

Docket No. 07-35821

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INTERSCOPE RECORDS, a California general partnership; CAPITAL RECORDS, INC., a Delaware corporation; SONY BMG MUSIC ENTERTAINMENT, a Delaware general partnership; ATLANTIC RECORDING CORPORATION, a Delaware corporation; BMG MUSIC, a New York general partnership; VIRGIN RECORDS OF AMERICA, INC., a California corporation,

Plaintiffs-Appellees,

v.

DAWNELL LEADBETTER,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Washington

APPELLANT'S PETITION FOR PANEL REHEARING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

I. INTRODUCTION..... 1

II. GROUNDS FOR REHEARING

 A. The Court’s Memorandum Opinion Overlooks and
 Misapprehends Various Decisions of this Court and its
 Sister Courts of Appeals Regarding the Ability to Re-file
 Dismissed Claims After the Expiration of the
 Statute of Limitations.....3

 B. The Court’s Memorandum Opinion Overlooks Additional
 Factual Matters in the Record Which Established that
 Plaintiffs Could Not Re-file Their Dismissed Claims
 After Obtaining Judgment Against a Third Party
 on Identical Claims.....10

III. CONCLUSION.....12

CERTIFICATE OF COMPLIANCE.....13

CERTIFICATE OF SERVICE.....14

TABLE OF AUTHORITIES

CASES

Assessment Technologies of WI, LLC v. WIREdata, Inc.,
361 F.3d 434 (7th Cir. 2004).....9

Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept.
of Health and Human Services,
532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001).....3

Burden v. Yates,
644 F.2d 503 (5th Cir. Unit B 1981).....1, 5

Eagle Services Corp. v. H2O Industrial Svcs. Inc.,
532 F.3d 620 (7th Cir. 2008).....1, 9

Fogerty v. Fantasy, Inc.,
510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994).....9

Gocolay v. New Mexico Federal Sav. & Loan Ass'n,
968 F.2d 1017 (10th Cir. 1992).....1, 5

Gustafson v. Cornelius Co.,
724 F.2d 75 (8th Cir. 1983).....1, 6

ITSI TV Prod. v. Agric. Ass'n,
3 F.3d 1289 (9th Cir. 1993).....5

<u>Levy v. Ohl,</u>	
477 F.3d 988 (8th Cir. 2007).....	6
<u>Miles v. California,</u>	
320 F.3d 986 (9th Cir.2003).....	1, 4, 5
<u>Oscar v. Alaska Dept. of Educ. and Early Development,</u>	
541 F.3d 978 (9th Cir. 2008).....	1, 3
<u>Riviera Distributors, Inc. v. Jones,</u>	
517 F.3d 926 (7th Cir. 2008).....	9
<u>Rodi v. Southern New England School Of Law,</u>	
389 F.3d 5 (1st Cir. 2004).....	6
<u>Staehr v. Hartford Financial Svcs. Group,</u>	
547 F.3d 406 (2nd Cir. 2008).....	6
<u>Texas State Teacher’s Ass’n. v. Garland Independent School Dist.,</u>	
489 U.S. 782, 109 S.Ct. 1486 (1989).....	3
<u>Thomas v. U.S.,</u>	
245 Fed. Appx. 18 (Fed. Cir. 2007).....	12
<u>Wakefield v. Cordis Corp.,</u>	
2008 WL 5381432 (11th Cir. December 22, 2008).....	5

STATUTES

17 U.S.C. § 505.....	3
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I. INTRODUCTION

In its Memorandum Opinion dated February 10, 2009, this Court determined that its earlier opinion in Oscar v. Alaska Dept. of Educ. and Early Development, 541 F.3d 978 (9th Cir. 2008), was controlling authority and affirmed the district court's decision to deny Dawnell Leadbetter an award of attorney's fees as the "prevailing party" under the Copyright Act. This Court rejected Ms. Leadbetter's argument that here, unlike in Oscar, the plaintiffs could not re-file their copyright claims against her because the statute of limitations on those claims had expired by the time the district court entered an order dismissing the claims "without prejudice". This Court reasoned that because no "statute of limitations determination" was made by the district court, the plaintiffs "retain the legal ability to re-file."

Ms. Leadbetter respectfully submits that this reasoning misapplies this Court's decision in Oscar, and also overlooks the Court's prior decision in Miles v. California, 320 F.3d 986 (9th Cir. 2003), as well as decisions of its sister Courts of Appeals including, but not limited to, Eagle Services Corp. v. H2O Industrial Svcs. Inc., 532 F.3d 620 (7th Cir. 2008), Gocolay v. New Mexico Federal Sav. & Loan Ass'n, 968 F.2d 1017 (10th Cir. 1992), Gustafson v. Cornelius Co., 724 F.2d 75 (8th Cir. 1983), and Burden v. Yates, 644 F.2d 503 (5th Cir. Unit B 1981).

The Court's Memorandum Opinion also overlooks important factual matters in the record that bear upon the central issue on appeal. In holding that Ms. Leadbetter was required to obtain a district court "judicial determination" of the statute of limitations defense in order for her to avoid the risk that the plaintiffs might re-file their claims against her, the Court ignored various practical realities and appellate court decisions which make seeking such a determination impractical, unnecessary, and inequitable. The Memorandum Opinion also ignores the fact that after the dismissal of the claims against Ms. Leadbetter, the district court entered judgment against another individual on claims of infringement that were identical to those earlier alleged against Ms. Leadbetter. The plaintiffs were clearly precluded from thereafter re-filing identical claims against Ms. Leadbetter.

Ms. Leadbetter respectfully requests that the Court grant her petition, conduct panel rehearing of her appeal, reverse the decision of the district court, and remand the matter for further determination of fees and costs in her favor.

II. GROUNDS FOR REHEARING

A. The Court's Memorandum Opinion Overlooks and Misapprehends Various Decisions of this Court and its Sister Courts of Appeals Regarding the Ability to Re-file Dismissed Claims After the Expiration of the Statute of Limitations.

The Copyright Act provides that “the court may...award a reasonable attorney’s fee to the prevailing party as part of the costs.” 17 U.S.C. § 505.¹ Ms. Leadbetter appealed the district court’s decision that she was not entitled to “prevailing party” status and thus not eligible for an award of fees under the Copyright Act. Months after initial briefing was concluded, this Court entered an order which recognized that the Oscar opinion had been recently issued and requested supplemental briefing by the parties “advising of the effect of Oscar on their respective positions”. See December 24, 2008 Order.

Following supplemental briefing, this Court issued its two-page Memorandum Opinion. Regarding the expiration of the statute of

¹ In Buckhannon Bd. and Care Home, Inc. v. West Virginia Dept. of Health and Human Services, 532 U.S. 598, 121 S. Ct. 1835, 149 L.Ed.2d 855 (2001), the Supreme Court explained that what is required for prevailing party status is a “material alteration of the legal relationship of the parties’ necessary to permit an award of attorney's fees.” Buckhannon, 532 U.S. at 604 (quoting Texas State Teacher’s Ass’n. v. Garland Independent School Dist., 489 U.S. 782, 792-793, 109 S. Ct. 1486 (1989)).

limitations and the inability of the plaintiffs to re-file their unfounded copyright claims, the Court's discussion was limited to the following:

Appellant attempts to distinguish her case from that in Oscar on the ground that the statute of limitations has expired for appellees' claims against her such that they lack the ability to re-file their claims. We reject this argument as no statute of limitations determination was requested or made by the district court. Barring such a judicial determination, appellees, as the plaintiff in Oscar, retain the legal ability to re-file. Therefore, Oscar controls.

Memorandum Opinion, at 3 (attached hereto as Exhibit A).

Ms. Leadbetter respectfully submits that this reasoning overlooks and misapprehends various important decisions of this Court and its sister circuits, several of which were discussed at length in her prior briefing.

In addressing Oscar, Ms. Leadbetter argued that her circumstances were much more similar to that of the defendant in Miles v. California, 320 F.3d 986 (9th Cir. 2003), an earlier decision which the Oscar Court was constrained to distinguish. In Miles, the plaintiff's claims under the Americans with Disabilities Act (ADA) were dismissed by the district court on Eleventh Amendment immunity grounds, "without prejudice to Miles' right to seek any available relief in the state court." Miles, 320 F.3d at 989.

In Miles, neither party had requested a district court determination of Eleventh Amendment immunity. This Court had specifically directed entry of judgment on these grounds--and vacature of a prior judgment on wholly

different grounds--following an intervening decision of the U.S. Supreme Court. See Miles, 320 F.3d at 988. The Miles Court also noted that Eleventh Amendment immunity is treated as an affirmative defense. Id., at 989 (citing ITSI TV Prod. v. Agric. Ass'n, 3 F.3d 1289, 1291 (9th Cir.1993)).

The Miles Court affirmed an award of costs to the defendant as the prevailing party, reasoning that because the dismissal without prejudice effectively prevented further proceedings in the federal court, it constituted a material alteration of the legal relationship of the parties. Miles, 320 F.3d at 989 (citation omitted).

It is well-established that where a plaintiff dismisses his or her claims after the applicable statute of limitations has run, the plaintiff is precluded from re-filing the claims in a new action, regardless of whether the dismissal is labeled “without prejudice”². In addition, it is widely held that courts are freely permitted to take judicial notice of court records and other public

² See Gocolay v. New Mexico Federal Sav. & Loan Ass'n, 968 F.2d 1017, 1021 (10th Cir. 1992)(“Although the district court dismissed [plaintiff’s] claim without prejudice...the dismissal was, for all practical purposes, a dismissal with prejudice because the statute of limitations had expired on all [of plaintiff’s] claims”)(alteration supplied); Wakefield v. Cordis Corp., 2008 WL 5381432 at *1 (11th Cir. December 22, 2008)(district court’s dismissal “was based on the statute of limitations for filing a Title VII suit and was, in effect, with prejudice despite the label of ‘without prejudice’”); Burden v. Yates, 644 F.2d 503, 505 (5th Cir. Unit B 1981)(a dismissal without prejudice after the applicable statute of limitations has run has the effect of precluding a party from pursuing his case in a later action).

documents in order to establish the running of the statute of limitations. See, e.g., Staehr v. Hartford Financial Svcs. Group, 547 F.3d 406, 425 (2nd Cir. 2008); Levy v. Ohl, 477 F.3d 988, 991 (8th Cir. 2007); Rodi v. Southern New England School Of Law, 389 F.3d 5, 18-19 (1st Cir. 2004). Moreover, the Court of Appeals may take judicial notice of facts establishing the expiration of the statute of limitations for the first time on appeal. Gustafson v. Cornelius Co., 724 F.2d 75, 79 (8th Cir. 1983).

The Copyright Act's statute of limitations, like the Eleventh Amendment immunity defense which served as the basis for dismissal in Miles, is an affirmative defense. Ms. Leadbetter pled the defense in answering the plaintiffs' complaint. However, like the defendant ultimately deemed the prevailing party in Miles, she never had occasion or ability to seek a "judicial determination" of the application of the defense. This was because, after approximately two years of litigation, the plaintiffs unilaterally decided to abandon their claims by moving for dismissal "without prejudice". Rather than prolonging the litigation by resisting voluntary dismissal of the claims against her, Ms. Leadbetter timely notified the plaintiffs and the court that she would seek recovery of her attorneys' fees and costs at the appropriate time. While the parties awaited the district court's entry of a final order of dismissal, the limitations period expired.

There was no need (nor practical procedure) to compel a “judicial determination” of her affirmative defense to claims that had already been dismissed. She had already prevailed.

In holding that Ms. Leadbetter was required to obtain a district court “judicial determination” of the statute of limitations defense in order for her to avoid the risk that the plaintiffs might re-file their claims against her, the Court’s Opinion not only misapprehends Oscar and Miles, but also conflicts with various decisions of its sister circuits cited herein.

As was set forth in detail in Ms. Leadbetter’s briefing on appeal, the facts establishing the running of the limitations period were plainly evident from pleadings filed in the district court and made part of the record on appeal. These include the allegations of the original and amended complaints and the affidavit of plaintiffs’ own investigator establishing the date plaintiffs obtained knowledge of the alleged copyright infringement. See ER 1-7, ER 11-15, SER 9-11.³ These facts establish the plaintiffs’ inability to re-file their claims, but were not considered or mentioned in the

³ As was discussed in Ms. Leadbetter’s Reply Brief, plaintiffs’ suggestion that their boilerplate allegation of “ongoing” and unspecified infringement and their hope that “subsequent evidence” implicating Ms. Leadbetter might be discovered could somehow indefinitely extend the statute of limitations is wholly unsupported and contrary to Ninth Circuit precedent. See Reply Brief, at 15-17.

Memorandum Opinion. The Court could have readily taken judicial notice of these facts.

The Court's Opinion also will effectively require litigants to attempt post-dismissal procedural maneuvers that are not only unnecessary but are not even recognized by the Federal Rules of Civil Procedure. Such a requirement is inequitable, impractical and wasteful of judicial resources.

The Federal Rules of Civil Procedure allow no specified procedure for a defendant to seek an advisory "judicial determination" of the merits of an affirmative statute of limitations defense after the plaintiff's claims against her have been dismissed. Courts generally do not issue advisory opinions or decisions on controversies that are no longer live or are not ripe. Moreover, a defendant could very reasonably expect that an attempt to seek an advisory ruling as to whether a plaintiff who has dismissed its claims "without prejudice" is barred from later asserting the same claims would not be received favorably by the district court, which understandably seeks to conserve judicial resources, promote early resolution of claims, and issue decisions that conclude legal disputes with finality.

Moreover, as was discussed at length in Ms. Leadbetter's opening brief, by denying her "prevailing party" status, the district court contravened the well-established policy that defendants must be treated equally with

plaintiffs in determining eligibility for prevailing party fees under the Copyright Act⁴. The district court decision effectively required Ms. Leadbetter to have somehow resisted the plaintiffs' unilateral, voluntary dismissal of the claims against her in order to remain eligible for compensation of her defense costs. In affirming the district court's decision on the basis that Ms. Leadbetter needed to have obtained a "judicial determination" of her affirmative defense in order to have prevailed, this Court's Memorandum Opinion not only contravenes the Copyright Act's policy of equal treatment for copyright litigants, but also has the practical effect of promoting extended litigation at a stage when the party who commenced the litigation seeks to end it.

Finally, in view of the circumstances discussed above and herein below, the Court's conclusion that the plaintiffs "retain the legal ability to re-file" is true only if one were to disregard the procedural history and law of the case below. In fact, re-filing these same unfounded claims on this record would have subjected plaintiffs to imposition of attorney's fees and costs under Rule 41, judgment on the pleadings under Rule 12, and also

⁴ See Fogerty v. Fantasy, Inc., 510 U.S. 517, 534, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994); Eagle Services Corp. v. H2O Industrial Svcs. Inc., 532 F.3d 620, 624 (7th Cir. 2008); Riviera Distributors, Inc. v. Jones, 517 F.3d 926, 927-29 (7th Cir. 2008); Assessment Technologies of WI, LLC v. WIREdata, Inc., 361 F.3d 434, 437 (7th Cir. 2004). See also Brief of Appellant, at 21-24.

sanctions for a frivolous filing in contravention of Rule 11. The plaintiffs' recognition of their practical inability to re-file their claims is evidenced by the fact that, over two years after the dismissal of their claims, they have made no effort to re-file. As such, this Court's conclusion regarding the "legal ability to re-file" contradicts Miles and the various decisions of its sister circuits which focus on the "practical purposes" and "effect" of a dismissal following the running of the limitations period regardless of the "without prejudice" label attached to the dismissal. See fn 2, *supra*.

B. The Court's Memorandum Opinion Overlooks Additional Factual Matters in the Record Which Established that Plaintiffs Could Not Re-file Their Dismissed Claims After Obtaining Judgment Against a Third Party on Identical Claims.

The Court's Memorandum Opinion also overlooks other factual matters in the record that further establish that the plaintiffs had no practical nor legal ability to re-file their claims following dismissal, entitling Ms. Leadbetter to prevailing party status.

When the plaintiffs sued two other individual defendants, they accused them of the very same acts of infringement that Ms. Leadbetter had been accused of: infringement of the identical copyrighted sound recordings using the identical internet protocol address to access the identical peer-to-

peer network at the identical time⁵. ER 11-15. The claims against Ms. Leadbetter were dismissed on December 29, 2006. ER 16-20. Several months later, on June 8, 2007, the district court entered a Judgment for monetary and injunctive relief against one of these additional defendants for the identical infringing acts plaintiffs had alleged against Ms. Leadbetter. SER 12-14. Three days later, a Satisfaction of Judgment was filed with the district court (Docket #89). The Judgment, in the amount of \$40,000, was entered by the district court less than three months before the entry of its September 6, 2007 order which denied Ms. Leadbetter prevailing party status. ER 21-28.

Having already dismissed their claims against Dawnell Leadbetter and obtained a final judgment against another party for the very same acts of alleged infringement, plaintiffs were completely precluded from re-filing

⁵ The amended complaint included a cursory, vague and specious allegation that “Defendants...have contributorily and/or vicariously” infringed the plaintiffs’ copyrights. ER 13. As was discussed in Ms. Leadbetter’s prior briefing, this allegation was fundamentally defective and failed to state a claim for relief as it did not allege any of the essential elements of a secondary liability claim. Reply Brief, at 4, fn 1. Regardless, the statute of limitations on all direct and secondary claims arising from the same alleged infringement expired simultaneously. Moreover, the plaintiffs never disputed on appeal that the investigation protocol they employed was simply incapable of identifying an individual suspected of copyright infringement. After the claims against Ms. Leadbetter proved unfounded, the plaintiffs improperly utilized the litigation against her as a means to gain evidence against third parties.

identical unfounded claims against Ms. Leadbetter. See, e.g., Thomas v. U.S., 245 Fed. Appx. 18 (Fed. Cir. 2007). For these reasons as well, Ms. Leadbetter respectfully submits that the Court's conclusion that she needed to seek or obtain a judicial determination of the plaintiffs' ability to re-file is in error.

III. CONCLUSION

For the reasons set forth above, Dawnell Leadbetter respectfully requests that the Court grant her petition for rehearing, conduct panel rehearing of her appeal, reverse the decision of the district court, and remand the matter for further determination of fees and costs in her favor.

Respectfully submitted this 25 day of February, 2009

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CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32, Fed. R. App. P. 40(b) and Ninth Circuit Rule 40-1, this petition complies with the page limitations of Fed. R. App. P. 40(b) and Ninth Circuit Rule 40-1 because this petition does not exceed 15 pages. This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced type face, Microsoft Word Times New Roman 14 point font.

DATED this 25 day of February, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2009, I electronically filed the foregoing Appellant's Petition for Panel Rehearing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

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