

# 23-

---

---

**United States Court of Appeals**  
*for the*  
**Second Circuit**

---

In re

JOHN WAITE *et al.*,

*Petitioners,*

– v. –

UMG RECORDINGS, INC. *et al.*,

*Respondents.*

---

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

---

---

**FED. R. CIV. P. 23(f) PETITION FOR PERMISSION TO  
APPEAL ORDER DENYING CLASS CERTIFICATION**

---

---

ROY W. ARNOLD  
ANDREW HAMBELTON  
BLANK ROME LLP  
1271 Avenue of the Americas  
New York, NY 10020  
(212) 885-5000

*Counsel for Petitioners*

---

---

## TABLE OF CONTENTS

	<b>Page</b>
JURISDICTIONAL STATEMENT.....	1
QUESTIONS PRESENTED.....	1
RELIEF REQUESTED.....	2
INTRODUCTION.....	2
RELEVANT FACTS AND CLASS-WIDE EVIDENCE.....	5
A. Defendants’ Systematic and Uniform Scheme to Disregard Notices of Copyright Termination and Vested Terminations .....	8
B. Defendants’ Systematic and Uniform Mischaracterizations of the Plaintiffs’ and Class Members’ Sound Recordings as “Works Made for Hire”.....	9
C. Class-wide Proof of Defendants’ “Work Made for Hire” Artifice .....	10
D. Defendants’ “Evidence” in Opposition to Class Certification .....	11
IMMEDIATE RULE 23(f) REVIEW IS WARRANTED.....	12
A. Applicable Standard of Review.....	12
B. The District Court’s Opinion Is Highly Questionable and Manifestly Erroneous, Implicating Fundamental and Important Class Certification and Federal Copyright Act Issues as to Which There Is a Compelling and Immediate Need for Appellate Disposition. ....	14
C. Rule 23(b)(3)’s Predominance of Common Issues Requirement.....	15
D. The District Court Fundamentally Erred by Misapplying Reid, Aymes and Their Progeny Instead of Performing the Requisite Rigorous Analysis of the Evidentiary Record.....	16
1. Defendants’ Sham Work-Made-for-Hire Defense Is a Common, Overriding Class-wide Issue That Predominates. ....	16
2. None of the Plaintiffs or Class Members Were Employees Creating Sound Recordings Within the Scope of An Employment Relationship. ....	19

3.	Plaintiffs and the Classes Rebutted Any Purported Presumption under Section 410(c) and Thereafter Defendants Failed to Adduce Any Evidence to Support Their Common Work-Made-for-Hire Defense.....	22
4.	Defendants Failed to Adduce Evidence Showing That Any of the Sound Recordings at Issue Were Specially Ordered or Commissioned for Use as a Part of a Collective Work or Compilation.....	24
	CONCLUSION .....	25

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Amchem Prods., Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	16
<i>Augustin v. Jablonsky</i> , 461 F.3d 502 (2d Cir. 2006).....	13
<i>Aymes v. Bonelli</i> , 980 F.2d 857 (2d Cir. 1992).....	4, 16, 20, 21
<i>Ballas v. Tedesco</i> , 41 F. Supp. 2d 531 (D.N.J. 1999).....	18
<i>Estate of Burne Hogarth v. Edgar Rice Burroughs, Inc.</i> , 342 F.3d 149 (2d Cir. 2003).....	23
<i>Comcast Corp. v. Behrend</i> , 569 U.S. 27 (2013).....	15
<i>Community for Creative Non-Violence v. Reid</i> , 490 U.S. 730 (1989).....	<i>passim</i>
<i>Cuevas v. Citizens Fin. Goup, Inc.</i> , 526 Fed. Appx. 19 (2d Cir. 2013).....	15
<i>Horror Inc. v. Miller</i> , 335 F. Supp. 3d 273 (D. Conn. 2018), <i>aff'd</i> , 15 F.4th 232 (2d Cir. 2021).....	19, 20, 23
<i>In re IPO Sec. Litig.</i> , 471 F.3d 24 (2d Cir. 2006).....	15
<i>Johnson v. Nextel Commc'ns Inc.</i> , 780 F.3d 128 (2d Cir. 2015).....	16
<i>Kesey, LLC v. Francis</i> , No. CV 06-540-AC, 2009 WL 10693885 (D. Or. Aug. 17, 2009), <i>aff'd</i> , 433 F. App'x 565 (9th Cir. 2011).....	23

*Langan v. Johnson & Johnson Cons. Cos., Inc.*,  
897 F.3d 88 (2d Cir. 2018).....15

*Marvel Characters, Inc. v. Simon*,  
310 F.3d 280 (2d Cir. 2002)..... 18, 19

*Oliver v. Johanson*,  
357 F. Supp. 3d 758 (W.D. Ark. 2018).....22

*Scott v. Chipotle Mexican Grill, Inc.*,  
954 F.3d 502 (2d Cir. 2020).....14

*In re Sumitomo Copper Litig.*,  
262 F.3d 134 (2d Cir. 2001)..... 12, 13

*Sykes v. Mel S. Harris & Assocs.*,  
780 F.3d 70 (2d Cir. 2015).....16

*TD Bank N.A. v. Hill*,  
928 F.3d 259 (3d Cir. 2019)..... 18, 19

*Universal Furniture Int’l, Inc. v. Collezione Europa USA, Inc.*,  
618 F.3d 417 (4th Cir. 2010), *as amended* (Aug. 24, 2010) .....22

*Waite v. UMG Recordings, Inc.*,  
450 F. Supp. 3d 430 (S.D.N.Y. 2020)..... 3

*Wal-Mart Stores, Inc. v. Dukes*,  
564 U.S. 338 (2011).....15

**Statutes**

17 U.S.C.A. § 102.....17

17 U.S.C. § 101(1) ..... 17, 22

17 U.S.C. § 101(2) ..... 17, 24, 25

17 U.S.C. § 201(a).....16

17 U.S.C. § 203(a)(5) .....19

17 U.S.C. § 203(b)(2)..... 8

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.