

19-3335-CV

United States Court of Appeals
for the
Second Circuit

CHRISTIAN CHARLES,

Plaintiff-Appellant,

– v. –

JERRY SEINFELD, COLUMBUS 81 PRODUCTIONS, INC., (AND NEW
MATERIAL, LLC), COMEDIANS IN CARS, LLC, SONY PICTURES
TELEVISION INC., NETFLIX, INC., EMBASSY ROW, LLC,

Defendants-Appellees,

EMBASSY ROW, MICHAEL DAVIES, CEO,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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U.S. Copyright Reg. No. PA 2-055-6109

Plaintiff-Appellant Christian Charles (“Charles,” “Plaintiff” or “Appellant”) appeals from a final judgment (A-278)¹ entered pursuant to a decision by the United States District Court for the Southern District of New York (Nathan, J) dismissing all of Plaintiff’s claims under Fed. R. Civ. P. 12(b). (A-269-277).

PRELIMINARY STATEMENT

The actions by defendant Jerry Seinfeld (“Seinfeld”) that led to this litigation were reprehensible. He and Charles had collaborated on projects for eighteen years. Facing a downturn in his career, in 2011 Seinfeld came to Charles for help, and the two long-time colleagues agreed Charles would create and develop a show based on an idea Charles had begun to develop and had presented to Seinfeld years earlier, in 2000. Charles did so. Charles wrote and prepared various copyrightable components for a project now known as *Comedians In Cars Getting Coffee*. Charles then produced and directed the pilot episode of the show (the “Pilot”).

Seinfeld made no copyrightable contribution to the *Comedians In Cars Getting Coffee* Pilot and has never claimed otherwise. But Seinfeld apparently gathered that Charles wanted to own the intellectual property he had created, and be compensated and credited for creating it. Seinfeld had a tantrum. He insisted that

¹ The Joint Appendix will be cited as “A-__.”

Charles had generated only a work for hire. No work for hire agreement was ever prepared or executed, but Seinfeld nevertheless behaved as though he could do whatever he wanted with *Comedians In Cars Getting Coffee*, its concept and its copyrights. He licensed the show first to a streaming division of defendant SONY Pictures Television, Inc. (“SONY”), and once it enjoyed success there, licensed it to defendant Netflix, Inc. (“Netflix”) for \$100,000,000. Concluding that Seinfeld had no intention of acknowledging his ownership of a copyright interest, Charles again proposed to negotiate with Seinfeld, through mediation, to settle upon his proper compensation and credit. Seinfeld’s attorney, in January 2018, then declared – for the first time – that the idea for *Comedians In Cars Getting Coffee* was actually Seinfeld’s, and Seinfeld was its sole author and creator. Charles sued. In response, Seinfeld moved to dismiss. His sole argument boiled down to “sorry, I don’t really dispute that you created everything and I created nothing, but you waited too long to sue me; now you get nothing.”

The District Court ignored various material facts and failed to accept important allegations in the complaint as true and to draw all reasonable inferences in Charles’s favor. The court below also failed to accept that the factual scenario presented a question of first impression, which prior case law in this Circuit and elsewhere had never addressed. The District Court then held the statute of limitations barred Charles’s claims. The District Court was wrong.

JURISDICTIONAL STATEMENT

The court below had subject matter jurisdiction under 28 U.S.C. § 1338.

This Court has jurisdiction under 28 U.S.C. § 1291. Final judgment was entered in the court below on September 30, 2019. (A-278). Plaintiff filed a timely notice of appeal on October 16, 2008. (A-279).

The appeal is from a final judgment that disposes of all plaintiff's claims against all defendants – Seinfeld, SONY, Netflix, Columbus 81 Productions, Inc. (“Columbus 81”), Comedians in Cars, LLC (“CICLLC”), Embassy Row, LLC (“Embassy”) and Michael Davies (“Davies”).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the District Court err by implicitly finding that Seinfeld, who created no copyrightable expression for the streaming television program *Comedians In Cars Getting Coffee*, and did not obtain rights to Charles's copyrightable expression as a work for hire or by other written transfer, owns the copyright to *Comedians In Cars Getting Coffee* and could license that copyright to defendants SONY and Netflix?

2. Did the District Court err by finding that Seinfeld, who cannot assert any legally valid ownership interest in the *Comedians In Cars*

Getting Coffee copyright, had the power to trigger the statute of limitations for Charles's assertion of ownership in that copyright?

STATEMENT OF THE CASE

A. The Nature of the Case

When Jerry Seinfeld asked his long-time collaborator Christian Charles to help him develop a new project to boost his sagging career, Charles wrote and developed materials for a show based on an idea he had first proposed to Seinfeld almost a decade earlier. The show has come to be known as *Comedians In Cars Getting Coffee*. Seinfeld made no copyrightable contributions to the project. Charles's production company mouseROAR produced a Pilot episode, which Charles directed. Seinfeld has never disputed any of those facts, including that he made no copyrightable contribution to *Comedians In Cars Getting Coffee*.

Once plans were set in motion for *Comedians In Cars Getting Coffee* to begin streaming on the fledgling "Crackle" digital platform owned by defendant SONY, Seinfeld became outraged when he gathered that Charles expected to be compensated and credited as the creator of *Comedians In Cars Getting Coffee*. He insisted Charles had merely created a work for hire. When Charles declined to accept that status – which implied significantly diminished compensation and credit – and to transfer his ownership to Seinfeld, Seinfeld self-importantly proceeded on his own. But no work for hire agreement was ever presented to Charles or executed

by him. Nor did Charles transfer his intellectual property to Seinfeld in any other way.

The Pilot episode itself, and subsequent episodes of *Comedians In Cars Getting Coffee*, each of which is a derivative work based on Charles's Pilot, have continued to stream digitally – first on SONY's "Crackle," more recently and through the present on Netflix. Seinfeld has taken the unusual and devious step of arranging that episodes of the show stream with no on-screen credits, obscuring from the viewing public and entertainment industry members² Charles's role as the creator of *Comedians In Cars Getting Coffee*.³

On December 27, 2017, Charles wrote to Seinfeld, proposing that they "participate in a voluntary and confidential mediation" with a neutral third party. (A-167). On January 10, 2018, Seinfeld's attorney responded, asserting for the first

² After litigation commenced, Charles discovered that his credit as creator of *Comedians In Cars Getting Coffee* had been removed – apparently under Seinfeld's auspices – from IMDb, the all-important entertainment industry digital reference guide.

³ Throughout both the course of events leading to this litigation, and during the litigation itself, Seinfeld and his surrogates have characterized Charles's suit as a "money grab" entirely lacking merit or equity. But Charles has always been as much if not more concerned about being *credited for his creativity* – in an industry where credit has enormous currency – as he has been about receiving appropriate monetary compensation for creating an enormously successful show.

time that Seinfeld had himself “conceived the concept for this show,” and that Charles had been “asked to simply shoot the idea.” (A-121).⁴

One month later, on February 9, 2018, Charles sued the defendants. Defendants have moved to dismiss three times. Each of their motions rests solely on the argument that various actions by Seinfeld triggered the running of the limitations period of “three years after the claim accrued” established by § 507 of the Copyright Act, 17 U.S.C. §§ 101, *et seq.*, and it therefore bars Charles’s claims. Agreeing that the statute of limitations had been triggered over three years before Charles filed his first complaint, on September 30, 2019, the District Court granted defendants’ Motion To Dismiss the Second Amended Complaint.

B. The Course of Proceedings and Disposition Below

Charles filed his initial complaint pro se on February 9, 2018. (A-2, #1). Defendants moved to dismiss on April 4, 2018, based on the statute of limitations. (A-4, #21-22). Before any opposition was filed, Charles found an attorney to file an amended complaint on June 22, 2018. (A-7; #46). Within a week, on June 28, 2018, Charles’s attorney was forced out by defendants’ assertion of a conflict. (See A-7,

⁴ Seinfeld’s attorney also claimed to have “documentation” proving that Seinfeld had “registered the concept and the title “*Comedians In Cars Getting Coffee*” in February, 2011, and that Seinfeld had “first disclosed it” to Charles six months later. (A-121). Revealingly, no such documentation was produced to Charles or submitted below.

#47). The next day, on June 29, 2018, Defendants again moved to dismiss, with essentially the same brief, again arguing statute of limitations. (A-7-8, #49-50). After Charles retained his current counsel, leave to file a Second Amended Complaint was granted on August 31, 2018. The Second Amended Complaint added a joint copyright claim, pleading it in the alternative to the initial copyright infringement claim. (A-9, #69). On September 17, 2018, Defendants moved to dismiss for the third time, with essentially the same brief, yet again arguing statute of limitations. (A-10, #73-74). On September 30, 2019, the court below dismissed the Complaint. (A-269-277). On October 16, 2019, Plaintiff filed the Notice of Appeal. (A-279).

STATEMENT OF FACTS

A. Development of Comedians In Cars Getting Coffee.

Christian Charles has enjoyed a 30-year career as an award-winning writer, director and producer. (A-134; ¶2). For 18 of those years, he collaborated on various projects with Seinfeld. (A-135; ¶¶4-5). Seinfeld is also an award-winning writer, producer and director, but it was not uncommon for Seinfeld to claim creative ownership of Charles's ideas. (A-135; ¶5; A-247).⁵

⁵ Various declarations and affidavits were submitted below to support Charles's Opposition to defendants' Motion to Dismiss. Because the District Court declared "these declarations and affidavits would not affect the Court's analysis if they were considered" (A-277, n. 2), they are relevant and should be considered here. They

Charles conceived the idea for and directed “*Comedian*” – a feature film documenting Seinfeld’s attempt to develop a new stand-up comedy act from scratch. (A-136; ¶¶9-10). At the conclusion of work on “*Comedian*,” Charles suggested to Seinfeld developing a show about two comedians driving in a car and exploiting their comedic prowess in various free-wheeling conversations. (A-137-138; ¶¶14-16).

Charles worked up a pitch for such a show, and in 2002 presented it to Seinfeld. (A-138; ¶16). Seinfeld declined the pitch; but Charles never let go of the idea and knew it was only a matter of time before technology and content caught up with the unique style, tone and structure he envisioned (A-139; ¶¶17-18), and Charles continued to collaborate with Seinfeld on many projects. (A-139-140; ¶19).

are respectfully submitted in the Joint Appendix as (A-134-216). *See* (A-226 n.1) (explaining “Extrinsic evidence may be considered part of the complaint when the court deems the evidence integral to at least one claim in the pleading. *See Bank of New York Mellon Trust Co, v. Morgan Stanley Mortg. Capital, Inc.* No 11Civ. 0505, 2011 WL 2610661, at *3 (S.D.N.Y. June 27, 2011) (on motion to dismiss, court may consider “documents that the plaintiff either possessed or knew about and relied upon in bringing the suit”). Evidence is “integral” to the pleading when plaintiff has actual notice of the evidence and the complaint “relies heavily upon its terms and effect” in “framing the pleading.” *Chambers v. Time Warner, Inc.* 282 F.3d 147, 152-53 (2d Cir. 2002). All of the declarations and exhibits submitted below consist of evidence plaintiff relied upon in framing the Second Amended Complaint and are integral to it.” *See also Wilson v. Dynatone Publ'g Co.*, 16 Civ. 104 (PAE) (S.D.N.Y. Apr. 10, 2017) at 2 n.1 (for the same proposition).

Almost a decade later, Seinfeld approached Charles for help in creating a new show, which he described as involving himself and another comedian driving someplace in a car and talking, uninterrupted, during the drive. (A-141; ¶21-23). Charles immediately reminded Seinfeld this was the very idea he had pitched to him in 2002. Seinfeld in no way disputed this or corrected Charles. (A-141; ¶23). Charles enthusiastically agreed to develop it for Seinfeld. At no other point during developing and creating the test/pilot episode of *Comedians In Cars Getting Coffee* did Seinfeld ever claim he thought the idea was his, and when Charles reminded him it wasn't, Seinfeld did not disagree. (A-141; ¶24).

Charles put together a treatment for the show that expressed his idea as simply as possible, and later registered this treatment under U.S. Copyright Reg. No. PA 2-055-610. (A-158).

Charles's production company, mouseROAR, conducted all the necessary pre-production work to shoot the Pilot. Charles completed all the location research and scouting without Seinfeld as he would normally do; and the production team and Charles built-out crew, schedules, shot lists, etc. – all as they would normally do on a job – without Seinfeld's participation. (A-143; ¶32). During the actual shoot of the test/Pilot, Seinfeld was in a very foul mood. Despite various problems making for a difficult shoot, Charles shot most elements needed for a successful edit, and

began editing the film alone with his editor in the edit suites of mouseROAR's office. (A-144; ¶¶35-36).

While Charles was completing a cut of the Pilot, Seinfeld called Charles and told him he was no longer interested in pursuing the idea. He didn't think that it worked and said "I don't even know what it is." (A-145; ¶37). Devastated at Seinfeld's decision to quit, Charles explained he was already well down the path of producing an edit of the show, and was determined to complete it and share the final result with Seinfeld. He did so, and emailed it to Seinfeld. To Charles's great relief, Seinfeld quickly responded that he had been wrong, that the idea did work and have great potential, and he thanked Charles "for persevering." He emailed Charles: "I really enjoyed the cut," adding "I'm starting to see this now." (A-145-146; ¶¶38-41).

Seinfeld and Charles agreed that while Seinfeld's representatives would search for both sponsorship from a relevant brand and distribution through a non-traditional digital distributor, Charles would continue developing the show, and mouseROAR, under his creative guidance, would work on research, location scouting, car acquisition and other pre-production details. (A-146; 42-45).

A meeting was arranged with Michael Davies of Embassy Row, a boutique production company owned by SONY. (A-147; ¶¶46-47). Charles was concerned, because Embassy, a production company, is a competitor of mouseROAR. Charles

had assumed – as had always been the case with the work he developed with Seinfeld – that mouseROAR would handle all production of *Comedians In Cars Getting Coffee*. (A-147; ¶¶47-48). But Charles attended the meeting and took the lead in explaining the creative and structural elements of the show. Davies was instantly interested and excited about streaming the show on “Crackle,” a burgeoning but somewhat unknown digital platform owned by SONY. (A-147; ¶49). After the meeting, Charles’s representative, Lenny Beckerman, contacted Davies and Seinfeld’s rep, George Shapiro, to negotiate Charles’s deal. Both assured Beckerman they would make a deal and “take care of Christian.” (A-148-149; ¶51-55; A-206; ¶5).

Charles’s negotiations as a writer and director are always dealt with separately from mouseROAR through his loan-out company, PBBHHH!!!! LLC (A-149; ¶54; A-172-173), so he contacted Beckerman to discuss how to approach his personal deal as the creator and director of the show. Beckerman emailed Embassy requesting to work out Charles’s deal – including for Charles’s writing, directing and producing of the show, and Charles’s backend and ownership interest in the show. (A-149; ¶55).

When Seinfeld learned about Charles’s requests, he called Charles directly and expressed anger that Charles was attempting to negotiate his creative contribution and a backend deal. (A-149; ¶56). Although Seinfeld did not dispute

that Charles had created and developed the Pilot, and although the issue of who owned was not addressed, Seinfeld expressed outrage that Charles would receive anything other than a fee for directing individual episodes. The call ended with Seinfeld yelling at Charles, calling him “ungrateful” and “out of line.” (A-149; ¶56). A few days later, at Charles’s request he and Seinfeld spoke again, but once again failed to see eye-to-eye. During this second call, Seinfeld insisted that Charles’s product had been a work for hire (A-78; A-31; ¶70; *see* A-270) – an implicit recognition that Charles owned the Pilot but Seinfeld wanted it to be transferred to him.

Charles was concerned he had been set up. But angry, sad and confused about how things had deteriorated so badly, he contacted Carolyn Liebling, Seinfeld’s older sister and business colleague at Columbus 81, with whom Charles had a long-standing relationship, both professionally and personally. Carolyn expressed deep disappointment that things had gotten to this point with her brother. She conveyed that Seinfeld’s behavior was inappropriate and, as she had told Charles in the past, when Seinfeld gets stuck on something, there’s no reasoning with him. Carolyn assured Charles that everything would blow over, and that Seinfeld would eventually come to his senses; that their relationship was too strong for this disagreement to be permanent. Carolyn also confided that Seinfeld’s wife Jessica agreed with her that Seinfeld was being unreasonable. At about the same time, Charles’s wife and

mouseROAR business partner, Anne Estonilo, received a call from George Shapiro, who also assured her that Charles's relationship with Seinfeld was far from over. (A150; ¶58; A-166-177; ¶¶35-36).

When *Comedians In Cars Getting Coffee* streamed on Crackle, Seinfeld had taken the all-but-unprecedented step of arranging that episodes would carry no screen credits whatsoever – obscuring all visible indications of the show's origins, ownership and creative background. (A-154).

Seinfeld frequently engaged in “puffing” to enhance his creative profile in the press, but because of the pain it caused him, Charles did not follow press reports about *Comedians In Cars Getting Coffee*, and remained unaware of Seinfeld's media embellishments and hyperboles when they appeared. He knew that Seinfeld had never claimed to *him* that the idea for *Comedians In Cars Getting Coffee* was his own, and knew, too, Seinfeld often took creative credit with no factual basis. (A-153).⁶

By 2016 Estonilo and Beckerman began suggesting that Charles challenge Seinfeld legally about his authorship/ownership interest in the show. Although

⁶ The District Court acknowledged Charles's concession “that Seinfeld had previously claimed to be the ‘creator’ of the show in the press,” and his explanation the January 10, 2018 letter from Seinfeld's attorney (A-121) “was the first time that “Seinfeld or a representative of Seinfeld had directly made this claim to Charles.”

Charles had received no royalty payments, Seinfeld had insisted there was no real money in the “Crackle” deal, so Charles reasonably believed that streaming the show on the fledgling “Crackle” digital network wasn’t generating income for Seinfeld; that it was intended instead merely to keep Seinfeld’s name before the public. He concluded there was little to be gained by an expensive lawsuit against well-heeled adversaries – an assumption later confirmed to Charles by Simon Smith, a mutual entertainment industry associate and friend of both Charles and Seinfeld, who reported to Charles and Estonilo a conversation with Seinfeld in which Seinfeld claimed there was no money in *Comedians In Cars Getting Coffee*. (A-154; ¶70; A-216; ¶6).

B. The Lower Court’s Decision

Without argument, the District Court granted defendants’ motion to dismiss. (A-269-277). Stressing that “authorship is merely one path to ownership of a copyright” (A-274), and while never saying so explicitly, the District Court implicitly found that although Seinfeld was not the “author” of *Comedians In Cars Getting Coffee*, that he made no copyrightable contributions to the show and did not obtain a written work for hire agreement or other transfer from Charles, he owns the copyright in *Comedians In Cars Getting Coffee* and could enter into valid licenses to exploit it. This was error.

Quoting from *Kwan v. Schlein*, 634 F.3d 224, 229 (2d Cir. 2011), the District Court held “[t]he principle issue in this case . . . is whether Charles’s alleged ‘contributions . . . qualify [him] as the *author and therefore owner*’ of the copyrights in *Comedians In Cars Getting Coffee*.” Emphasis added. Charles’s authorship cannot be – and was not – seriously questioned. More accurately, the principle issue *should* have been whether anything qualified *Seinfeld* as either an author or an owner – to which the answer is “no.” But the District Court accepted defendants’ arguments that *Seinfeld*’s insistence upon a work for hire agreement – which was never executed – and his failure to credit Charles, or anyone else, triggered the statute of limitations. This was error.

In *Kwan v. Schlein* and every case cited below by defendants and the District Court, and in every other case Appellant has found addressing the issue, the defendant who repudiated the plaintiff’s ownership claim was an uncontroverted author and owner of the creative work in question. Here, it is incontestible that *Seinfeld* is not the author of *Comedians In Cars Getting Coffee* and never became the lawful owner of Charles’s copyrightable expression. Only through the District Court’s erroneous implicit holding that *Seinfeld* somehow nevertheless owns the *Comedians In Cars Getting Coffee* copyright can prior case law in this Circuit and elsewhere support defendants’ position – and the District Court’s holding – that *Seinfeld* had the power to trigger the statute of limitations.

Seinfeld was and is a stranger to the copyright in *Comedians In Cars Getting Coffee*. The central question on this appeal is one of first impression. It is whether Seinfeld, who does not assert authorship and can assert no legitimate ownership interest in the *Comedians In Cars Getting Coffee* copyright, could – by “repudiating” Charles’s ownership of rights the Copyright Act had given him – trigger the statute of limitations and compel Charles to sue to protect his ownership of that copyright and prevent its wholesale usurpation by Seinfeld and his co-defendants.

SUMMARY OF THE ARGUMENT

Under a constitutional and statutory framework in which Congress grants copyrights to “authors,” and the Copyright Act, 17 U.S.C. §§ 101, *et seq.* (the “Act”), which vests copyright initially in one who like Charles, besides producing and directing the Pilot of *Comedians In Cars Getting Coffee* had created both its written and audiovisual components, Charles was – including the day he sued – the author and owner of copyright in *Comedians In Cars Getting Coffee*.

But Seinfeld:

- who does not dispute he created no fixed copyrightable expression protectible under § 102 to qualify as an author under § 201 (a);

- who, absent a “written instrument” signed by Charles, cannot be “considered the author” or become the “owner” of *Comedians In Cars Getting Coffee* as a work made for hire under §§ 101 and 201 (b); and
- who received no transfer “in writing and signed by [Charles]” under §204 (a)

cannot be the owner of the *Comedians In Cars Getting Coffee* copyright. We explain below that Seinfeld’s performance as an actor in the Pilot may entitle him to claim *joint* authorship of the Pilot. But he has not done so, and discovery would be required for him to establish joint authorship.

No discovery was conducted below. It is therefore mysterious why the lower court explained its decision to decline to exercise supplemental jurisdiction over Charles’s state law claims stating “[t]he *extensive discovery already taken* is likely sufficient to enable [these] claims to be evaluated in state court without any additional discovery.” (A-277; emphasis added). This unquestionably mistaken assertion at least calls into question the District Court’s understanding of the facts, and its acceptance of the complaint’s factual allegations as true.

To the extent the District Court not only questioned “whether Charles’s alleged ‘contributions . . . qualify [him] as the *author and therefore owner*’ of the copyrights in *Comedians In Cars Getting Coffee*” (A-273), but also held or implied

that Seinfeld owns the *Comedians In Cars Getting Coffee* copyright and could validly license rights under that copyright to SONY and Netflix, the District Court's decision is the product of clear errors of law.

More significantly, the District Court held that by repudiating Charles's assertion of ownership, and by failing to credit Charles on streamed episodes of *Comedians In Cars Getting Coffee*, Seinfeld – who was not the show's author and did not become its lawful owner – triggered the limitations period for Charles to file his Complaint. But in no case (i) cited by defendants below, (ii) cited by the District Court, or (iii) revealed by Appellant's research, has a defendant who successfully triggers the limitations period by repudiating a plaintiff's ownership claim been, like Seinfeld, neither the author nor the owner of the work in question. To the contrary, in each case of which Appellant is aware, a plaintiff was asserting an ownership interest against a defendant who was an uncontroverted author and holder of an ownership interest in the creative work in question.

Whether Seinfeld – neither author nor owner of the *Comedians In Cars Getting Coffee* copyright – had the power here to trigger the limitations period is hence a question of first impression. The answer should be “no.” Otherwise, strangers to copyrights like Seinfeld can – by the simple expedient of telling a lawful copyright owner like Charles “you don't own this copyright and I'm going to exploit

it” – force a lawful owner to expend the time, money and other resources necessary to prevent the theft of his or her rights that the District Court permitted here.

STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss on the pleadings *de novo*. See *Karedes v. Ackerley Group, Inc.*, 423 F.3d 107, 113 (2d Cir. 2005) (“We apply a *de novo* standard of review to the grant of a motion to dismiss on the pleadings, accepting as true the complaint’s factual allegations and drawing all inferences in the plaintiff’s favor.”).

ARGUMENT

I. THE DISTRICT COURT ERRED BY QUESTIONING WHETHER CHARLES WAS THE AUTHOR OF *COMEDIANS IN CARS GETTING COFFEE* AND BY IMPLICITLY HOLDING THAT SEINFELD OWNED ITS COPYRIGHT

A. There Is No Basis To Question Whether Charles Was the Author Of *Comedians In Cars Getting Coffee*.

The District Court acknowledged that when “Seinfeld allegedly mentioned to Charles that he was considering a talk show about ‘comedians driving in a car to a coffee place and just “chatting,”’ as his next project . . . Charles claims he immediately noted that this was the same idea for which he earlier produced the treatment . . .” and the parties “then purportedly agreed to work together on the project.” (A-269-270). The court below also acknowledged that “Charles then produced a new treatment which he claims captures the ‘look and feel’ of

Comedians in Cars Getting Coffee” and “created a ‘synopsis, camera shot list with description and visual camera angles, and script,’ all of which he deems ‘the Script.’” (A-270). Finally, the lower court recorded that “[i]n October 2011, Charles and his production company, mouseROAR, shot a pilot of the show with Seinfeld.” *Id.*

Necessarily, the District Court recognized its obligations (i) to “accept the allegations in the complaint as true and draw all reasonable inferences in the non-movant's favor” (*citing ATS! Communs, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir.2007) (A-272)), and (ii) that when evaluating 12(b)(6) motions based on the statute of limitations, “the Court must continue to ‘assume [Plaintiffs] factual allegations are true’ and apply the plausibility standard announced in *Twombly* and *Iqbal*.”

But somewhat inexplicably, the District Court identified – as the “principle issue in this case”—“whether Charles's alleged ‘contributions ... qualify [him] as the author and therefore owner’ of the copyrights in *Comedians in Cars Getting Coffee*.” (A-273).

The United States Constitution vests in the Congress the power to grant copyrights to “authors.”⁷ In exercising that power, the Copyright Act, 17 U.S.C. §§

⁷ U.S. Const. Art. I, § 8, cl. 8 – Patent and Copyright Clause of the Constitution. [The Congress shall have power] “To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

101, *et seq.* (the “Act”) does not define the term “author,” but in § 102 the Act lists the types of original works that can be protected by copyright when they are “fixed in any tangible medium of expression.” In § 201 (a), the Act declares that copyright “vests initially in the author or authors” of protected works, and that “authors of a joint work are coowners” of the copyright.

The District Court had to accept as truthful allegations (i) that the initial idea for *Comedians In Cars Getting Coffee* was Charles’s, and in 2000 he had prepared a first treatment for the show; (ii) that after meeting with Seinfeld in 2011, Charles produced a new treatment, and a synopsis, camera shot list with description and visual camera angles, and a script; and (iii) that Charles and his production company, mouseROAR, shot the Pilot.

Each of those components constituted copyrightable expression under the Act; each was fixed in a tangible medium of expression. As their author, copyright in those components vested in Charles. There is no basis for the District Court to have even questioned Charles’s role as “author,” much less to have implicitly found he was not the author of *Comedians In Cars Getting Coffee*.

B. There Is No Basis To Find That Seinfeld Alone Owns the Copyright In *Comedians In Cars Getting Coffee*.

Under § 201 (b) of the Act, “[i]n the case of a work made for hire,” one who is not an author is “considered the author” for purposes of the Act and can *become* the *owner* of “all of the rights comprised in the copyright.” But to qualify as a work made for hire under § 101 (which restricts availability of this status to a subset that includes “a part of a motion picture or other audiovisual work”), the Act requires that “the parties *expressly agree in a written instrument signed by them* that the work shall be considered a work made for hire.” Emphasis added.⁸ Seinfeld’s insistence that Charles should transform the Pilot into a work made for hire confirms that Seinfeld *knew* Charles owned it, but Seinfeld wanted it for himself. Since the necessary “written instrument” was never executed here, ownership was never transferred to Seinfeld. Charles continues to own the Pilot.

Under § 204 (a), one who is not an author can also *become* the owner of a copyright by transferring ownership, but any such transfer “other than by operation of law, *is not valid* unless an instrument of conveyance, or a note or memorandum of the transfer, *is in writing and signed by the owner of the rights conveyed or such*

⁸ The sole exception to the requirement of a “written instrument” arises when “the work is prepared by an employee within the scope of employment.” The exception is irrelevant here.

owner's duly authorized agent.” Emphasis added. No such written transfer of ownership was executed here.

Overall:

- Seinfeld created no copyrightable expression during development of the *Comedians In Cars Getting Coffee* Pilot. He is the sole “author” of no part of the Pilot. He has never claimed otherwise.
- Seinfeld did not obtain a written work made for hire agreement from Charles. He is not an employer for hire who is “considered the author” of Charles’s copyrightable expression. He has never claimed otherwise.
- Seinfeld obtained no written transfer granting him ownership of Charles’s copyrightable expression. He has never claimed otherwise.

Since Seinfeld is not an author, an employer for hire or a transferee from Charles, Seinfeld has no lawful ownership interest in the *Comedians In Cars Getting Coffee* Pilot copyright. To the extent Seinfeld has ever claimed otherwise, his claim is meritless. To the extent the District Court held or merely implied otherwise, it was wrong.

C. Seinfeld’s Only Path To Ownership of An Interest in the *Comedians In Cars Getting Coffee* Copyright Requires Him To Establish Joint Authorship.

While Charles’s entitlement to copyright ownership as author of the Pilot is clear-cut, Seinfeld’s only possible path to assert an ownership interest in *Comedians In Cars Getting Coffee* is as a *joint* author based on his performance in the Pilot. In *16 Casa Duse, LLC v. Merkin*, 791 F.3d 247 (2d Cir. 2015), this Court considered the copyrightability of an actor’s performance in a film, and agreed with an *en banc* panel of the Ninth Circuit in rejecting an actor’s performance as deserving of independent copyright protection. *Casa Duse*, 791 F.3d at 258, *citing Garcia v. Google, Inc.*, 786 F.3d 733 (9th Cir.2015) ("*Garcia (en banc)*"). The Court agreed with *Garcia*’s conclusion that “the actor's ‘theory of copyright law would result in [a] legal morass[,] ... [making] Swiss cheese of copyrights.’” *Id.* The *Garcia* Court also cited the position taken earlier in the litigation by the Copyright Office, which had explained its “longstanding practices do not allow a copyright claim by an individual actor or actress in his or her performance contained within a motion picture.” *Garcia*, 786 F. 3d. at 742. By letter dated March 6, 2014 from the Copyright Office’s Associate Register of Copyrights and Director of Registration Policy and Practices, the Office had explained “the rationale behind this position is clear: an actor or actress in a motion picture is either a *joint author in the entire work*,

or, as most often is the case, is not an author at all by virtue of a work for hire agreement.” Emphasis added.

Here, Seinfeld’s performance in the Pilot is no more deserving of independent copyright protection than is Barry Marder’s – the comedian who joined Seinfeld for the Pilot’s coffee outing. As the Copyright Office has explained, if a performer “lacks a work-for-hire agreement but . . . ‘intend[s] her contribution or performance to be merged into inseparable or interdependent parts of a unitary whole,” the performance may qualify for joint-authorship status. So Seinfeld can seek to establish his entitlement to joint authorship, but discovery will be required for him to do so. It is only through joint authorship that Seinfeld can legitimately assert any ownership interest in the *Comedians In Cars Getting Coffee* copyright.

II. THE DISTRICT COURT ERRED BY FINDING THAT SEINFELD, WHO CANNOT ASSERT ANY OWNERSHIP INTEREST IN THE *COMEDIANS IN CARS GETTING COFFEE* COPYRIGHT, HAD THE POWER TO TRIGGER THE STATUTE OF LIMITATIONS FOR CHARLES’S ASSERTION OF OWNERSHIP IN THAT COPYRIGHT

Citing *Kwan v. Schlein* for the straightforward proposition “any number of events can trigger the accrual of an ownership claim,” the District Court held that various events described in the Second Amended Complaint “over three years before this lawsuit was filed . . . were sufficiently express as to put a reasonably diligent plaintiff on inquiry” that his ownership claim had accrued. (A-274). To support this conclusion, both defendants and the District Court relied principally on *Kwan*

v. Schlein and Simmons v. Stanberry, 810 F.3d 114, 116 (2d Cir. 2016) (per curiam). The court below acknowledged Charles’s opposition to the motion to dismiss had argued “that *Kwan* and *Simmons* involved disputes over the plaintiffs status as an owner but not defendant's status.” (A-274). But the lower court insisted “[t]his is not a material distinction, because a non-owner defendant can prevail in an infringement suit *so long as the plaintiff is also not the owner.*” *Id.* Emphasis added. Doubling-down on its rejection of Charles’s argument, the lower court declared “[t]his set of facts largely mirrors the present case.” *Id.* But the District Court’s mirror was broken. Charles *was* the owner. He was the author in whom ownership of copyright “initially vest[ed].” § 201 (a). The District Court’s conclusion Charles was not the owner was clear error.

Defendants and the District Court reckoned that in 2012, *Seinfeld* had triggered the 3-year limitations period in § 507 of the Act. They cited *Kwan* to assert that “when ‘ownership is the dispositive issue’ in an infringement claim and the ‘ownership claim is time-barred,’ then the infringement claim itself is time-barred, even if there had been infringing activity in the three years preceding the lawsuit.” (A-273). But in *Kwan*, defendant Schlein was indisputably the *author and owner* of a book manuscript about the use of the internet, which plaintiff Kwan had been hired by the publisher to edit. *Kwan v. Schlein*, 634 F.3d at 226. After a second edition of the book was published, Kwan asserted ownership of copyright in the work – first

as co-author and later as sole author, based on her editorial work. *Kwan*, 634 F.3d at 227. But the court held that Kwan knew her rights had been disputed – by a defendant indisputably an author and owner of an interest in the copyright – over three years before she sued. 634 F.3d at 228. The authorship and ownership associations in *Kwan* – where the defendant was an author and owner – bear no resemblance to those at bar, where Seinfeld is neither.

Both defendants and the District Court also relied on *Simmons v. Stanberry* for the proposition that once an ownership claim is time-barred, it cannot be resuscitated by claims based upon the defendants’ continuing course of infringing publication. (A-273). But in *Simmons*, defendant Stanberry, a hip-hop producer, was the *author* of a musical “beat” – *ownership* of which he licensed to plaintiff Simmons, a hip-hop writer/performer. 810 F.3d at 115. Stanberry attempted to repudiate the license he had granted to Simmons. He then arranged with another performer to produce a recording using the “beat,” and released the recording to the public. *Id.* When Simmons asserted his ownership of the “beat” more than three years after the recording had been released, the Court relied on its decision in *Kwan v. Schlein*, concluding it “precludes this action.” As in *Kwan*, the defendant in *Simmons* was both the *author* and initial *owner* of the “beat” – the work in question. Seinfeld was neither the author nor the lawful owner of this work.

Other cases cited by the District Court are similarly distinguishable. *Stone v. Williams*, 970 F.2d 1043 (2d Cir. 1992), “continue[d] the bitter litigation arising from plaintiff’s belated discovery that she is the daughter of the late famous country and western singer Hank Williams, Sr.” Defendants were inarguably *authors and owners* of Williams’s copyrights. At issue was whether his illegitimate daughter was entitled to a share of his royalties. It has no relevance in deciding the question here, where defendants are neither authors nor owners.

Mahan v. ROC Nation, LLC, 634 F. App’x 329 (2d Cir. 2016) involved claims by Mahan, a sound engineer, for co-ownership of several musical recordings. Defendant ROC’s predecessor in interest had registered copyrights in the recordings, and was both their *author and owner*. Occupying that status, ROC’s repudiation of Mahan’s ownership claim was sufficient to trigger accrual of his claim.

Wilson v. Dynatone Publishing Co., 892 F.3d 112 (2d Cir. 2018) (A-274) is inapposite here on several grounds. Plaintiff Wilson was one author of a musical composition written “prior to April 1973.” *Wilson*, 892 F.3d at 115. Defendant Dynatone was the publisher and an *owner* of rights to a sound recording of the song during its initial term of copyright. *Id.*, at 115-16. At issue was ownership of rights to the renewal term, which depended upon whether defendants held their ownership rights as a work made for hire. *Wilson*, 892 F.3d at 119.

Defendants had filed copyright registrations for the song as “employer for hire” (*Id.*, at 118), but Wilson’s complaint alleged plaintiffs “never executed any written agreements . . . that included a ‘work for hire’ provision, and never transferred their renewal term copyrights. . . .” *Id.*, at 116. Assessing Defendants’ renewal of their copyrights claiming as “employers for hire,” the Court explained

registration of the renewal term with the Copyright Office did not amount to a repudiation of the Plaintiffs’ claim triggering their obligation to bring suit. If mere registration of a copyright without more sufficed to trigger the accrual of an ownership claim, then rightful owners would be forced to maintain constant vigil over new registrations. Such a requirement would be vastly more burdensome than the obligations that ‘a reasonably diligent plaintiff’ would undertake. (*citing Kwan* , [634 F.3d at 228](#)).

Explaining its own citation to *Wilson*, the District Court acknowledges “a defendant who, in a copyright registration, ‘assert[ed] ownership as a *work for hire* would effectively repudiate Plaintiff’s claim of copyright ownership’ *if the plaintiffs were put on notice of the registration.*” (A-274; emphasis added), *citing Wilson*, 892 F.3d. at 119. Here, not only did Charles grant no one rights to his intellectual property as a work made for hire, but nothing in the record below establishes that Charles was “put on notice” of defendants first copyright

registration for *Comedians In Cars Getting Coffee*, which in any event was issued on September 8, 2016 – well within the statute of limitations. (A-123).⁹

In every case cited below by defendants and the District Court about the triggering of the statute of limitations, and in every other case Appellant has found addressing the issue, the defendant repudiating the plaintiff's ownership claim was an uncontroverted author and/or owner of the creative work in question. Here, it is incontrovertible that Seinfeld is neither the author of *Comedians In Cars Getting Coffee* nor the lawful owner of Charles's copyrightable expression.

If Seinfeld represented otherwise to his co-defendants, he dissembled. Entertainment industry due diligence practice would demand that both SONY and Netflix obtain satisfactory chain-of-title documentation and comprehensive contractual warranties and indemnities to satisfy the invariable industry-wide requirement to obtain "errors and omissions" insurance coverage before distributing a single episode of *Comedians In Cars Getting Coffee*. Because Seinfeld possesses no such chain-of-title documentation signed by Charles to have provided to them,

⁹ The bona fides of that registration are obscure and questionable. It lists SONY as the "author" of the *Comedians In Cars Getting Coffee* episode as a work made for hire, and Seinfeld's company Comedians In Cars, LLC (c/o SONY) as the "copyright claimant" – "By written agreement." The District Court record reveals neither how SONY became an "author" of a *Comedians In Cars Getting Coffee* episode as a work for hire, nor by what "written agreement" and with what representations it transferred its interest to Comedians In Cars, LLC.

SONY and Netflix ostensibly – and necessarily – relied on Seinfeld’s false representations. The only copyright registration defendants presented below states that the copyright claimant secured its interest by “written agreement.” If that representation purports to flow from any alleged underlying written agreement with Charles, it reflects both a lie to Seinfeld’s co-defendants and a fraud on the Copyright Office.

The District Court recognized Charles’s allegation that in conversations early in 2012, Seinfeld “expressed outrage at the notion that Charles would have more than a ‘work for hire’ directing role” and “told Charles that he “should expect to be compensated through his directing fee.” (A-270). The court below also noted that “[d]uring these conversations, Charles alleges that ‘Seinfeld did not claim authorship or ownership of the Pilot’ even though ‘Charles had often reminded Seinfeld’ that the idea for the show was Charles’s.” (A-270-271).

Notwithstanding Seinfeld’s failure to assert authorship or ownership – and his implicit recognition that at that point he could claim neither – the District Court held

Seinfeld restricting Charles to a “work-for-hire” directing role necessarily contradicted any idea that Charles was the owner of intellectual property in the show. Even if all inferences are drawn in favor of Charles, a reasonably diligent plaintiff would have understood that Seinfeld was repudiating any claim of ownership that Charles may have. *That Seinfeld did not expressly claim*

ownership for himself during these conversations does not matter. It is sufficient that Charles's claim was rejected. (A-275).

That holding is rife with errors. Charles *knew* he “was the owner of intellectual property in the show.” He knew he was the show’s sole author. Seinfeld was not “claim[ing] ownership for himself,” and as an experienced writer/producer/director, Charles knew that unless he executed a work made for hire agreement, Seinfeld could not do so. Nor did Seinfeld have any legal power or right – contractual or otherwise – to “restrict” Charles’s inherent rights of ownership or to “reject” the rights of authorship and ownership the Copyright Act had given him.

The far more reasonable inference is that *Seinfeld also knew* Charles was the author and owner of the Pilot, and would remain so *unless he transferred ownership to Seinfeld as a work for hire*. Coming from neither an author nor an owner of *Comedians In Cars Getting Coffee*, Seinfeld’s “rejection” was *not* sufficient notice to Charles he was now compelled to establish his certain, lawfully-obtained authorship and ownership – and Seinfeld’s continuing lack thereof – by suing Seinfeld.

The District Court acknowledged Charles’s belief that “statements made by associates of Seinfeld in the aftermath of the two phone calls” further “diluted or muddled the repudiation.” (A-275). But the court below opined those

reassurances – from Seinfeld’s sister, his wife and his manager (A-151; ¶¶61; A-166-177; ¶¶35-36) – “do not plausibly contradict Seinfeld's statements that Charles would not be ‘involved’ on more than a work-for-hire basis.” *Id.* But to the contrary, since Charles had no intention of executing a work for hire agreement, he hoped and expected that although Seinfeld’s intemperate tantrum had been hurtful and insulting, it was legally hollow and his unreasonableness would “blow over.”

The District Court also held that Charles’s ownership claim had been repudiated, and the limitations period had accrued for asserting his claim, when “Seinfeld and other Defendants went on to produce and distribute the show without giving any credit to Charles.” (A-275). According to the lower court, “[e]ven interpreting the SAC most favorably to Charles, it clearly alleges he was aware that the show was being produced and that he was not being credited on it.” (A-275-276). But the absence of credit for Charles told him nothing, since from the outset the show has been produced and streamed with no visible credits whatsoever. To this day, episodes of *Comedians In Cars Getting Coffee* stream with no on-screen credits, because Seinfeld has arranged that they carry none.

Finally, although the District Court did not address it, Appellees will likely argue, as they did below, that Charles was placed on notice of his claim when defendants failed to pay him royalties.

There are three problems with this argument.

First, defendants have maintained, albeit mistakenly and disingenuously, that they had satisfied their financial obligations to Charles by payment of \$107,734.41 to mouseROAR. (A-76).¹⁰ Defendants cannot have it both ways: maintaining both they paid Charles everything he was owed, and their failure to pay him constituted a repudiation.

Second, without knowing the financial terms Seinfeld had struck with SONY and Crackle, Charles had no way of determining when and if royalty payments would be due – since the likely recoupment of production expenses assumed by those licensees might have constituted a first charge against any modest earnings. Further, Charles asserted his reasonable assumption that anything Seinfeld might be earning from streaming on Crackle’s minor, fledgling platform was indeed modest. Seinfeld had said as much at the outset (A-31; ¶70), and Charles’s continuing assumption it was true was reinforced later, when Seinfeld professed to their mutual friend Simon Smith “there’s no money in this.”

Third, were Seinfeld either to agree to joint authorship or be induced to accept that status, there is neither law nor any universally-accepted understanding

¹⁰ The \$107,734.41 did not represent in any way payment for Charles’s authorship or ownership of the Pilot. It was payment on an invoice Anne Estonilo of mouseROAR had submitted to Seinfeld’s sister and Columbus 81 business associate, Carolyn Liebling, for agreed-upon pre-production expenses mouseROAR had incurred on additional *Comedians In Cars Getting Coffee* episodes. See (A-173; ¶¶20-22; A-175-176; ¶¶32-33).

establishing the time frame within which a joint author must account to and share earnings with co-authors.

For all of these reasons, until Seinfeld's very public and very substantial sale to Netflix became known, Charles could not discern what if any compensation was due to him, thereby putting him on notice that a claim for any failure to submit that compensation had accrued. *See Wilson v. Dynatone*, 892 F.3d at 119 (“absence of royalty payments . . . does not show repudiation” when there “is no indication [plaintiff was] entitled to royalties . . . much less that [plaintiff] would have known of such entitlement,” *citing Gary Friedrich Enterprises, LLC v. Marvel Characters, Inc.*, 716 F.3d 302, 318-19 (2d Cir. 2013) (observing failure to pay royalties must be sufficiently obvious to put “a reasonably diligent person” on notice in order to imply repudiation).

Dismissing both of Charles's copyright claims, the District Court held that because Charles “was on notice that his ownership claim had been repudiated since at least 2012, his infringement claim is time-barred. His joint authorship claim is also time-barred for the same reasons.” (A-276). Charles respectfully submits that because Seinfeld was a stranger to the *Comedians In Cars Getting Coffee* copyright – neither its author nor its owner – his repudiations carried no legal consequence and should be afforded none, so neither Charles's infringement claim nor his joint authorship claim should be time-barred.

CONCLUSION

For the reasons set forth above, the Judgment of the District Court should be reversed.

Dated: December 13,
2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

I hereby certify pursuant to Fed. R. App. P. 32(a)(7)(C) that the attached brief is proportionally spaced, has a typeface (New Times Roman) of 14 points, and contains 8,111 words (excluding, as permitted by Fed. R. App. P. 32(a)(7)(B), the table of contents, table of authorities, and certificate of compliance), as counted by the Microsoft Word processing system used to produce this brief.

Dated: December 13, 2019

/s/ Peter L. Skolnik
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