

ORIGINAL

IN THE UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF NEW YORK

_____	)	
OSCILLOSCOPE PICTURE, INC.	)	
	)	Civil Action No.: CV-17-7458
Plaintiff,	)	
	)	
v.	)	Assigned Judge: Margo K. Brodie
	)	
DEAFUEH MONBO, <i>et al.</i> ,	)	Magistrate Judge: Steven L. Tiscione
	)	
Defendants.	)	
_____	)	

**DEFENDANTS' MOTION TO DISMISS FOR LACK OF STANDING**

Defendants Deafueh Monbo and Taje Monbo (“Monbo”) move to dismiss Plaintiff Oscilloscope's (hereinafter “Oscilloscope[’s],” or the “Plaintiff[’s]”) Complaint (Docket No. 1) filed on December 22, 2017 for Lack of Standing under Rule 19 pursuant to Federal Rules of Civil Procedures 12(b)(1).

**FACTUAL BACKGROUND**

1. Red Gap Film Group, LLC (“Red Gap”) is the Licensor of Plaintiff Oscilloscope.
2. Red Gap is the Copyright Owner of the film entitled 12 O’CLOCK BOYS bearing the registration number PAu003699143 that was issued on September 6, 2013. (*See Exhibit 1*)



## STANDARD OF REVIEW

Plaintiff Oscilloscope bears the burden of establishing subject matter jurisdiction, *see Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), including Oscilloscope's own standing to sue, *see Cobb v. Central States*, 461 F.3d 632, 635 (5th Cir. 2006).

Subject matter jurisdiction is an essential element to every lawsuit and must be demonstrated "at the successive stages of the litigation." *Chapman v. Pier 1 Imports (U.S.), Inc.*, 631 F.3d 939, 954 (9th Cir. 2011) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). The existence of subject matter jurisdiction is an ongoing inquiry that a court must conduct *sua sponte* in order to continue the case. *Chapman*, 631 F.3d at 954; *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002). Where subject matter jurisdiction is absent, a court has no discretion and must dismiss the case. *Chapman*, 631 F.3d at 954.

A central component to subject matter jurisdiction is the question of standing, which requires that the party experience actual or imminent harm. *Lujan*, 504 U.S. at 561 (citing *Whitmore v. Ark.*, 495 U.S. 149, 155 (1990)). A party's standing to bring a case is not subject to waiver, and can be used to dismiss the instant action at any time. Fed. R. Civ. P. 12(h)(3); *U.S. v. Hays*, 515 U.S. 737, 742 (1995); *Chapman*, 631 F.3d at 954.

## ARGUMENT

### COPYRIGHT ARGUMENT

#### I. OSCILLOSCOPE HAS NO STANDING TO BRING THIS CASE

Oscilloscope is neither the owner nor exclusive holder of any rights in "12 O'Clock Boys", the copyrighted work underlying this lawsuit. (*See Exhibit 1*) As such, Oscilloscope has suffered no injury or other cognizable harm required for it to have standing under *Lujan*. Absent this very basic requirement of standing, there is no subject matter jurisdiction in this case, and it must be dismissed.

For a plaintiff to sue for a copyright declaratory judgment, it must have an exclusive right in a copyright. *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005); see *Sybersound Records v. UAV Corp.*, 517 F.3d 1137, 1144 (holding that only owners and “exclusive licensees” may bring a copyright declaratory judgment action). Without such exclusivity, a plaintiff has no standing to sue for copyright declaratory judgment. *Sybersound*, 517 F.3d at 1144. As status as a copyright owner or exclusive licensee is prerequisite for enforcing such a right, a plaintiff with neither lacks standing to pursue a copyright declaratory judgment action on that copyright, as it cannot experience the injury requisite for Article III standing under *Whitmore* and *Lujan*.

Oscilloscope lacks sufficient rights under *Silvers* and *Sybersound* to bring this lawsuit. The Distribution Agreement between Red Gap and Oscilloscope is a “naked” distribution agreement for Oscilloscope to sell the “12 O’Clock Boys” film.

Red Gap is the copyright owner of the film, 12 O’Clock Boys and not Oscilloscope. (See Exhibit 1). Oscilloscope actually has *no* rights in the copyright in the film, 12 O’Clock Boys.

**Although, Red Gap gives Oscilloscope the illusory rights for Oscilloscope to be the distributor of the film 12 O’Clock Boys, Red Gap does not provide any transfer of the rights in 17 U.S.C. § 106 that must be transferred to make a valid copyright license. See *Silvers*, 402 F.3d at 885.**

Oscilloscope “lacks standing to sue for a copyright declaratory judgment because Oscilloscope is not the owner of any of the exclusive rights in the film, 12 O’Clock Boys required for standing under the Copyright Act” and *Silvers v. Sony Pictures Entertainment, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005) (en banc).

## TRADEMARK ARGUMENT

### II. OSCILLOSCOPE HAS NO STANDING TO BRING THIS CASE

Standing is a threshold issue that must be proven by the plaintiff in every *interpartes* case. To establish standing in an opposition or cancellation proceeding, a plaintiff must show “both a ‘real ‘interest’ in the proceedings as well as a ‘reasonable basis’ for its belief of damage.” *Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 753 F.3d 1270, 111 USPQ2d 1058, 1062 (Fed. Cir. 2014) (quoting *ShutEmDown Sports, Inc. v. Lacy*, 102 USPQ2d 1036, 1041 (TTAB 2012)), *cert denied*, 135 S. Ct. 1401 (2015); *Ritchie v. Simpson*, 170 F.3d 1092, 50 USPQ2d 1023, 1025 (Fed. Cir. 1999); *Lipton Indus., Inc. v. Ralston Purina Co.*, 670 F.2d 1024, 213 USPQ 185, 189 (CCPA 1982).

Oscilloscope has not produced nor introduced a United States trademark registration. **Further, Red Gap who is the licensor of Oscilloscope does not own a United States trademark registration.** Red Gap never owned the mark 12 O’Clock Boys, therefore Red Gap does not provide any transfer of rights to Oscilloscope under the Trademark Act. Oscilloscope lacks standing. See *Julie A. Moreno v. Pro Boxing Supplies, Inc.*, 124 USPQ2d 1028 (TTAB 2017) [precedential] (Opinion by Cindy B. Greenbaum)

### CONCLUSION

Under the law of this Circuit, Oscilloscope does not have the legal right to pursue its copyright and trademark declaratory judgment action claim in this case. As seen from Exhibit 1 Oscilloscope has acquired *no* rights from Red Gap and certainly not enough to bring a declaratory judgment action. As such, Oscilloscope has not suffered an injury cognizable by law, and Oscilloscope's case is not properly before this Court. Therefore, consistent with Federal Rule of Civil Procedure 12(h)(3), this Court should dismiss Oscilloscope’s Complaint WITH PREJUDICE.

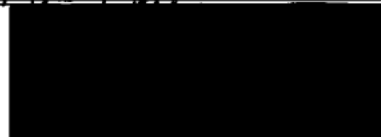
Dated: April 5, 2019

Respectfully submitted,

By 







**CERTIFICATE OF SERVICE**

I hereby certify that a copy of this MOTION TO DISMISS FOR LACK OF STANDING was mailed by Mail on APRIL 5, 2019 to:

Robert S. Meloni  
Thomas P. McCaffrey  
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Tel: (212) 520-6090

*Attorneys for Plaintiff Oscilloscope Pictures, Inc.*

Dated: April 5, 2019

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# **EXHIBIT 1**



Help Search History Titles Start Over

## Public Catalog

Copyright Catalog (1978 to present)

Search Request: Left Anchored Title = 12 o'clock boys

Search Results: Displaying 1 of 1 entries



### 12 O'Clock Boys.

**Type of Work:** Motion Picture

**Registration Number / Date:** PAu003699143 / 2013-09-06

**Application Title:** 12 O'Clock Boys.

**Title:** 12 O'Clock Boys.

**Description:** Videodisc (DVD)

**Copyright Claimant:** Red Gap Film Group, LLC. Address: 194 S 2nd Street floor 3, Brooklyn, NY, 11211, United States.

**Date of Creation:** 2013

**Authorship on Application:** Red Gap Film Group, LLC, employer for hire; Domicile: United States. Authorship: entire motion picture.

**Rights and Permissions:** Lotfy Nathan, Red Gap Film Group, 194 S 2nd Street, Floor 3, Brooklyn, NY, 11211, United States, (508) 380-5202, (508) 380-5202, lotfynathan@gmail.com

**Copyright Note:** C.O. correspondence.

**Names:** Red Gap Film Group, LLC



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