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1338(a), as well as 28 U.S.C. § 1332(d). In an April 10, 2020 Order, the District Court granted Plaintiffs' motion for class certification.

Defendants timely filed a petition with this Court seeking permission to appeal the District Court's Order, which this Court granted on December 9, 2020. On December 22, 2020, Defendants perfected their appeal in accordance with Fed. R. App. P. 5(d). Jurisdiction in this Court is based on Rule 23(f).

STATUTORY AUTHORITIES

FEDERAL RULE OF CIVIL PROCEDURE 23(a)–(b): Class Actions

(a) **Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

- (1) the class is so numerous that joinder of all members is impracticable;
- (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:

- (1) prosecuting separate actions by or against individual class members would create a risk of:
 - (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
 - (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other

members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

ISSUES PRESENTED

This appeal raises five questions:

1. Do individualized issues implicated by this litigation (such as license, consent, damages, and copyright ownership) predominate over any class-wide inquiries, thereby barring certification under Rule 23(b)(3)?
2. Is the sole fact that class members' works or performances appear on Defendants' websites sufficient to satisfy Rule 23(a)(2)'s commonality requirement?
3. Can Plaintiffs satisfy Rule 23(a)(1)'s numerosity requirement based on pure speculation and no common alleged injury?
4. Can Plaintiffs satisfy Rule 23(a)(3)'s typicality requirement despite the unique defenses their claims raise?
5. Did the District Court improperly certify an injunctive relief class in the copyright context, especially since no court has ever certified a Rule 23(b)(2) copyright class?

STATEMENT OF THE CASE

A. The Parties

1. Defendants

Defendant William Sagan is the CEO of two companies, Defendants Wolfgang's Vault ("WV") and Norton LLC. 4-ER-565. WV is the lawful owner of the master sound recordings and sound recording copyrights in thousands of historic live concert recordings, including, for example, performances by The Rolling Stones and The Grateful Dead. *Id.* The Wall Street Journal has referred to Defendants' collection as "the most important collection of live concert recordings ever assembled." Dkt. 176 at 1.

Defendants spent tens of millions of dollars to purchase, restore and bring this unique collection of recordings to the public. 11-ER-2245. WV amassed these recordings and their associated intellectual property through a dozen acquisitions over the past two decades. 1-ER-5; 4-ER-565. WV built its unique and expansive collection of recordings from many well-respected sources, including the King Biscuit Flower Hour, the Capitol Theatre, Newport Folk, Newport Jazz, Great American Music Hall, the Trammips, the Record Plant, Dawson Sound, the Bill Graham Fillmore/Winterland recordings, the Ash Grove recordings, the Daytrotter Session, the Metropolitan recordings, Amazingrace, the Silver Eagle archive, the Starfleet recordings, and others. 4-ER-565-566.

Each acquisition agreement involved a unique set of original recordings with distinct histories from different artists and producers, with a multiplicity of different provisions that differ depending on how the recordings were produced and created. The agreements, in some variation or another, make representations that the recordings were lawfully created and consented to. 4-ER-565-566; 4-ER-573--5-ER-957. Defendants' predecessors were concert producers and sound engineers who recorded many concerts available on Defendants' websites, and were integral to the sound captured in those recordings. 4-ER-566-567. Defendants' predecessors' joint contributions to the recordings meant that they were also performers, and therefore held a joint-ownership interest in the copyright to those recordings. *Id.* These rights have been properly transferred to WV. 4-ER-565-566; 4-ER-573--5-ER-957

Some artists, such as Carlos Santana, are on record that they consented to the recordings.² In particular, one of the very first collections Defendants obtained was that of the legendary concert promoter, Bill Graham. Indeed, Kihn admitted that the 1976 Winterland concert at issue, which Bill Graham's companies produced, included large visible recording equipment that was "revolutionary" at the time,

² Carlos Santana was a party to the 2007 lawsuit previously resolved between Defendants and the major record labels, as described in the next section. *See Grateful Dead Prods. v. Sagan*, Case No. C-06-07727 JW (PVT) (N.D. Cal.).

and which Kihn knew about but never objected to. 3-ER-519. Plaintiffs’ specific conduct and testimony *directly* contradicts their claim that the recordings are surreptitious “bootlegs,”³ as would reasonable viewers conclude from reviewing the recordings themselves. The recordings themselves are clearly professionally created and consented to, as some feature musicians interacting with the camera or clearly recognizing that recording equipment was visible. 11-ER-2252 (“It was impossible to miss for performers to know they were being recorded”); 11-ER-2256-2257; 3-ER-519.⁴

Among Defendants’ collection is a licensing arrangement for the recordings made for “King Biscuit Flower Hour,” which was a cultural phenomenon in the 1970s where musicians would perform songs live with permission for King Biscuit to record and rebroadcast the recordings. 2-ER-69; 4-ER-543-555.

In total, WV acquired over 21,000 audio and audiovisual recordings, some of which included multiple songs (or musical works). 11-ER-2248. WV copied the recordings onto hard drives and servers, sometimes mixing or mastering the files depending on their condition, and then created mp3 file copies of them. 4-ER-569. Beginning in 2002, WV began registering copyrights for each master recording

³ Indeed, Kihn testified that he never played “bootlegs” on his radio show 3-ER-514, yet could not deny having played Dire Straits live recordings from Defendants’ collection, as reflected in documents produced by Plaintiffs. *Id.*

⁴

with the United States Copyright Office. 4-ER-568. In 2003, WV’s website began offering copies of the recordings to the public for digital download; in 2006, WV began offering the recordings via on-demand streaming. 4-ER-569. WV launched a second website in 2006, Concert Vault, offering both audio and audiovisual recordings for on-demand streaming. *Id.*

In short, Defendants have provided access to their recordings through their websites since 2003. Since that time, Defendants have paid publishers and rights-holders through various mechanisms, including many years of statutory licenses, and separate artist agreements. 4-ER-567-568, 570-571. Defendants’ business has never been profitable. 2-ER-46.

2. Plaintiffs

Plaintiffs include the rock musician, Greg Kihn, and his publishing company Rye Boy Music, LLC. Over the last 40 years, Kihn has recorded several rock albums as *The Greg Kihn Band*, and has performed live on various concert tours. 2-ER-92-93. He is also a self-proclaimed “radio personality.” *Id.* Rye Boy is Kihn’s music publisher, and the alleged copyright owner of Kihn’s musical compositions at issue, though ownership has changed hands. *Id.*⁵ WV’s online

⁵ Rye Boy is co-owned by Joel Turtle, Kihn’s manager. 11-ER-2227-2228. There were multiple transactions in which the ownership of the compositions at issue changed hands amongst Plaintiffs. 11-ER-2235-2238.

archives include several of Kihn's live performances embodying compositions owned by Rye Boy. 2-ER-94.

B. WV Acquires Necessary Licenses and Permissions to Lawfully Make Its Recordings Available to The Public

WV owns the master recordings and therefore has the right to transmit the recordings to the public without the need for further licenses or consents with respect to the master recordings themselves. WV does not purport to own the compositions performed in the recordings, and therefore WV has obtained requisite licenses for public performance of the compositions, which grant the right to publicly perform these works and transmit works to the public, by paying the required amounts to performing rights organizations ("PROs"), which in turn pay songwriters and publishers. 4-ER-570-571. WV has licenses with and makes payments to the three leading PROs: American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; and Society of European Stage Authors and Composers. 4-ER-570; 10-ER-2047-2084; 11-ER-2114-2221. Prior to 2010, WV remitted royalties for all on-demand streaming under the licenses they had, and still have, with the three major PROs, in accordance with law and industry practice. 4-ER-571. WV has also properly acquired and paid Plaintiffs under mechanical

licenses⁶ for any use of the works at issue. These mechanical licenses granted WV the rights to reproduce and distribute copyrighted musical compositions featured in recordings they lawfully own on CDs, records, tapes, ringtones, permanent digital downloads, and, more recently, interactive streaming. 4-ER-571.

Beginning in 2006, WV made royalty payments through the Harry Fox Agency (“HFA”), a third party hired by many music publishers to administer and manage the licensing and royalties for musical compositions. *Id.* Once mechanical licenses became required for purposes of on-demand streaming, in August 2010, WV hired Rightsflow Inc. to manage its additional licensing needs, including paying various music publishers and administrators from whom Defendants licensed the compositions. *Id.*; 10-ER-2085-2096. In May 2013, Defendants hired MediaNet, Inc. to license the compositions and make the requisite payments owed under them. Those payments continue today. 4-ER-571; 10-ER-2097-2112.

Plaintiffs have produced no evidence that they have ever rejected any payment made on WV’s behalf, except that at some point after the lawsuit was

⁶ The mechanical license is a product of the 1909 Copyright Act and granted the right to make and distribute, or authorize others to make and distribute, mechanical reproductions of musical works. To prevent monopolistic behavior, Congress created a compulsory license to allow anyone to make and distribute a mechanical reproduction of a musical work without the consent of the copyright owner, provided that person adheres to the provisions of the license and pays a negotiated or statutorily established royalty to the copyright owner, which Defendants have done. Prior to the passage of the Music Modernization Act, obtaining compulsory licenses required a notice to be provided by the registered rights holder of the composition.

filed, Plaintiffs claim that they tried to return the amount of one small check (which represented the only amounts owed to Plaintiffs during that time based on the small number of WV's users who accessed Plaintiffs' works)—a check that Plaintiffs had already cashed. 3-ER-536. In short, Defendants have paid to Plaintiffs—and all other owners of relevant works—all royalties owed. 4-ER-570.

To resolve certain litigation brought by musical artists and the record labels that represent substantial percentage of the artists who performed the recordings owned by WV, WV entered into Joint Exploitation Agreements in 2009 with major labels including UMG Recordings Inc., Warner Music, Inc., and Sony Music Entertainment (which has since acquired EMI's publishing catalog). 4-ER-567-568. The Sony Joint Exploitation Agreement applies to some of the recordings featuring Mr. Kihn. 4-ER-567. All of these agreements acknowledge WV's copyright ownership in the master recordings covered by the agreements and have confirmed that WV held the rights to exploit the recordings at issue, including through download, streaming, and other means, with mechanical licenses. 4-ER-567-568; 6-ER-959—8-ER-1530 (agreements). WV has relied on these agreements in conducting its business. 4-ER-567.

Over the past fifteen years, Defendants have prevailed in, or otherwise favorably resolved, several separate (non-class) copyright lawsuits, except for this case and *ABKCO Music, Inc., et al. v. Sagan, et al.* Plaintiffs here seek to piggy-

back off *ABKCO*, a case brought by over twenty separate publishers and organized by the National Music Publishers' Association ("NMPA") who organizes lawsuits on behalf of music publishers, and is pending in a separate court by certain publisher plaintiffs that have individually sued Defendants. The *ABCKO* district court's summary judgment Order, and the jury's subsequent and very low damages verdict are on appeal before the Second Circuit. Indeed, the jury in the damages trial⁷ for that case heard evidence about 197 total works, and rendered a damages verdict where it found different amounts appropriate for different works, for a total judgment of \$189,500, in the face of the plaintiffs in *ABKCO* seeking \$30 million.

C. Defendants' Unique History with Plaintiffs

Plaintiffs have a unique history with Defendants and their predecessors. With respect to Bill Graham, Kihn considered Graham a "friend" whom he asked to manage him. 3-ER-511. With respect to the King Biscuit recordings, Plaintiffs entered a seven-year license agreement for those recordings (from 1995 until 2002). 2-ER-69 (n.2); 2-ER-73 (n.4); 3-ER-533, 538; 4-ER-551-555, 558-563; Plaintiffs have also received payments from Defendants through other licenses. 4-

⁷ The district court in New York determined liability on summary judgment, finding critical whether the original recording was "fixed lawfully." Defendants' recordings shown to the jury in that case did not appear to be bootlegs, as the witnesses confirmed; *see, e.g.*, 2-ER-352 ("Bootleg is not a word that I could say specifically.")

ER-570; 8-ER-1589—9-ER-1899. Thus, Plaintiffs’ suggestion that Kihn did not know about the recordings contradicts the record.

In addition, Kihn visited the WV studio back in 2010 and again in 2011 for a tour, and he testified that he knew that Defendants had obtained and were exploiting the recordings on their website but that he was not concerned about them. 3-ER-515-516. At around the same time, Kihn promoted Defendants’ websites and songs during his radio program on KFOX in San Francisco. 3-ER-515. Kihn also played recordings from WV’s archives on his radio show, from which Plaintiffs earned ad revenue. 3-ER-514-515; 3-ER-535. [REDACTED]

[REDACTED]. 3-ER-535. Kihn also featured and distributed Defendants’ live recordings on his blog. 3-ER-517; 4-ER-557.

Not only did Kihn know about Defendants’ exploitation of the recordings since at least 2011 (long before suing), he also made *new* live recordings in Defendants’ studio between 2010-2011. 3-ER-515, 518. Indeed, Plaintiffs plainly believe that certain of their own recordings are situated differently, as they declined to include those recordings in this lawsuit.

Plaintiffs have had numerous opportunities to discuss this lawsuit with potential other class members through regular conversations with other performers

and publishers whose recordings Defendants have exploited. They have not done so. Instead, Plaintiffs have testified that they have not bothered to discuss the action at all, let alone ask anyone if they would want to participate in it. 3-ER-508-509, 521-522, 523-524; 3-ER-531-532, 534.

To the contrary, Kihn has referred to this lawsuit as his own fight and his “personal business” in which he has no interest in involving other musician friends or bandmates. 3-ER-521-522. Kihn also admitted that he does not know if Defendants have underpaid anyone, and is unaware of any other performers who would be interested in joining a class action. 3-ER-508-509, 512, 521-522, 523-524. Turtle admitted he is only seeking to certify this class to personally avoid protracted legal expense—not because he is aware that his complaints against Defendants extend beyond his individual claims. 3-ER-534.

D. Plaintiffs File Class Action Lawsuit Against Defendants

Plaintiffs sued Defendants in September 2017. Plaintiffs alleged that Defendants did not have the proper licenses to exploit 24 of Plaintiffs’ compositions online (via download and streaming). 2-ER-100-101. They also alleged that Defendants reproduced copies of seven “bootleg” live musical performances without Plaintiffs’ consent or authorization. 2-ER-101-102. Based on these allegations, Plaintiffs claimed copyright infringement, and violations of the Copyright Act’s “anti-bootlegging” provision, 17 U.S.C. § 1101. 2-ER-100-102.

Plaintiffs sought damages, declaratory relief as to infringement, and injunctive relief. 2-ER-104. Plaintiffs also sought to certify a class action pursuant to both Fed. R. Civ. P. 23(b)(2) and 23(b)(3). 2-ER-98. Defendants answered Plaintiffs' Complaint in November 2017. 2-ER-75.

Plaintiffs testified to their lack of knowledge about the basic facts surrounding their claims, and have contradicted the documents prepared by their attorneys. 3-ER-510, 515, 517-518, 521, 523; 3-ER-530. Though Plaintiffs were selective about which works to include, they claimed to lack any understanding of why certain songs were included in this case and not others, or why the copyrights at issue changed between the Complaint and the interrogatory responses. 3-ER-510; 3-ER-530.

Plaintiff Kihn also testified that he never read his declaration attached to Plaintiffs' Motion before signing, never read any interrogatory responses before verifying them, and was unfamiliar with facts in both documents. 3-ER-520; 3-ER-523. And until he was reminded by certain documents, Kihn claimed that he could not recall significant facts relevant to this case. 3-ER-515, 517-518, 521, 523. He forgot the fact that he visited Defendants' facilities twice in 2010 and 2011; he forgot that he licensed King Biscuit recordings; and could not recall other key details from the time that the recordings were created. *Id.*

E. Plaintiffs Move for Class Certification

In November 2018, Plaintiffs moved to certify two classes: a “Composer Class” and “Performer Class.” Plaintiffs’ original proposed putative “Composer Class” included:

All owners of copyrights in the musical compositions which have been reproduced, performed, distributed, or otherwise exploited by Bill Graham Archives, LLC d/b/a Wolfgang’s, Norton, LLC and William Sagan (“Defendants”) without a license or authorization to do so during the period from September 14, 2014 to the present. Excluded from the Class are Defendants, Defendants’ affiliates, subsidiaries or co-conspirators; employees of Defendants, including their officers and directors; and the Court to which this case is assigned (“Composer Class”). [Dkt. 107 at 2.]

As the owner of Kihn’s compositions, Plaintiff Rye Boy sought to be appointed as the “Composer Class” representative. *Id.* Rye Boy alleged copyright infringement, based on the unauthorized sale and distribution of their copyrighted compositions (embodied in both audio recordings and video concert footage).

Plaintiff Greg Kihn sought to be appointed class representative of the putative “Performer Class,” which when Plaintiffs moved for class certification included:

All persons whose performances are fixed on the sound recordings and audiovisual works which have been reproduced, performed, distributed, or otherwise exploited by Defendants without a license or authorization to do so during the period from September 14, 2014 to the present. Excluded from the Class are Defendants, Defendants’ affiliates, subsidiaries or co-conspirators; employees of Defendants, including their officers and directors; and the Court to which this case is assigned (“Performer Class”). *Id.*

Kihn brought this claim under the “anti-bootlegging” Section 1101, alleging that Defendants had trafficked in unauthorized, “bootleg” recordings of Plaintiffs’ live performances. *See* 17 U.S.C. § 1101.

In February 2019, Defendants opposed Plaintiffs’ motion for class certification. Dkt. 108. Defendants highlighted several issues with Plaintiffs’ proposed classes, commonality, numerosity, and typicality. *Id.* at 1-3. Defendants challenged Plaintiffs’ “fail safe” class definitions (expressly forbidden in the Ninth Circuit), Plaintiffs’ failure to identify other class members, extensive individualized issues, and the improper nature of injunctive relief. *Id.* at 1-3, 11.

Plaintiffs then filed a reply in support of class certification. Dkt. 121. In an effort to “cure” the fail-safe issues with their proposed class definitions, Plaintiffs revised their classes to “now include all non-studio performances, for which no evidence of consent at the time of fixation exists, and explicitly exclude groups of works that were recorded in a studio.” *Id.* at 3. Plaintiffs did so to resolve any “fail-safe issue” with Plaintiffs’ class definitions. *Id.* Otherwise, Plaintiffs maintained the “overwhelming evidence” of common issues, and argued that “no individualized issue predominates over class issues.” *Id.* at 1, 14. Yet again, Plaintiffs were unable to name a single other class member. *Id.* at 4.

Following oral argument on April 17, 2019 (Dkt. 139), the District Court then requested supplemental briefing on who had the burden to establish consent

and authorization with respect to the putative Performer class. Dkt. 159 at 1. Given that the recordings were many decades old and have changed ownership, at this juncture it would make sense to place the burden on the party seeking to belatedly challenge the rights to the recordings to come forward with evidence.

Certain of the key witnesses to the making of the initial recordings, like Bill Graham and Jerry Garcia, who were performing thirty to fifty years ago, have died, or are unavailable in this Court. The issues of performers' consent and lawful fixation will require individualized inquiries into the factual circumstances surrounding the making of and contracts surrounding each of these recordings, rendering class-wide resolution practically impossible. Dkt. 161 at 1.

Further, Defendants submitted nearly 300 agreements between Defendants (and Defendants' predecessors) and various performers and rightsholders regarding the recordings at issue reflecting the variety and disparate nature of relevant agreements. 3-ER-246-498 (including illustrative sample of agreements). The agreements contain different provisions and different representations based on when and how the recordings were created and who created them. Nevertheless, the District Court gave Defendants the burden, and minimized the individualized issues with respect to the agreements.

F. The District Court Grants Class Certification

On April 10, 2020, the District Court certified Plaintiffs' two classes: the Composer Class and Performer Class. 1-ER-37-38. Despite the unique issues and hurdles this case presents, the District Court held that Plaintiffs satisfied their evidentiary burden of establishing that their proposed (revised) classes met all four requirements of Rule 23(a).

With respect to the predominance requirements of Rule 23(b)(3), as to the Composer Class, the District Court held that questions of copyright ownership regarding the works on thousands of recordings are somehow "susceptible to common proof," and that the key individual issues of consent, license, damages, and ownership were merely "marginal" individual questions. 1-ER-18.

The District Court also held that individual damage valuations did not preclude class certification, in part because "calculation of a statutory damage rate for the violations is straightforward." 1-ER-23. In actuality, as discussed in detail below, the Copyright Act contains a complex and wide-ranging scheme for awarding either actual or statutory damages, on a scale ranging between \$750 and \$30,000 for non-willful infringement, between \$750 and \$150,000 for willful infringement, and \$200 for innocent infringement. Statutory damages are based on a work-specific, multi-factored assessment by the jury. And even the *threshold* inquiry of whether statutory damages are available requires an individual

determination as to whether a work was registered prior to the allegedly infringing activity (unless occurring within three months of publication). The specific circumstances surrounding a particular copyrighted work, and the history between the owners of the copyright and defendants in a particular case, including payments, consent and the value of the works in question, directly relates to how much, or how little, damages can be awarded.

As to the Performer Class, the District Court held that claimants “need only establish that they are performers in the recording” at issue. 1-ER-34. The District Court did not address Defendants’ argument that many of these performers have likely signed away their rights to their record labels. *See* Dkt. 108 at 15. And it is extraordinarily difficult to even identify the artists for audio-only recordings that spanned many decades. How any anti-bootlegging damages would be calculated under the Copyright Act is also complex—as the damages scheme awards a large range of damages per work. Moreover, it is unclear how separate artists over time would participate even with respect to individual works, which could be awarded per song as opposed to per recording.

The District Court also held that the burden somehow shifted to Defendants to establish that works from many transfers ago and many decades ago were created with consent of the performer. 1-ER-34. That question would surely fall on the unique testimony of each performer (or others present at the time of the

recording, such as the sound engineer who produced the recording). And this issue is even further complicated because many of the original performers, producers, and sound engineers are no longer alive to testify, such as Bill Graham himself, who tragically died in a helicopter crash over thirty years ago.

The District Court—without finding any common injury amongst the members of the proposed classes—found that commonality was satisfied. Specifically, the District Court found that Plaintiffs’ claims “all arise from” Defendants offering the recording on their website, and that Defendants “rely on the same set of agreements” to establish proper licensing—even though Defendants submitted hundreds of agreements from numerous third parties and the agreements cover different recordings. 1-ER-10-11.

The District Court found adequate numerosity because even though Kihn testified that he saw this as a “personal battle” and had expressly declined to discuss the case with presumed class members, Defendants’ websites feature many performers and compositions. 1-ER-9-10.

Despite several unique defenses such as statute of limitations based on Defendants’ knowledge, and other equitable defenses based on Plaintiffs’ conduct, the District Court erroneously found sufficient typicality. 1-ER-13. The District Court also held (even though Plaintiffs testified to not understanding the basic contours of their claims, and Kihn did not even seem to understand he was

representing a class) that the named Plaintiffs would adequately represent the proposed classes. 1-ER-14.

Finally, even though no court has ever done so in a copyright case, the District Court held that certification under Rule 23(b)(2), injunctive relief classes would be appropriate for both classes. 1-ER-36-37. The District Court did not address irreparable harm, or the complication that absent class members would have their royalty payments halted if injunctive relief was granted.

G. This Court Permits Interlocutory Appeal

Defendants submitted to this Court a petition for permission to appeal the District Court's certification Order under Fed. R. Civ. P. 23(f). 2-ER-193. Defendants cited several errors in the Order: the District Court's oversimplification of individualized issues like damages and authorization; improper burden-shifting to establish copyright ownership; and flawed "commonality" and "numerosity" analyses. Defendants also highlighted how rarely courts have certified class actions in copyright cases, and described how Rule 23(b)(2) certification was not only improper, but unprecedented in copyright law. 2-ER-193-195. Finally, Defendants argued that certification would present a "death-knell" situation to Defendants, given Defendants' (already) dire financial straits. 2-ER-212.

This Court granted Defendants' Rule 23(f) petition, citing to *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 962 (9th Cir. 2005), which holds that "[w]hen an

error is alleged, we generally will permit an interlocutory appeal only when the certification decision is manifestly erroneous and virtually certain to be reversed on appeal from the final judgment.” 2-ER-40. The issues raised in Defendants’ petition form the basis of this appeal.

SUMMARY OF THE ARGUMENT

In granting class certification, the District Court abused its discretion in five crucial ways.

First, the District Court failed to recognize that the predominate issues in this litigation necessitate individualized inquiry. These issues include whether and the extent to which the compositions at issue were licensed, whether the recordings at issue were consented to, the assessment of any damages, and the ownership of the copyrights at issue. These issues predominate over the claims of both classes, and require individualized inquiry into each recording, thousands of licenses and payments, and performers' consent. Furthermore, recording artists are often under record-label contracts under which their recording rights inure to the record label, and the major record labels have agreement with WV, whereas smaller labels, which represent some of the relevant recording artists, do not. These issues will require individual examination of the recordings at issue, performer testimony about consent, and whether a recording is subject to an agreement with WV and if so, the specific provisions of the relevant agreement.

As to damages, the District Court glossed over the complex damages assessment required in copyright cases for statutory damages. Factors like willfulness are assessed on a work-by-work basis, and there is a wide range of available statutory damages awards, which can differ for each work. There is

nothing “straightforward” about statutory damages, especially on a class-wide basis.

As to copyright ownership, the District Court overlooked the individual assessments required to establish ownership of a copyright—especially where ownership has changed hands many times since the original creation and registration. Defendants should thus be permitted to undertake an in-depth chain-of-title investigation and review. The District Court also erred in shifting the burden of establishing ownership away from Plaintiffs.

Second, the District Court incorrectly ruled that the question of class members’ appearance on Defendants’ websites satisfied commonality. Merely appearing on Defendants’ websites is not a central question to the validity of Plaintiffs’ claims. Commonality inquires as to common *injury* suffered amongst class members, not merely a common factual prerequisite.

Third, the District Court abused its discretion in finding that numerosity was satisfied. Plaintiffs failed to identify a *single* absent class member with common injury. Indeed, Plaintiffs have testified to the “personal” nature of their lawsuit, and a reluctance to involve bandmates or acquaintances. The Court improperly speculated that, because Plaintiffs decided to sue after years of collecting royalties from Defendants for an alleged injury, others must also have been injured.

Fourth, the District Court found typicality by downplaying defenses unique to the named Plaintiffs, including statute of limitations, estoppel, implied license and waiver, and other atypical issues arising from the named Plaintiffs' relationship with Defendants.

Fifth, the District Court improperly certified both classes for Rule 23(b)(2) injunctive relief, even though no court has *ever* certified such a class in a copyright infringement case. Plaintiffs' requested injunctive relief would cut off payments to absent class members without an opportunity for class members to opt out.

STANDARD OF REVIEW

This Court reviews a district court's class-certification decision for an abuse of discretion. *See Pulaski & Middleman, LLC v. Google, Inc.*, 802 F.3d 979, 984 (9th Cir. 2015); *Parra v. Bashas', Inc.*, 536 F.3d 975, 977 (9th Cir. 2008). The district court's decision must be supported by sufficient findings to be entitled to the traditional deference given to such a determination. *See Narouz v. Charter Comm's, LLC*, 591 F.3d 1261, 1266 (9th Cir. 2010).

In determining whether a district court has abused its discretion, this Court looks first “to whether the trial court identified and applied the correct legal rule to the relief requested,” and second “to whether the trial court's resolution of the motion resulted from a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record.” *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013). “[A]n error of law *is* an abuse of discretion.” *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1091 (9th Cir. 2010).

ARGUMENT

I. The District Court Erred In Finding That Plaintiffs Met Their Burden of Establishing All Class Certification Requirements of Rule 23

The party seeking class certification bears the burden of proving each of the prerequisites and requirements of Rule 23. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011). “Rule 23 does not set forth a mere pleading standard.” *Id.* at 350. Instead, “a party seeking class certification must affirmatively demonstrate ... that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc.” *Id.* “[C]ertification is proper only if ‘the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied....’” *Id.* at 350-351 (citation omitted).

This Court has reiterated this rigorous standard concerning class certification. *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012). Certification may be granted *only if* all four prerequisites of Rule 23(a) are satisfied “through *evidentiary proof*....” *Sali v. Corona Reg’l Med. Ctr.*, 909 F.3d 996, 1004 (9th Cir. 2018) (citing *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (emphasis added)).

“Generally speaking, copyright claims are poor candidates for class-action treatment,” because they entail highly individualized legal and factual inquiries. *Football Ass’n v. YouTube*, 297 F.R.D. 64, 65-66 (S.D.N.Y. 2013) (“[A]ccumulation of all the copyright claims, and claimants, into one action will

not simplify or unify the process of their resolution, but multiply its difficulties over the normal one-by-one adjudications of copyright cases.”); *see also Wu v. Pearson Educ. Inc.*, 09 CIV. 6557 KBF, 2012 WL 6681701, at *2, *7 (S.D.N.Y. Dec. 21, 2012) (upon review of contractual relationships at issue, class certification is not appropriate with respect to the plaintiff's copyright claims).

Courts rejecting copyright cases as class actions have regularly found:

- individual issues predominated over common issues;
- commonality amongst class members was lacking; and
- typicality of the class representative's claims was lacking.

See, e.g., Football Ass'n, 297 F.R.D. at 65; *Wu*, 2012 WL 6681701 at *7; *Palmer Kane LLC v. Scholastic Corp.*, No. 11 Civ. 7456(KBF), 2012 WL 2952898 at *9 (S.D.N.Y. July 16, 2012).

This case is a model for why such cases are not appropriate for class treatment.

A. The District Court Committed Reversible Error in Holding That Common Issues of Fact and Law Predominate

Certification under Rule 23(b)(3) requires a plaintiff to establish that “the questions of law or fact common to the members of the class predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3). *Football Ass'n v. YouTube* is particularly instructive. There, the court denied the plaintiffs' motion for class certification in a copyright action, finding that certifying a class

would create a “Frankenstein Monster” of individual issues, including the “validity and ownership of the copyright, its licensing to and the authorization of the party asserting it (including by way of implied license and equitable estoppel) and amount of injury and damages, as well as the over-arching questions of substantial similarity and fair use.” 297 F.R.D. at 66.

The same holds true here. The claims and defenses here will necessarily involve individualized inquiries with respect to both the Performer Class and the Composer Class. The Order fails to address the complexity and fact-intensive individualized inquiries needed to resolve them. As discussed below, questions of license, performer consent, any damages (actual or statutory), and standing/ownership would require individual assessment and would predominate the litigation.

1. Individualized Issues of License and Consent Predominate

With respect to the Composer class, the extent, length and amount of Defendants’ licensing payments, and whether the particular claimants accepted or knew about those payments varies across class members, as would each member’s potential knowledge of when the licenses were obtained. Similarly, there are unique facts as to how each recording was created, which goes directly to the question of whether a recording was fixed lawfully. *See e.g., ABKCO Music, Inc. v. Sagan*, No. 15 CIV. 4025 (ER), 2018 WL 1746564, at *12 (S.D.N.Y. Apr. 9,

2018) (finding that Section 115 “compulsory” license is only available to recordings that were “fixed lawfully.”) 17 U.S.C. § 115;⁸ 17 U.S.C. § 1101. These issues will require numerous individualized inquiries that will predominate over any common issues.

The District Court’s Order, however, neither addresses evidence of lawful fixation, nor, in turn, the individualized evidence required for Defendants’ licensing defenses. Both issues necessarily require an inquiry into the facts surrounding the creation of the thousands of recordings at issue, and those individualized inquiries predominate over any common questions. *Wu*, 2012 WL 6681701, at *7 (holding that “the layers of individually negotiated contractual arrangements and courses of dealing” prevent “a class-wide proceeding from supplying a common answer to any common question”).

The Order concluded that license issues would not implicate complex individualized inquiries based on a presumption that Defendants would rely exclusively on the hundreds of agreements they submitted to prove license and performer consent.⁹ 1-ER-21-22. That is simply incorrect. Defendants would also

⁸ The lawful requirements of Section 115 further distinguish between recordings made prior to February 15, 1972, adding an additional layer of inquiry into this complex analysis. *See* 17 U.S.C. § 115(b).

⁹ The Court, relying exclusively on the precedent that copyright ownership transfers must be in writing, incorrectly held that there is a writing requirement for license. 1-ER-20. That is wrong. Courts may imply a license from the parties’ conduct. *Foad Consulting Grp., Inc. v. Azzalino*, 270 F.3d 821, 825 (9th Cir. 2001)

seek to obtain witness testimony about the thousands of individual recordings themselves to refute Plaintiffs' claim that these recordings were not lawfully created. Furthermore, the hundreds of separate agreements submitted by Defendants are not identical, "template" agreements; analyzing these agreements alongside the individual recordings, performer testimony and other evidence relating to unique recordings with separate copyrights makes central legal and factual inquiries in this case subject to individualized inquiry. *See, e.g.* 3-ER-246-498 (illustrative sample of agreements).

The District Court side-stepped the lawful-fixation issue by holding a Section 115 license did not apply to audiovisual recordings because "a person must obtain a 'synchronization license'" for such recordings, which is a type of agreement entered to deal with the synching of music to a commercial or movie. 1-ER-21. But there is no precedent or requirement in the Copyright Act requiring "synchronization" licenses for live recordings of a musical performance—where there is no need for "synchronizing."¹⁰

("We have recognized, however, that § 204(a)'s writing requirement applies only to the transfer of exclusive rights; grants of nonexclusive copyright licenses need not be in writing."). Even if it were true that Defendants were relying on the agreements alone, analysis of the legal effects of hundreds of separate agreements is not a "common" question.

¹⁰ Indeed, plaintiff witnesses in the recent *ABKCO* damages trial struggled to recall synchronization licenses for this type of recording; *see* 2-ER-57-58 ("I'm not aware of any").

Even if Defendants needed a “synchronization license” for the portion of its collection comprising audiovisual recordings (and they did not), questions of “lawful fixation” would *still* apply to thousands upon thousands of separate audio-only recordings, which comprise the majority of Defendants’ collection. And the resulting inquiry into performer consent will require evaluation as to each individual class member, and individualized proof. That would include, for example, depositions or other testimony examining each artist’s recollections as to each of the recordings at issue, as well as further investigation into whether band members, managers, or agents may have consented on behalf of the act.

The Performer Class suffers the same issue. There could be disparate (or conflicting) answers from performers in the same band or musical act on the recordings. On a class-wide basis, this is impracticable to say the least, if not impossible. Moreover, certification on a class-wide basis of a performer class does not permit Defendants to adequately assert an individual defense of laches, waiver, implied license or statute of limitations against members of the Performer class. Further, an individualized inquiry would be required to determine if a performing artist assigned any purported rights to a record label and if so, whether that label had an agreement with WV that acknowledged WV’s ownership in the applicable recording.

2. Complex Individualized Damages Inquiries Predominate Over Any “Common” Issues

The District Court’s finding that “calculation of a statutory damage rate for the violations is straightforward” under the Copyright Act is simply incorrect. 1-ER-23. In fact, the calculation of appropriate damages in a copyright case is a complex process that must be determined by a jury on a per-work basis, considering a wide range of factors. 17 U.S.C. § 504(c); *see Feltner v. Columbia Pictures Tel., Inc.*, 523 U.S. 340, 353 (1998) (“The right to a jury trial includes the right to have a jury determine the *amount* of statutory damages, if any, awarded to the copyright owner.”).

The available range of per-work damages depends on whether the infringement was innocent, setting the range at \$200 to \$30,000 per work; non-willful, setting the range at \$750 to \$30,000 per work; or willful, setting the range at \$750 to \$150,000 per work. *See* 17 U.S.C. § 504(c)(2). Findings of innocence, non-willfulness, or willfulness can differ for each work. *Id.*; *see also, e.g., ABKCO*, 2018 WL 1746564, at *1.

Once the appropriate “range” is assigned to a given work, the jury must then assess the appropriate damages award for that work.¹¹ There are a number of

¹¹ There is a right to a damages trial by jury if *either* party requests it. *See Feltner*, 523 U.S. at 355.

factors juries may consider when setting the appropriate level of statutory damages on a per-work basis, including, but not limited to:

(1) the expenses saved and the profits reaped; (2) the revenues lost by the plaintiffs; (3) the value of the copyright; (4) the deterrent effect on others besides the defendant; (5) whether the defendant's conduct was innocent or willful; (6) whether a defendant has cooperated in providing particular records from which to assess the value of the infringing material produced; and (7) the potential for discouraging the defendant.

Sanrio Co. v. J.I.K. Accessories, 2012 WL 1366611, at *6 (N.D. Cal. Apr. 19, 2012) (collecting cases). Evidence of these factors will necessarily differ by work, and is therefore unsuitable for class treatment. For example, it is well established that “actual damages” are relevant considerations when deciding an appropriate level of statutory damages.¹² Kihn testified that certain of his songs and albums are more “successful” than others, measured in part on “how many units they sell.” 11-ER-2230; 3-ER-540. Thus, a jury could find different award amounts appropriate even among Plaintiffs’ own works. There should be the same opportunity to for Defendants to distinguish amongst the recordings of any other class members.

Other large-scale copyright cases illustrate this complexity. In *ABKCO*, for example, the court held a nine-day jury trial *solely* on the question of statutory

¹² See, e.g., *Muppets Studio, LLC v. Pacheco*, CV 12-7303 JGB FFMx, 2013 WL 2456617, at *2 (C.D. Cal. June 6, 2013) (Courts can consider whether the amount of damages requested bears a “plausible relationship” to actual damages).

damages; further complicated because certain works were found “willfully” infringed, while others were not. *ABKCO Music, Inc. v. Sagan* 2020w WL 6690641, at *1 (S.D.N.Y. Nov. 13, 2020) (awarding different low amounts per work based on non-willfulness findings). *ABKCO* also illustrates the vastness of the statutory damages range. There, the plaintiffs’ damages award of \$189,500 paled in comparison to the \$30 million they sought by seeking the maximum statutory damages (\$150,000 per work) for all 197 works. *Id.* at *1, *5. Unlike *ABKCO*, which involved only 197 works, this case involves upwards of 20,000 separate recordings.

Indeed, statutory damage awards in mass copyright cases vary widely depending on the circumstances of a particular case. *See Warner-Tamerlane Publishing Corp. v. Leadsinger Corp., et al.*, No. 2:06-cv-06531-VAP-PJW (C.D. Cal. Aug. 27, 2008) (awarding \$150,000 per 220 infringed works, for a total damages award of \$33,000,000); *Arista Records LLC v. Usenet.com*, No. 1:07-cv-08822-HB-THK (S.D.N.Y. Sept. 23, 2010) (awarding \$7,500 for 878 infringed works for a total damages award of \$6,585,000). Even where relatively few works are at issue, statutory damages can still be a volatile inquiry. In *Capitol Recs., Inc. v. Thomas-Rasset*, for instance, one jury awarded statutory damages of \$80,000 per work, the district court remitted damages to \$2,250 per work, and a later jury awarded \$62,500 per work. 692 F.3d 899, 904 (8th Cir. 2012).

Here, the range would allow Plaintiffs here to potentially seek billions of dollars in damages. Any trial that afforded Defendants any semblance of due process would surely become unmanageable.

The District Court's reliance on *Leyva v. Medline Indus. Inc.* for the proposition that damages calculations in this case would be simple is misplaced. Indeed, *Leyva* counsels against the District Court's predominance holding. 716 F.3d 510, 515 (9th Cir. 2013). The District Court cited to *Leyva* in a parenthetical as "rejecting argument that individualized damages calculations preclude class certification." 1-ER-23. But *Leyva* was a labor case—not a copyright case—and offers no guidance on the complexity of copyright damages. *Leyva*, 716 F.3d at 515. In fact, the damages at issue in *Leyva* involved only a calculation of lost wages. Moreover, *Leyva* found that damage determinations were feasible on a class-wide basis because the defendant's "electronic payroll records contain much of the data needed to calculate damages." *Id.*

Here, in contrast, there is no central database to streamline a damages inquiry. Instead, the jury's damages assessment would rely upon the contours of individual works, and the amount of damages should not be treated as a collective question with a singular answer.

The District Court's reliance on *In re Napster* was also misplaced. 1-ER-23 (citing *In re Napster, Inc. Copyright Litig.*, No. C 04-1671 MHP, 2005 WL

1287611, at *7-12 (N.D. Cal. June 1, 2005)). *Napster* was primarily concerned with the “due process concerns” raised by “large awards of statutory damages”—in the copyright context and elsewhere. *Id.* at *10. *Napster* did not address whether the complex individualized questions raised by awarding statutory damages should preclude class-wide adjudication.

In short, the District Court did not cite a single case to support the idea that statutory damage calculations under § 504(c)(1) are “straightforward.” And they are not. As shown above, awarding statutory damages in a case like this would be a labyrinthine task, required a multifaceted analysis for each work at issue. This issue alone should preclude Rule 23(b)(3) certification.

3. The Order Improperly Relieves Plaintiffs of Their Burden to Prove Copyright Ownership and Overlooks the Complex, Individualized Inquiries Required to Establish Ownership

To make out a *prima facie* case for copyright infringement, a plaintiff must have a valid copyright registration. *Feist Publ’ns., Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Often those registrations are not in the same name as the plaintiff claiming their rights, in which case the plaintiff can only succeed if it can provide independent evidence of ownership, requiring individual chain of title discovery. Because of such transfers in copyright ownership, chain-of-title records often are necessary to prove ownership. Chain-of-title discovery is a substantial component of copyright litigation, and can include documents related to mergers,

catalog acquisitions, copyright transfers, work-for-hire agreements, and exclusive licenses—none of which need be registered with the Copyright Office. *Jim Marshall Photography, LLC v. John Varvatos of California*, No. C-11-06702 DMR, 2013 WL 3339048, at *8 (N.D. Cal. June 28, 2013).

Even if the plaintiff can produce a valid copyright registration in its name, this creates only a *presumption* of ownership—defendants have the right to investigate and challenge the plaintiff’s assertion of ownership. *See In re Napster, Inc. Copyright Litig.*, 191 F. Supp. 2d 1087, 1100 (N.D. Cal. 2002) (“[R]efusing to allow any discovery on the issue of ownership converts the presumption of ownership into an irrefutable one.”).

The Order fundamentally misunderstands these principles of ownership challenges in copyright litigation. The District Court held that individualized ownership issues would not be predominate because: (1) “proof of the class members’ ownership of the copyrights to the compositions may be established readily from the records of the Copyright Office” 1-ER-18, and (2) “identification of the owners of the registered compositions can be accomplished simply by comparing the catalog of recordings offered by defendants with the Copyright Office records.” *Id.* But that is simply incorrect. The most up-to-date ownership information is often *not* in Copyright Office records. While the Copyright Office would likely have a copy of the original registration, ownership commonly

changes hands, and thus the registration often does not reflect the current rights holder's name. *See, e.g., Jim Marshall Photography, LLC* 2013 WL 3339048, at *8. Indeed, Plaintiffs themselves have transferred their ownership rights in their asserted works. 11-ER-2235-2238.

The Order also states that, “as necessary, ownership can further be substantiated by the third-party licensing rights agencies who administer and manage licensing for music publishers (*i.e.*, Harry Fox Agency, Rightsflow, Inc., and MediaNet).” 1-ER-18. This improperly shifts Plaintiffs’ burden to prove ownership to third parties. *See Feist*, 499 U.S. at 361 (to establish infringement, *claimant* must first prove “ownership of a valid copyright”). And even if such burden shifting were proper, these third parties are in no position to verify or provide the underlying chain-of-title information to prove ownership—they simply take the claimant’s word for what they claim to own. Further, many of the compositions may not be administered by third parties. Ownership is an individualized, *evidentiary* inquiry requiring close examination of the evidence, and cannot be dispensed of by relying on inadequate records and third-party representations. Because of the complexity of these investigations, individualized ownership issues will predominate over common issues.

Indeed, chain-of-title inquiries often lead to the plaintiffs in copyright infringement actions dropping or removing works from the lawsuit—in other

words, plaintiffs are often mistaken as to what copyrights they own. *Compare, e.g., UMG Recordings, Inc. v. MP3.com, Inc.*, No. 00 Civ. 472, 2000 WL 1262568, at *6 (S.D.N.Y. Sept. 6, 2000) (noting at least 4,700 copyrights claimed) *with UMG Recordings, Inc. v. MP3.com, Inc.*, 2000 U.S. Dist. Lexis 17907, *1 (S.D.N.Y. Nov. 14, 2000) (awarding damages to UMG for only 2,136 works); *compare Warner Records Inc., et al. v. Charter Comms., Inc.*, 1:19-cv-00874-RBJ-MEH, Dkt. 1, Exs. A and B (Complaint) (D. Colo. 2019) *with* Dkt. 123 Exs. A and B (Amended Complaint) (removing 455 works in suit following preliminary ownership discovery).

Additionally, permitting a class to proceed absent identification of works-in-suit violates Defendants' due process rights. Because copyright actions are tethered inherently to *works*, copyright suits cannot be vague or speculative about the works at issue. Instead, the plaintiffs must definitively identify works that they claim the defendant unlawfully exploited. *See, e.g., Bespaq Corp. v. Haoshen Trading Co.*, No. C 04-3698 PJH, 2005 WL 14841, at *2-3 (N.D. Cal. Jan. 3, 2005) (dismissing case in which allegedly infringed works not definitively identified); *see also Four Navy Seals v. Associated Press*, 413 F. Supp. 2d 1136, 1148 (S.D. Cal. 2005) (finding complaint deficient when the plaintiff alleged that "certain of [its 1800] photographs" had been infringed without specifying which works it placed at issue).

Furthermore, just as proving standing is an individual question, in copyright cases it is each copyright owner's decision which, if any, works that they wish to pursue. Yet, as is often the case in mass copyright cases, some members of the putative classes may wish not to pursue claims as to their full catalogs for economic reasons. See *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, at 682-83 (2014). (copyright owners may be selective about which alleged infringements to pursue based on benefits they may receive from the use). Indeed, the named Plaintiffs are a prime example—for whatever individual reasons, they have declined to pursue damages for many of their works. 11-ER-2232. Yet, as to all the other members of the putative class, the named Plaintiffs want to presume inclusion of every recording without any input from the class members.

4. The Performer Class Fails to Define “Person” for the Sake of Class Membership, Leaving Open Individualized Questions of Standing

The Performer Class purports to include every person who appeared, for any amount of time, on any of the tens of thousands of recordings at issue. But it will be nearly impossible to verify from decades-old audio-only recordings each of the individuals that performed on the recordings, many of whom are simply not identifiable, and many of whom will be unable to testify because they are deceased or outside the District Court's jurisdiction.

Even if limited to the members of particular musical groups, given the turnover in such groups, different performers would appear on different recordings over time and the performers likely have agreements among themselves, and with third parties such as record labels, as to the ownership of a recording which goes directly to the issue of standing. Thus, the assessment of membership in the Performer Class would inevitably become a focal point of class litigation, leading to mini-trials on standing.

How statutory damages would be applied based on an anti-bootlegging claim is also unclear—as the damages should be assessed per work (e.g., per composition or song or per concert recording), and yet the various recordings of the same work would mean that only one version of each band should be able to recover (as opposed to a separate award where the work/song appears on many different recordings). This is far too complicated to administer on a class-wide basis, particularly since the performers are not actively participating in the lawsuit.

The Order does not address any of this. It does not define “person” in connection with the Performer class. 1-ER-38. Nor does it address how damages would be awarded for the Section 1101 claims with respect to the “persons” in the Performer class. These are necessarily individualized analyses on a per-recording basis.

Plaintiffs have not produced a “common nucleus” of evidence that could dispose of these questions on a class-wide basis. 1-ER-15,22. Thus, the District Court abused its discretion in certifying these issues for class treatment.

B. The District Court Erred in Finding that Plaintiffs’ Classes Have Sufficient Commonality

The District Court mistook a common circumstance—Plaintiffs’ appearance on Defendants’ websites—for the commonality required to certify a class. Commonality is only satisfied if the “common contention” is of “such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is *central* to the validity of each one of the claims in one stroke.” *Dukes*, 564 U.S. at 350 (emphasis added). Plaintiffs must prove “that the class members have suffered the same *injury*”—not “merely that they have all suffered a violation of the same provision of law.” *Id.* at 349 (emphasis added) (citation omitted). Furthermore, courts must consider any dissimilarities to determine whether the plaintiffs have provided “convincing proof” of a common question. *Id.* at 359.

The Order does not satisfy the requirements of *Dukes*. The District Court held that because all claims arise from “[D]efendants’ sale and distribution of audio and audiovisual recordings of live performances on their Websites,” commonality is satisfied. 1-ER-10-11. This “common question,” however, does not

determine whether Plaintiffs’ claims are capable of class-wide resolution of either a common *injury* or the validity of the claim. *Dukes*, 564 U.S. at 349.

Instead, the District Court’s “common question” resembles the *Dukes* Court’s famous example of an *unsatisfactory* common question: “do all of us plaintiffs indeed work for Wal-Mart?” *Id.* at 349. Such a question, *Dukes* explained, while perhaps a basic prerequisite to class membership, does not address whether the parties’ claims or defenses are capable of class-wide resolution. Similarly, whether Defendants’ websites included class members’ works, while perhaps a threshold issue for class membership, does not address the plethora of individual issues required to establish liability.

The District Court analogized its single “common question” to the findings in *Napster*, a case decided pre-*Dukes*. 1-ER-11; *see In re Napster*, 2005 WL 1287611 at *3. That comparison was inapt. The *Napster* court found that although the issues of ownership, registration, and actual damages would require a work-by-work inquiry, “the fact that the claims of every member of the class are uniformly premised upon the uploading or downloading of a copyrighted work by Napster users” was sufficient.¹³ *Id.* at 7. However, unlike in this case, the question of downloading or uploading was *central* to the question of Napster’s liability;

¹³ The Order cites this in its discussion of commonality, but the quoted text is from the *Napster* court’s discussion of predominance.

Plaintiffs alleged Napster’s secondary infringement based on its subscribers’ direct infringement via uploading or downloading. *Id.* Moreover, Napster did not assert license or consent defenses, nor did Napster assert that it owned any sound recording copyrights, whereas in this case Defendants assert ownerships of sound recording copyrights, which members of the purported Performer Class would be implicitly challenging—yet many of the performers have no standing to do so. *Napster* is therefore inapposite, and does not inform whether this case is suitable for class treatment.¹⁴

Critical to a commonality determination is “the capacity of a classwide proceeding to generate common answers apt to drive resolution of the litigation.” *Dukes*, 564 U.S. at 350 (citation omitted). As the Supreme Court has warned, “[w]ithout some glue holding” the underling allegations of the claims together, “it will be impossible to say that examination of all the class members’ claims for relief will produce a common answer.” *Id.* at 340-341.

There is no glue here. Plaintiffs cannot meet their burden that each class member may “suffer[] the same injury,” nor that any issue central to liability may

¹⁴ Plaintiffs’ Reply also cited *Flo & Eddie, Inc. v. Sirius-XM Radio, Inc.*, 2015 WL 4776932 (C.D. Cal. 2015), which is also distinguishable. Because class certification followed summary judgment, Sirius had been found liable and admitted that it did not seek authorization or pay any owners in connection with the recordings at issue. *Id.* at *2, *9.

be resolved in “one stroke.” *Id.* at 350 (citation omitted). As such, the District Court’s finding on commonality is flawed.

C. The District Court Erred In Finding Rule 23(a)’s Numerosity Requirement Was Satisfied Even Though Plaintiffs Failed to Identify Any Absent Class Members

To satisfy Rule 23(a)(1), Plaintiffs must demonstrate that “the class is so numerous that joinder of all members is impracticable.” Fed. R. Civ. P. 23(a)(1). To date, Plaintiffs have failed to identify a single publisher, composer, or performer in their proposed classes beyond themselves. *See Nguyen Da Yen v. Kissinger*, 70 F.R.D. 656, 661 (N.D. Cal. 1976) (“Mere speculation as to satisfaction of this numerosity requirement does not satisfy Rule 23(a)(1)”); *Schwartz v. Upper Deck Co.*, 183 F.R.D. 672, 681 (S.D. Cal. 1999) (“[T]he Court will not rely on the cursory allegations of Plaintiffs.”).

The District Court indulged Plaintiffs’ vague speculation, and found both classes to be sufficiently numerous. The District Court found numerosity based solely on the “number of performers and musical works in the recordings on defendants’ Websites.” 1-ER-9. This is equivalent to certifying a class of all purchasers of a car model for a faulty part where only one purchaser has complained of a defect. The District Court adopted Plaintiffs’ logic that, because these two Plaintiffs object to Defendants’ business, surely “hundreds, if not thousands” of others will, too. *Id.* Plaintiffs have provided no evidence that this is the case. Defendants have been operating their websites for many, many years,

making the works of many thousands of performers available to the public and paying licensing fees to many thousands of composition owners – yet there has not been “hundreds” (let alone “thousands”) of others that have taken issue with Defendants’ business. Plaintiffs’ baseless assumption—while perhaps permissible at the pleading stage—cannot stand at the certification stage.

Instead, it is Plaintiffs’ *affirmative burden* to prove that the class is sufficiently numerous. But Plaintiffs have adduced no evidence that there is a class of artists or performers who have suffered the same alleged harm. *See Ryan v. Carl Corp.*, 1999 WL 16320, at *3 (N.D. Cal. Jan. 13, 1999) (“The burden of proving that a class is appropriate rests with the proponent of the class.”); *see also Celano v. Marriott Int’l, Inc.*, 242 F.R.D. 544, 550 (N.D. Cal. 2007) (Rule 23(a)(1) not satisfied where Plaintiffs failed to link putative population to alleged harm).

At the class certification hearing, the District Court asked Plaintiffs specific questions about whether they could identify any class members; again, Plaintiffs could not do so. 2-ER-65-66. Kihn testified he has regular conversations with other performers and publishers that would conceivably be in Plaintiffs’ potential classes, but he has not bothered to discuss this case with them at all—let alone ask anyone if they want to participate in it. 3-ER-508-509, 521-524; 3-ER-531-532. Instead, Kihn referred to this lawsuit as his own fight and his “personal business” in which he had no interest in involving other musician friends or bandmates. 3-

ER-521-522. This raises the question of why Kihn sought class certification at all (if he even understood that aspect of the case).

Kihn also admitted that he does not know that Defendants have underpaid anyone, and is unaware of any other performers who would be interested in joining a class action. 3-ER-508-509, 512, 521-524. Turtle admitted he is only seeking to certify this class to avoid protracted legal expense—*not* because he is aware that any complaints he has against Defendants extend beyond his individual claims. 3-ER-534.

The District Court confused these numerosity concerns with “ascertainability”—a separate issue entirely. 1-ER-10. After correctly noting that “Defendants argue that the actual number of class members is speculative [numerosity] and that plaintiffs have offered no way in which to identify the composers and performers [ascertainability]” *Id.*, the District Court then side-stepped numerosity concerns by lumping *all* of Defendants’ arguments into ascertainability. *Id.* (“These arguments concern ascertainability of class members, not whether they are sufficiently numerous”). But the “actual number of class members” (or lack thereof) is not an ascertainability issue—it is the central question of numerosity. *See Barrett v. Wesley Fin. Grp., LLC*, 2015 WL 12910740, at *5 (S.D. Cal. Mar. 30, 2015) (numerosity satisfied by plaintiff’s undisputed claim that “there are 3,105 class members”).

The District Court also appeared to conflate Defendants’ numerosity concerns with a red herring: “willingness” to litigate. 1-ER-10. But the problem presented here is not simply putative class members’ willingness to pursue litigation—it is whether other aggrieved parties that share a common alleged injury with the named Plaintiffs even *exist*. *Schwartz*, 183 F.R.D. at 681; *Nguyen Da Yen*, 70 F.R.D. at 661.

Celano v. Marriott Int’l, Inc. discussed the relationship between numerosity and willingness. 242 F.R.D. at 549. There, the plaintiffs relied on statistics and census information for the premise that there are numerous disabled golfers, and that “some golfers would play golf if some accommodation were made” by defendant’s golf courses. *Id.* at 550. The court, however, found “no indication that the disabled membership of any of the organizations referenced in plaintiffs’ papers have been polled on their interest and/or attempts to play at [defendant’s] courses.” *Id.* Plaintiffs therefore failed “to link their population data to *the alleged violation and injury* at issue here,” and for that reason could not satisfy the numerosity requirement. *Id.* (emphasis added).¹⁵ In other words, any “common

¹⁵ *Celano*, in turn, cited to *Jeffries v. Pension Trust Fund*, 172 F. Supp. 2d 389, 394 (S.D.N.Y.2001) (while the plaintiff alleged that many of union’s members were unemployed, it failed to proffer evidence of how many laid-off members suffered the alleged injury), and *Green v. Borg–Warner Protective Servs. Corp.*, 1998 WL 17719, *3–4 (S.D.N.Y. Jan. 15, 1998) (the fact that four thousand single adult men and women reside in shelters on any given day, along with some reports of assault and misconduct at shelters, does not establish numerosity).

sense inferences that plaintiffs urge the court to make” must “be based on something other than rank speculation untethered to real facts.” *Id.*

As in *Celano*, Plaintiffs here point to a general population of publishers and performers, but they do not connect this population to “the alleged violation and injury at issue here.” Their “hunch” that those publishers and performers are dissatisfied with Defendants is simply insufficient to satisfy their evidentiary burden at the class certification stage. *See Schwartz*, 183 F.R.D. at 681 (“[S]peculation is insufficient. A higher level of proof than mere common sense impression or extrapolation from cursory allegations is required.”). Plaintiffs’ speculative, “cursory allegations” are all the more unavailing because Plaintiffs claim to know and talk with other putative class members and yet still they have not put forward a single affidavit, poll, or evidence of numerosity.

This numerosity problem is much like that posed by the District Court’s commonality analysis. That other rights-holders’ works appear on Defendants’ websites does not mean that these rights-holders have been harmed, or even believe themselves to have been harmed. Presumably, many publishers take no issue with Defendants’ conduct, as Defendants have dutifully paid out on their licenses for many years to the publishers’ monetary benefit. Plaintiffs’ class action, if successful, would effectively cut off these royalty payments. Dkt. 108 at 13. Other performers presumably take no issue with their inclusion in Defendants’

archives, as they do not perceive the recordings at issue to be “bootlegged” or otherwise illicit, and could be enjoying promotional and other benefits. The District Court missed the mark in construing these well-founded concerns as somehow tangential to its numerosity analysis.¹⁶ The District Court effectively shifted the numerosity burden from Plaintiffs to prove, and onto Defendants to disprove, which was clear error.

Finally, the District Court added that any evidence that putative class members may be unwilling to bring their own claims because of “their financial resources, the size of the claims, and their fear of retaliation in light of an ongoing relationship with the defendant” weighs “*in favor*” of certification. 1-ER-10. Even if this would weigh in favor of certification, Plaintiffs have adduced no evidence that it is true. Nothing in the record indicates that potential class members have not sued due to lack of resources, based on the size of the claims, or because of an ongoing relationship with Defendants. *See* Dkt. 107 at 8-9; Dkt. 120 at 4. Nor is there any basis to presume that absent class members would be unwilling or unable to bring individual claims in this case.

¹⁶ On this point, the District Court added: “Likewise, defendants do not offer evidence to suggest that a large proportion of putative class members would opt out of the litigation.” 1-ER-10. It is impossible for Defendants to do so when Plaintiffs have not identified any other class members.

Indeed, copyright plaintiffs can recover substantial sums in individual cases even without proving actual damages—up to \$30,000 per work for non-willful infringement, and as high as \$150,000 per work if the infringement is found to be willful. *See* 17 U.S.C. § 504. Attorney’s fees and costs are also available for prevailing plaintiffs. 17 U.S.C. § 505. Defendants’ potential exposure for Plaintiffs’ *individual* claims is as high as \$9 million for the sixty compositions at issue, and perhaps \$9 million more if Plaintiffs separately pursue sixty Section 1101 awards. The award could also be less than \$100,000, or anywhere in between. It will depend on Plaintiffs’ showing to the jury about what is fair under the circumstances, and Defendants’ defenses to those claims, which would include some defenses that are unique to Plaintiffs as described above.

This is a far cry from the consumer class action cases relied on by Plaintiffs where the damages per suit, if brought individually, would range from \$5-\$30. *See, e.g., Opperman v. Path, Inc.*, No. 13-CV-00453-JST, 2016 WL 3844326, at *17 (N.D. Cal. July 15, 2016) (“[O]nly a lunatic sues for \$30”) (citation omitted); *Mullins v. Premier Nutrition Corp.*, No. 13-CV-01271-RS, 2016 WL 1535057, at *8 (N.D. Cal. Apr. 15, 2016) (noting at best that individual monetary claims would be worth \$5-\$20 per case). Unlike common consumer class actions that involve a class of plaintiffs that each individually have relatively low damages (and therefore it may make sense to pool plaintiffs into a class action), Plaintiffs have a

mechanism for meaningful damages by pursuing their own individual claims against Defendants in this case.

In short, there are plenty of incentives built into the Copyright Act for any individual copyright plaintiff to pursue individual claims.¹⁷

D. The Court Also Erred In Finding Plaintiffs Established that They Were Typical of the Class

The District Court also erred in finding that Plaintiffs met their burden under Rule 23(a)(3) of showing that “the claims or defenses of the representative [] are typical of the claims or defenses of the class.” 1-ER-11. Under established law, “typicality” requires that a representative “possess the same interest and suffer the same injury as the class members” so that the evidence needed to prove the representative’s claim is probative of class claims. *Cath. Soc. Servs., Inc. v. I.N.S.*, 232 F.3d 1139, 1148 (9th Cir. 2000) (“[A] class representative must be part of the class and possess the same interest and suffer the same injury as the class members.”) (citation omitted).

The typicality standard is especially difficult to satisfy in copyright actions. *See Football Ass’n*, 297 F.R.D. at 67 (“Nor are the claims of any plaintiff typical of the claims of the class. By their very nature, copyrightable works of art are each

¹⁷ Indeed, over twenty music publishers individually filed suit in *ABKCO Music, Inc. v. Sagan*, organized by the powerful NMPA. No. 15 CIV. 4025 (ER), 2016 WL 2642224, at *1 (S.D.N.Y. May 6, 2016)). Music rightsholders and publishing companies are perfectly able to join forces and pursue massive copyright claims outside the class action framework.

unique.... Each claim presents particular factual issues of copyright ownership, infringement, fair use, and damages, among others.”).

In *Estate of Berlin v. Stash Records, Inc.*, for example, the court denied class certification in a copyright action on typicality grounds, stating that, even if named plaintiff could prove that the defendants have pursued a general scheme of copyright infringement by releasing phonorecords without properly obtaining licenses, this proof of the defendants’ conduct does not assist any putative class member, including the named plaintiff, in prosecuting its claim. No. 95 Civ. No. 6575 (PKL), 1996 WL 374176, *2 (S.D.N.Y. July 2, 1996). Each class member would have to provide independent proof, relevant only to his claim, of what activities the defendants engaged in which violated his particular copyright. Accordingly, whether or not the defendants obtained a license from the plaintiff before releasing phonorecords to which the plaintiff has a copyright is not relevant to any other putative class member's claim.

In addition, when a representative plaintiff is “subject to unique defenses,” that plaintiff is atypical. *See Withers v. eHarmony, Inc.*, No. CV 09-2266, Dkt. 187 at 3-4 (C.D. Cal. Jun. 2, 2010) (denying certification because of individual defenses to plaintiff’s claims). That is plainly the case here. Plaintiffs have not only known about the recordings they now complain about for many years—implicating a statute of limitations defense—but Kihn exploited Defendants’ recordings,

played them on his own radio show, and recorded at Defendants’ studio. 3-ER-514-516. Plaintiffs have not suffered the same alleged injury as their proposed classes.

Plaintiffs’ unique relationship with Defendants also undermines their “typicality” as class representatives. The evidence shows that Plaintiffs knew about the works over a decade ago, and thus the District Court erred in overlooking these circumstances and finding that Plaintiffs had shown that they were typical of the class.

E. The Certification of Plaintiffs’ Classes Under Rule 23(b)(2) is Both Unprecedented and Improper

The District Court erred in finding that either of Plaintiffs’ classes were suited for Rule 23(b)(2)’s injunctive relief. Because Rule 23(b)(2) members cannot opt out of class participation, injunctive relief must be appropriate for the class as a whole. *See Dukes*, 564 U.S. at 362.

Here, injunctive relief would foreclose revenue streams for *all* class members, whether or not they would individually seek such relief. *See* Dkt. 108 at 3. The “indivisible nature” of this injunctive relief is problematic—especially for rights-holders who wish to continue collecting royalties for their inclusion in Defendants’ historic archive. *Cholakyan v. Mercedes-Benz, USA, LLC*, 281 F.R.D. 534, 558 (C.D. Cal. 2012) (Noting that the “indivisible nature” of Rule 23(b)(2) relief must apply “as to all of the class members or as to none of them,” and

finding Rule 23(b)(2) certification inappropriate for the putative class) (citation omitted).

The District Court glossed over this argument, stating only that “Due process concerns are diminished where a Rule 23(b)(3) class is also certified.” 1-ER-37. Simultaneous certification under 23(b)(3) in no way addresses these specific due process concerns.¹⁸ While 23(b)(3) class relief may bring monetary damages, these damages do not necessarily cover (or stand in for) the royalties that class members might have otherwise collected. The District Court disregarded the central due-process issue: some publishers might not want to participate in the action at all, and would rather benefit (as they have for years) from Defendants’ royalties. Given its “all-or-nothing” design, Rule 23(b)(2) certification would effectively force the hands of all involved. *See Dukes*, 564 U.S. 338 at 360.

Plaintiffs have further failed to prove that injunctive relief is proper, as they have failed to demonstrate irreparable harm. *See* Dkt. 108 at 22. The Order does not address this requirement, or whether injunctive relief is an appropriate remedy. 1-ER-36-37. The District Court, for example, did not address the fact that Plaintiffs have *known* of Defendants’ use of their recordings since at least 2011. Nor did the

¹⁸ Instead, the District Court’s reference to “due process concerns” touches on a different issue: Rule 23(b)(2) certification where *individualized monetary* damages are implicated, and class members cannot “opt out.” 1-ER-37. This is not the case here, where Plaintiffs seek Rule 23(b)(3) certification for monetary damages and Rule 23(b)(2) certification for injunctive relief.

District Court address Turtle’s testimony that, circa 2015, Defendants’ recordings “didn’t seem worth getting into a fight over.” 3-ER-537. Thus, any alleged “harm” to named Plaintiffs is hardly imminent, or irreparable. This Court has explicitly held that “presuming irreparable harm in a copyright infringement case is inconsistent with, and disapproved by, the Supreme Court’s opinion[] in *eBay*.” *Flexible Lifeline Sys., Inc. v. Precision Lift, Inc.*, 654 F.3d 989, 998 (9th Cir. 2011).

Given these defects, it is clear why no Rule 23(b)(2) class has ever been certified in a copyright case, or in an anti-bootlegging claim. In reviewing the District Court’s one-page Rule 23(b)(2) analysis, it is hard to imagine that the District Court appreciated the novel ground it was breaking, and the historic implications of its decision.

Finally, with regard to the Composer Class, injunctive relief contradicts Section 115’s compulsory licensing regime, and highlights the individualized nature of Plaintiffs’ claims. A licensor cannot deny a compulsory license where Section 115’s requirements are met. *See* 17 U.S.C. § 115. Absent an individualized inquiry into each compulsory license at issue, certification of a Rule 23(b)(2) class and the overbroad definition of the Composer Class deprives Defendants of their statutory right to exploit lawfully licensed works. For this reason, the order is manifestly erroneous.

CONCLUSION

Plaintiffs' copyright and bootlegging claims are inappropriate for class treatment. The District Court's Order failed to recognize the complex, individual inquiries that predominate here: performer consent, damages, copyright licensing, standing/ownership and others, and ignored crucial flaws related to commonality, numerosity and typicality. Furthermore, the District Court's decision to certify these classes for bootlegging claims and injunctive relief is unprecedented (in this Circuit and elsewhere), and forces injunctive "relief" onto parties who take no issue with Defendants' business and the royalties Defendants pay out. This Court should reverse the District Court's class-certification Order and remand this case to proceed as an individual action.

Dated: April 19, 2021

By: /s/ Michael S. Elkin
Michael S. Elkin
Attorney for Appellants

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, I, counsel of record for Appellants, am not aware of any related cases pending in this Court.

Dated: April 19, 2021

By: /s/ Michael S. Elkin
Michael S. Elkin
Attorney for Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, counsel of record for the Appellants, certify:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,480 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: April 19, 2021

By: /s/ Michael S. Elkin
Michael S. Elkin
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2021, an electronic copy of the foregoing brief was filed and served on counsel of record via this Court's CM/ECF system, which will send a notice of filing to all registered users.

Dated: April 19, 2021

By: /s/ Michael S. Elkin
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