

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION**

MICHAEL J. BYNUM and CANADA  
HOCKEY LLC d/b/a EPIC SPORTS,

Plaintiffs,

V.

TEXAS A&M UNIVERSITY ATHLETIC  
DEPARTMENT; TEXAS A&M UNIVERSITY  
12TH MAN FOUNDATION; BRAD MARQUARDT,  
in his individual capacity; ALAN CANNON, in his  
individual capacity; LANE STEPHENSON, in his  
individual capacity,

## Defendants

Cause No. 4:17-cv-00181

**MOTION TO DISMISS FOR LACK OF JURISDICTION**  
**AND FAILURE TO STATE A CLAIM**

Comes now, Texas A&M University, on behalf of its unincorporated division, the Texas A&M Athletic Department, and individual defendants, Brad Marquardt, Alan Cannon, and Lane Stephenson, and file this their motion to dismiss for lack of jurisdiction and failure to state a claim.

## INTRODUCTION

For approximately 72 hours in January 2014, a copy of a long-form, approximately 5,000-word article written by Whit Canning appeared on the Texas A&M University website. The article described the life of E. King Gill, a graduate of Texas A&M University who famously became known as the “12th Man,” because during a football game in 1922, he suited up and stood ready throughout the game in case his team needed a relief player.

The article was titled “The Original 12th Man,” and was attributed to Whit Canning, as a “special” to Texas A&M University. After the article appeared on the Texas A&M website, it

was the subject of two tweets sent out by University employees during an NFL play-off game on the evening of January 19, 2014.

Employees of Texas A&M University posted the article and tweeted about it with the reasonable belief that they acted lawfully in doing so. In an email sent on January 22, 2014, however, Plaintiff Mike Bynum stated to two University employees that Whit Canning had written the posted article as a work-for-hire for Mr. Bynum and his publishing company. Mr. Bynum further stated that he viewed the University's posting of the article as infringing on a copyright he owned in a larger book, of which the Canning article was a part, and that Mr. Bynum wanted the University to take the article down. The University complied with this request within an hour or two of receiving Mr. Bynum's email.

In his email back to Mr. Bynum, Defendant Brad Marquardt apologized, and asked if the University could re-post the Canning article, along with a promotional statement for Mr. Bynum's book, which Mr. Bynum had indicated was going to be published in a few months. Mr. Bynum did not accept this offer, and instead filed this lawsuit, alleging that the University and its employees had violated the Aggie Code of Honor, committed "willful infringement" and engaged in "plagiarism".

It is clear from Plaintiffs' complaint that Mr. Bynum was and remains unsatisfied with the University's handling of this situation. It is also clear, however, that Plaintiffs cannot prevail against the named defendants, with the allegations as currently stated. As an initial matter, the institutional defendant named in the complaint is an entity that has no legal capacity to be sued. With respect to the individual defendants, each of them are government employees, sued individually for lost profits, damages and attorneys' fees, because of actions they took as

part of their jobs. Under state law, these employees are protected by the sovereign immunity of the State. Under federal law, these employees are protected by qualified immunity.

Defendants request that all claims against them be dismissed.

### **ARGUMENT**

#### **I. Texas A&M University Athletic Department is not a legal entity, capable of being sued, and should be dismissed as a party.**

The Complaint admits that named defendant “Texas A&M University Athletic Department” is “the athletic department of Texas A&M University, a public university in the Texas A&M University System established by the State of Texas and based in College Station, Texas.” First Amended Complaint (“Am. Compl.”) at ¶ 8.

As an unincorporated division of Texas A&M University (“University”), the Texas A&M University Athletic Department is not a separate legal entity, capable of being sued. Accordingly, this defendant should be dismissed as a party.

##### **A. Texas A&M University Athletic Department is part of Texas A&M University, not a separate entity.**

The University’s governing documents, available to the public online, confirm that the Athletic Department is a part of Texas A&M University, not a separate entity. Attached as Exhibit A is a copy of the University’s organizational chart, located at the following link: [http://president.tamu.edu/documents/Pres\\_Org\\_Chart.pdf?v=20170330133150](http://president.tamu.edu/documents/Pres_Org_Chart.pdf?v=20170330133150) . This chart clearly delineates that the Director of Athletics reports to the President of the University, and does not lie outside the governing structure of the University as a whole. Attached as Exhibit B are policy statements from the Texas A&M University System Board of Regents, governing intercollegiate athletic activities at each of the member institutions, including Texas A&M University. These policies demonstrate that the University is expected to exercise meaningful

oversight of the activities of its athletic department, in keeping with the University's "values and goals befitting higher education." See Ex. B, Policy 18.02, ¶ 2; see also Policy 18.01 (Athletic Council) (providing that presidents of member institutions should appoint an "athletics council" in order to "advise the president in the development and supervision of intercollegiate athletics program").

In Policy 18.02, "Principles for Intercollegiate Athletics Participation," the Board of Regents dictates, for example, that the "board and chancellor expect all intercollegiate athletics programs to operate under institutional control, with academic and financial integrity and in full compliance with conference and national association rules." Ex. B, Policy 18.02 at ¶ 4. In addition, the Board of Regents states that "[a]ll intercollegiate athletics department funds, regardless of source, shall be deposited in the institutional fiscal office, and all accounting and disbursement of such funds shall be subject to institutional fiscal rules and procedures." *Id.* at ¶ 5.

The institutional structures and controls described here do not permit the conclusion that the Texas A&M Athletic Department is an entity separate from the University, capable of being sued in its own right.

**B. Unincorporated divisions within a corporation may not be sued as separate parties.**

Unincorporated divisions within a corporation are not capable of being sued separately from the corporation itself. In *EEOC v. St. Francis Xavier Parochial School*, 20 F. Supp. 2d 66 (D.D.C. 1998), the United States District Court for the District of Columbia dismissed claims brought against a church and school operated by a Catholic parish, which was itself part of the larger Archdiocese of Washington. The Court found that because neither of the named defendants, the church or the school, were separately incorporated, the defendants were "in fact

unincorporated divisions of a corporation . . . trigger[ing] a line of precedent holding that unincorporated divisions of a corporation lack legal capacity to be sued.” *Id.* at 73 (collecting cases from multiple district courts).

Similarly, the Northern District of Illinois has held repeatedly that the Chicago Police Department “is not a suable entity, but merely a department of the City of Chicago which does not have a separate legal existence.” *Gray v. City of Chicago*, 159 F. Supp. 2d 1086, 1089 (N.D. Ill. 2001) (cited with approval, along with other district court cases, in *Averhart v. City of Chicago*, 114 Fed. Appx. 246 (7th Cir. 2004) (unpublished)).

The Fifth Circuit has recognized this principle also, holding that a “division of a corporation is not a separate legal entity but is the corporation itself.” *Western Beef, Inc. v. Compton Inv. Co.*, 611 F.2d 587, 591 (5th Cir. 1980) (quoting *In re Sugar Antitrust Litigation*, 579 F. 2d 13 (3rd Cir. 1978)).

Plaintiffs’ assertion that the A&M Athletics Department “receives no funding from the State of Texas or public tax dollars,” has no relevance to this analysis. Am. Compl. at ¶ 8. Many functions of Texas A&M University are funded in ways other than legislative appropriations, including directed grants, earmarked gifts, and federal money for specific projects. The fact that a particular function of the University is funded in a particular way does not make that function a separate legal entity, capable of being sued.

**C. Dismissal is the proper remedy here, based on the University’s immunity from suit.**

Dismissal is a proper remedy for naming a party with no capacity to be sued. *See EEOC v. St. Francis Xavier Parochial School*, 20 F. Supp. 2d at 73. In some cases, however, courts have substituted the correct party when an improper party has been named. *See, e.g., Gray v. City of Chicago*, 159 F. Supp. 2d at 1089; Fed. R. Civ. P. 17.

Here, however, substitution would be improper, as Texas A&M University is an agency of the State of Texas, and enjoys sovereign immunity from suit. This basic principle is long-established, and applied consistently by federal district courts within the State of Texas. *See, e.g., Gay Student Servs. v. Texas A&M Univ.*, 737 F.2d 1317, 1333 at n.28 (5th Cir. 1984); *Zentgraf v. Texas A&M Univ.*, 492 F. Supp. 265, 271 (S.D. Tex. 1980); *Eustice v. Texas A&M Univ.*, 2016 WL 8710444, \*3 (S.D. Tex. 2016) (Harmon, J.).

Were the University to be substituted in as the correct party, it would then be named in a suit seeking money damages for violation of 17 U.S.C. § 501 (Infringement of Copyright) and 17 U.S.C. § 1202 (Integrity of Copyright Management Information), unconstitutional taking in violation of the Fifth Amendment to the United States Constitution, and an unconstitutional taking in violation of Article I, § 17 of the Texas Constitution. Am. Compl. at ¶¶ 67-120. None of these claims can be pursued against a State entity, sued in federal court. *See Chavez v. Arte Publico Press*, 204 F.3d 601, 603 (5th Cir. 2000) (holding that Congress's attempt to abrogate the state's sovereign immunity in copyright cases is invalid); *Rodriguez v. Tex. Com'n on the Arts*, 199 F.3d 279, 280-81 (5th Cir. 2000) (same); *John G. and Marie Stella Kennedy Memorial Found. v. Mauro*, 21 F.3d 667 (5th Cir. 1994) ("[A] Fifth Amendment inverse condemnation claim brought directly against the State . . . is . . . barred by the Eleventh Amendment."); *Seven Up Pete Venture v. Schweitzer*, 523 F. 3d 948 (9th Cir. 2008) (same) (collecting cases from the First, Fifth, Sixth, and Seventh Circuits); *Kentucky v. Graham*, 473 U.S. 159 (1985) ("[A]bsent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court."); *Virginia Office for Protection and Advocacy v. Stewart*, 563 U.S. 247 (2011) ("[A]bsent waiver or valid abrogation, federal courts may not entertain a private person's suit against a State.").

Given the protection afforded to the University by the Eleventh Amendment, substitution of the University as the named party in this case would be improper. In the event that the Court is inclined to substitute the University as the correct party, either on its own motion, or at the request of Plaintiffs, more detailed briefing can be provided on each of the Counts alleged in Plaintiffs' complaint.

**II. Sovereign immunity, as established by Texas law, bars all claims against the individual defendants.**

In *Meyers v. Texas*, 410 F.3d 236 (5th Cir. 2005), the Fifth Circuit Court of Appeals clarified that the Eleventh Amendment serves to protect, but does not create, the contours of state sovereign immunity. "Rather than require that the states adhere to a prescribed plan, the Court's decisions envision a Constitution that affords the states discretion to waive or vary the nature and elements of their sovereign immunity." *Id.* at 253.

In Texas, sovereign immunity for tort claims against the State is governed by the Texas Tort Claims Act (TTCA), codified at Tex. Civ. Prac. & Rem. Code, Chapter 101. The TTCA provides that in exchange for a limited waiver of sovereign immunity allowing certain claims to be brought against state agencies, immunity will be extended to individual state employees who act within the course and scope of their employment. *See Franka v. Velasquez*, 332 S.W.3d 367 (Tex. 2011) ("[R]estrictions on government employee liability have always been part of the tradeoff for the Act's waiver of immunity, expanding the government's own liability for its employees' conduct . . ."). Because the allegations in the complaint demonstrate that the named individuals were acting within the course and scope of their employment, and there is no separate waiver of immunity for the claims at issue here, these individual defendants are covered by sovereign immunity, as defined by Texas law.

**A. The Texas Tort Claims Act waives immunity in some limited circumstances, and expands it in others.**

The TTCA, originally passed in 1969, was modeled after the federal Tort Claims Act. *Franka*, 332 S.W.3d at 383. The primary purpose of the TTCA is to enact a limited waiver of sovereign immunity for certain tort claims against the State, namely those involving car accidents, or tangible personal property. Tex. Civ. Prac. & Rem. Code §§ 101.021; 101.025. As part of the legislative compromise necessary to pass this legislation, the TTCA also expands immunity to cover individual state employees who act within the course and scope of their employment, as long as the claims are based in tort, and are not subject to a separate statutory waiver of immunity. *Franka*, 332 S.W.3d at 384.

The section at issue is Tex. Civ. Prac. & Rem. Code § 101.106, titled “Election of Remedies,” and it contains two provisions that relate to the Complaint filed here. Subsection (b) provides that “[t]he filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.” Subsection (f) states that “[i]f a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee’s employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee’s official capacity only.” Subsection (f) further provides that “[o]n the employee’s motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.”

While initially Texas courts were split on characterizing these provisions as conferring immunity on state employees, or merely providing them with a procedural vehicle to escape



individual liability, the Texas Supreme Court definitively settled that question in 1997 in *Newman v. Obersteller*, 960 S.W.2d 621, 622-23 (Tex. 1997). In that case, the Texas Supreme Court held that “section 101.106 is an immunity statute,” such that the denial of a motion for dismissal under its provisions would entitle the losing employee to file an interlocutory appeal. *Id.* Later decisions apply this framework, and hold that the TTCA does confer immunity on state employees who act within the course and scope of their employment. *See Texas Adjutant General’s Office v. Ngakoue*, 408 S.W.3d 350, 357 (Tex. 2013) (“[I]n enacting subsection (f), the Legislature ‘foreclose[d] suit [under the TTCA] against a government employee in his individual capacity if he was acting within the scope of employment.’”) (internal quotation marks omitted).

**B. The individual defendants named here are covered by the TTCA.**

Applying the language in Tex. Civ. Prac. & Rem. Code § 101.106(f), as long as the individual defendants are sued for acts occurring in the course and scope of their employment, and the claims against them “could have been brought under the [Tort Claims Act],” then the individual defendants are immune from suit, and are entitled to assert that immunity in federal court pursuant to the protections of the Eleventh Amendment. Tex. Civ. Prac. & Rem. Code § 101.106(f).

With respect to course and scope of employment, Plaintiffs’ complaint makes clear that the allegations against Lane Stephenson, Alan Cannon, and Brad Marquardt are all based on actions taken as employees of Texas A&M University. Each of these defendants are identified in the complaint by reference to their job title, and how their responsibilities for the University relate to Plaintiffs’ claims of copyright infringement. Am. Compl. at ¶¶ 10-12 (identifying Lane Stephenson as “former Director of News & Information Services at Texas A&M University” and

“responsible for the content of the University’s e-newsletter and website”; Alan Cannon as “Associate Athletic Director of Media Relations for the Texas A&M Athletic Department” and “responsible for handling media relations for . . . the A&M Athletic Department”; and Brad Marquardt as Associate Director of Media Relations for the A&M Athletic Department” and “responsible for providing content for the A&M Athletic Department’s official Twitter account dedicated to its football program”).

The Complaint also alleges that the individual defendants took these actions at the direction of and with the intent to benefit their employer, Texas A&M University. *See, e.g.,* Am. Compl. at ¶ 39 (“Upon information and belief, the A&M Athletic Department and the Foundation directed staff at the A&M Athletic Department, including at least Marquardt and Cannon, to find background information on Gill that could be used to promote the 12th Man story and solicit more donations.”); ¶ 94 (“As the employer of Marquardt . . . the A&M Athletic Department has at all times had the right and ability to control and supervise the infringing acts of Marquardt.”).

With respect to the “could have been brought” prong, Texas courts hold that a claim “could have been brought “ under the TTCA “if it (1) is in tort and (2) is not brought under another statute that independently waives immunity, even if the particular tort alleged is one for which immunity has not been waived.” *Fink v. Anderson*, 477 S.W.3d 460, 472 (Tex. App. - Houston [1st Dist.] 2015) (quoting *Franka, supra*). Here, Plaintiffs bring a claim for copyright infringement, which is a statutory tort. *See, e.g., King Empire, Inc. v. Milan Courtyard Homes, Ltd.*, 173 F. Supp. 2d 649 (S.D. Tex. 2001) (discussing copyright infringement as a kind of tort). Also, as noted above, the Copyright Act contains no valid waiver or abrogation of immunity. *See Chavez; Rodriguez.*

Based on the allegations in the Complaint, the individual defendants fall within the scope of the state's sovereign immunity, as defined by Tex. Civ. Prac. & Rem. Code § 101.106. That immunity, in turn, as it is defined by state law, is protected in federal court by the Eleventh Amendment to the United States Constitution. *See Meyers*, 410 F. 3d at 251 (“In sum . . . there is no such thing as an Eleventh Amendment immunity separate and apart from state sovereign immunity . . .”). Accordingly, these individual defendants are entitled to dismissal based on sovereign immunity, as defined by Texas state law, and protected by the Eleventh Amendment.

**III. Plaintiffs’ complaint fails to state a claim that can overcome the individual defendants’ qualified immunity.**

Lane Stephenson, Alan Cannon and Brad Marquardt are state employees, named as defendants in this suit based on actions taken as part of their jobs. As state employees, these individual defendants are entitled to assert the defense of qualified immunity. “The doctrine of qualified immunity protects government officials ‘from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’” *Campinha-Bacote v. Bleidt*, 2011 WL 4625394 (S.D. Tex. 2011) (applying qualified immunity in the context of a claim for copyright infringement against two Texas A&M University professors) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

In assessing whether a particular allegation of copyright infringement alleges a violation of “clearly established” law, courts “must determine not whether copyright law is clearly established in a broad sense, but whether a specific right is clearly established under copyright law.” *Assoc. for Info. Media and Equip. v. Regents of the Univ. of Ca.*, 2012 WL 7683452, \*5 (C.D. Ca. 2012). As the Supreme Court explained in *Anderson v. Creighton*, 483 U.S. 635 (1987), “[p]laintiffs would be able to convert the rule of qualified immunity that our cases

plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights . . . [O]ur cases establish that the right the official is alleged to have violated must have been ‘clearly established’ in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.” *Id.* at 639.

**A. Qualified immunity provides a valid basis on which to find that a complaint “fails to state a claim.”**

In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Supreme Court assessed the sufficiency of a complaint, taking into account both the pleading standard required by Fed. R. Civ. P. 8, and the defendants’ assertion of qualified immunity. The Court took jurisdiction under the collateral order doctrine, stating that “the sufficiency of respondent’s pleadings is both inextricably intertwined with and directly implicated by the qualified immunity defense.” *Id.* at 673 (internal quotation marks and citations omitted).

In evaluating the complaint for facial plausibility, the Court in *Iqbal* counseled that “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* at 678. While well-pleaded factual allegations should be assumed to be true, conclusory allegations that “amount to nothing more than a formulaic recitation of the elements of the claim” “are not entitled to be assumed true.” *Id.* at 681.

The Court in *Iqbal* further emphasized that government employees must be held liable for their own conduct, and cannot be subjected to personal liability, based on the doctrine of respondeat superior. *Id.* at 676 (“Based on the rules our precedents establish, respondent

correctly concedes that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior.”); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (“[W]e have held that qualified immunity would be defeated if an official knew or reasonably should have known that the ***action he took within his sphere of official responsibility*** would violate [plaintiff’s rights] . . . or ***if he took the action*** with the malicious intention to cause a deprivation of constitutional rights or other injury.”) (internal quotation marks removed) (emphasis added).

Considering the allegations against each of the individual defendants here together with the exhibits attached to the complaint, in light of the invocation of qualified immunity, dismissal is warranted as to each individual defendant.

**B. Lane Stephenson (direct and contributory infringement)**

Lane Stephenson is named in the First Cause of Action of the complaint, which alleges direct infringement of a copyright in violation of 17 U.S.C. § 501, and the Second Cause of Action of the complaint, which alleges contributory infringement of a copyright in violation of 17 U.S.C. § 501.

In order to make out a claim for direct infringement under 17 U.S.C. § 501, a plaintiff must prove: “(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.” *BWP Media USA, Inc. v. T&S Software Assoc., Inc.*, 852 F.3d 436, 438 (5th Cir. 2017). In order to prove copying, a plaintiff must prove both copying as a factual matter, and “that the copying of the copyrighted material was so extensive that it rendered the infringing and copyrighted works ‘substantially similar.’” *Segrets, Inc. v. Gillman Knitwear Co.*, 207 F.3d 56, 60 (1st Cir. 2000).

“A party is liable for contributory infringement when it, with knowledge of the infringing activity, induces, causes or materially contributes to infringing conduct of another.” *Alcatel USA, Inc. v. DGI Tech., Inc.*, 166 F.3d 772, 790 (5th Cir. 1999).

**a. Plaintiffs’ complaint contains few allegations specifically referencing Lane Stephenson**

Lane Stephenson is mentioned by name in only eight paragraphs in the First Amended Complaint. Four of these paragraphs are standard conclusory allegations in the “Causes of Action” section of the complaint, making statements such as “. . . Marquardt, Cannon, Stephenson, and the A&M Athletic Department knowingly and willfully infringed Bynum’s exclusive rights in the Gill Biography”; and “Marquardt, Cannon, Stephenson and the A&M Athletic Department have realized unjust profits, gains, and advantages from their infringements.” Am. Compl. at ¶¶ 78, 79. Of the remaining four, one is a paragraph in the “Parties” section identifying Mr. Stephenson as a defendant.

Of the remaining three paragraphs, one identifies Mr. Stephenson as the recipient of a “plagiarized copy” of the Canning article. Am. Compl. at ¶ 49. One states that Mr. Stephenson “was responsible for featuring the infringing copy of the Gill Biography in the TAMU Times e-newsletter and on the homepage of the TAMU Times website.” Am. Compl. at ¶ 77. The final remaining paragraph states that Mr. Stephenson “promoted the infringing article further by featuring it at the top of the January 21, 2014, edition of the. . . e-newsletter and on the front page of the TAMU Times website on the same day.” Am. Compl. at ¶ 56.

**b. Plaintiffs’ complaint does not state a claim against Lane Stephenson for direct infringement**

Like the discredited allegations in *Iqbal*, these naked assertions fall far short of the requirement that a complaint “contain facts plausibly showing” that the named defendant has

personally engaged in a violation of “clearly established law”. *Iqbal*, 556 U.S. at 682. None of these allegations state that Lane Stephenson took any affirmative action to copy anything.

Instead, the complaint alleges that Mr. Stephenson “was responsible for featuring the infringing copy . . .” and that he “promoted the infringing article . . .” These are not the actions of a direct infringer. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005) (actions that induce or encourage direct infringement constitute contributory infringement).

Plaintiffs’ complaint seems to admit as much when it alleges, before the “Causes of Action” section, that “[u]pon information and belief, *at least Marquardt and the A&M Athletic Department* directly infringed Plaintiffs’ exclusive rights . . .,” notably leaving out both Lane Stephenson and Alan Cannon. Am. Compl. at ¶ 62 (emphasis added).

Moreover, in order to overcome qualified immunity, Plaintiffs would need to show what specific actions Mr. Stephenson took, personally, that constitute a violation of “clearly established law.” *Iqbal*, 556 U.S. at 676. Merely asserting that Mr. Stephenson was “responsible” in some unspecified way for the posting of an allegedly infringing article is not sufficient. *Id.*

Also, on the facts as alleged in the complaint, it is far from “clearly established” that posting the text of the Canning article, if that is in fact conduct that Mr. Stephenson engaged in, constituted infringement of Mr. Bynum’s alleged copyright. The only registered copyright claimed by Plaintiffs in the complaint is not for the Canning article (or the “Gill Biography,” as it is referred to in Plaintiffs’ complaint); it is for the book that Mr. Bynum compiled, which includes the Canning article, as well as other articles written by other people, combined with rare or otherwise unique photographs curated by Mr. Bynum or those working for him. Am. Compl. at ¶¶ 24-26, 70; Ex. C, at docket page 11 (Editor’s note to the Bynum book, p. 5 of the email

attachment included as part of this exhibit). Whether the text of the Canning article alone would be considered substantially similar to the protectable elements of the Bynum book in order to constitute actionable copying, is not a matter of clearly established law. *See Churchill Livingstone, Inc. v. Williams & Wilkins*, 949 F. Supp. 1045 (S.D.N.Y. 1996) (“The issue is whether that material in defendant’s book which is similar to the protected elements in plaintiff’s book, is substantial in relation to plaintiff’s book as a whole. There is no magic formula to determine how substantial a similarity must be to constitute infringement.”); *Feist Pub., Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991) (wrongful copying requires “copying of the constituent elements of the [registered] work *that are original*”) (emphasis added).

**c. Contributory infringement cannot be alleged without knowledge**

Contributory infringement requires knowledge of direct infringement. *Alcatel*, 166 F.3d at 790. The complaint contains no factual assertions that Lane Stephenson knew or had reason to know that the material he allegedly received from Brad Marquardt was infringing, if in fact it was. Plaintiffs’ conclusory allegation that “Defendants at all times had knowledge of these acts and the infringement of the Gill Biography,” is insufficient to survive a motion to dismiss. *See Hinojosa v. Livingston*, 807 F.3d 657, 684 (5th Cir. 2015) (“When the plaintiff’s complaint uses blanket terms covering all the defendants, by lumping them together . . . these allegations are properly disregarded . . .”).

Moreover, acceptance of a colleague’s representation that material has been obtained lawfully has been held to entitle a University employee to qualified immunity. *Campinha-Bacote v. Bleidt*, 2011 WL 4625394, \*3 (S.D. Tex. 2011).



**d. Lane Stephenson is entitled to dismissal.**

Based on the allegations in the complaint, and Lane Stephenson's assertion of qualified immunity, the allegations against Mr. Stephenson should be dismissed for failure to state a claim.

**C. Alan Cannon (direct and contributory infringement)**

Alan Cannon is named in the First Cause of Action of the complaint (direct infringement) and the Second Cause of Action of the complaint (contributory infringement). The elements of these causes of action are set out above.

**a. Allegations specifically referencing Alan Cannon**

Alan Cannon's name appears in Plaintiffs' complaint even less frequently than Mr. Stephenson, with no substantive allegations regarding his alleged conduct appearing in the body of the complaint at all. In paragraph 76, under the "First Cause of Action," the complaint states that "Cannon approved the distribution and display of the infringing copy of the Gill Biography on the A&M Athletic Department Website . . ." Paragraph 86, under the Second Cause of Action, states that "Cannon, the Foundation and the A&M Athletic Department approved and encouraged the unauthorized distribution and display of the infringing article on the A&M Athletic Department Website."

**b. No allegation of direct infringement**

The allegations against Alan Cannon are precisely the kind of "threadbare . . . conclusory" allegations that the United States Supreme Court found insufficient to overcome qualified immunity in *Iqbal*. "Approving" of a website post does not constitute an actionable claim of direct infringement. See *Grokster*, 545 U.S. 930 (describing inducement or encouragement for infringement as actions constituting contributory infringement).

In addition, to overcome the defense of qualified immunity, Plaintiffs would need to demonstrate that a reasonable official in Mr. Cannon's position would have understood that his actions violated copyright law. Here, there is no action attributed to Mr. Cannon other than passive "approval." Also, as noted above, whether the Canning article alone would be considered substantially similar to the Bynum book in order to constitute actionable copying, is not a matter of clearly established law. *See infra* at pp. 15-16.

Based on these allegations, Plaintiffs cannot make out a claim for direct copyright infringement against Mr. Cannon that could overcome the invocation of qualified immunity.

**c. No allegation of knowledge/contributory infringement.**

Contributory infringement requires knowledge of direct infringement. *Alcatel*, 166 F.3d at 790. The complaint contains no factual assertions that Alan Cannon knew or had reason to know that the material he allegedly received from Brad Marquardt was infringing, if in fact it was. As noted above with respect to the allegations against Lane Stephenson, Plaintiffs' conclusory allegation that "Defendants at all times had knowledge of these acts and the infringement of the Gill Biography," is insufficient to survive a motion to dismiss. *See Hinojosa v. Livingston*, 807 F.3d at 684.

Qualified immunity requires personal action by the employee that any reasonable employee would know violates clearly established law. *Iqbal*, 556 U.S. at 676. Moreover, as noted above, acceptance of material sent by a colleague as lawful has been held to entitle a University employee to qualified immunity. *Campinha-Bacote, supra*, 2011 WL 4625394, \*3.

**D. Brad Marquardt (direct, contributory, DMCA)**

Brad Marquardt is named in the First Cause of Action of the complaint, alleging direct infringement of a copyright, in violation of 17 U.S.C. § 501, the Second Cause of Action of the

complaint, alleging contributory infringement in violation of 17 U.S.C. § 501, and the Fourth Cause of Action of the complaint, alleging removal or alteration of copyright management information (CMI), in violation of 17 U.S.C. § 1202, commonly known as the Digital Management Copyright Act (DMCA).

The elements of direct and contributory infringement are set out above. The anti-circumvention provisions of the DMCA, codified at 17 U.S.C. § 1202 provides that “no person shall, without the authority of the copyright owner or the law – intentionally remove or alter any copyright management information [or] distribute . . . works . . . knowing that copyright management information has been removed or altered without authority of the copyright owner or the law, knowing or . . . having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.” Copyright management information (CMI) is defined broadly in the statute, but as discussed below, courts have come to conflicting conclusions about whether § 1202 covers any copyright notice, or only an automated copyright protection or digital rights management system.

**a. Allegations against Brad Marquardt**

The allegations against Brad Marquardt are more detailed than those relating to his co-defendants, Lane Stephenson and Alan Cannon, and center on an email exchange that Mr. Marquardt had with the plaintiff, Mr. Bynum, on January 22, 2014. Plaintiffs assert that Brad Marquardt admitted in this email exchange that he had come across a copy of Mr. Bynum’s book in his office, had asked his secretary to type up a portion of it, which was the article written by Whit Canning, and then sent that article on to other University employees, with the expectation that those employees would use or post the article in some way.

Plaintiffs further allege that Brad Marquardt obtained a copy of the book containing the Canning article from Mr. Bynum in 2010, when Mr. Bynum emailed him a draft, and asked for assistance in putting the book into final form.

Plaintiff characterize this series of events as “willful infringement,” either direct or contributory, and knowing removal of copyright management information (CMI).

**b. The allegations against Brad Marquardt, even if true, do not violate clearly established law.**

In assessing qualified immunity, courts ask whether reasonable employees would understand that what they are accused of doing violates clearly established federal law. Government employees are “not expected to determine the manner in which the law’s grey areas will be clarified and defined.” *Lane v. First Nat’l Bank of Boston*, 687 F. Supp. 11, 15 (D. Mass. 1988).

**1. The law regarding whether § 1202 covers typewritten CMI, as opposed to automated copyright protection or digital rights management systems, is not clearly established.**

The United States District Court for the District of New Jersey appears to be the first court to have addressed an argument that only automated copyright protections are covered as CMI under § 1202. *IQ Group, Ltd. v. Wiesner Pub., LLC*, 409 F. Supp. 2d 587 (D. N.J. 2006). In that case, the court held that while the statutory definition of CMI in § 1202 was broad, it must be read in conjunction with § 1201, and the DMCA’s legislative history, which demonstrate that the only CMI intended to be protected was CMI as part of an “automated copyright protection or management system.” *Id.* at 596-597.

Some district courts have followed this rationale, and some have not. *See Murphy v. Millenium Radio Group LLC*, 650 F.3d 295, 302 n.7 (3d Cir. 2011) (collecting district court cases on both sides of the issue); *see also Interplan Architect, Inc. v. C.L. Thomas, Inc.*, 2009

WL 6443117, \*4 (S.D. Tex. 2009) (discussing what information qualifies as CMI, and rejecting the analysis in *IQ Group* and other cases following that rationale). Most recently, the Third Circuit addressed the question, and while acknowledging that the analysis of *IQ Group* and other district courts “has some force,” ultimately decided that “while it is possible to read the legislative history to support [a restrictive interpretation] of CMI, that history does not provide the ‘extraordinary showing of contrary intentions’ [required by prior Third Circuit case law] which would compel use to disregard the plain language of the statute.” *Id.* at 304.

Counsel has found no Fifth Circuit case addressing this issue, and no decision from the United States Supreme Court. Based on these conflicting court opinions, it cannot be said that Marquardt’s actions in removing a typewritten copyright notice, if that is in fact what he did, violated clearly established law. *See Morgan v. Swanson*, 659 F.3d 359, 371-72 (5th Cir. 2011) (en banc) (holding that “[w]here no controlling authority specifically prohibits a defendant’s conduct, and when the federal circuit courts are split on the issue, the law cannot be said to be clearly established,” noting that when judges disagree on a legal question, “it is unfair to subject [government officials] to money damages for picking the losing side of the controversy”) (internal citations omitted).

**2. The law regarding fair use in a University setting is not sufficiently settled for a court to conclude that Marquardt’s alleged actions fall outside qualified immunity.**

Brad Marquardt loses his qualified immunity from suit only if this Court determines that “at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Use of a work that is subject to copyright is not unlawful if the use is authorized, or constitutes a “fair use.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S.

569, 575 (1994). Courts assess four factors in evaluating fair use: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” *Id.* (quoting 17 U.S.C. § 107).

Several factors here indicate that a reasonable employee could conclude that copying a portion of the Bynum book would constitute fair use, or was otherwise permissible. First, the use is for a state university, a factor which weighs in favor of a finding of fair use. *See Assoc. for Info. Media and Equip., supra*, 2012 WL 7683452, \*6 (finding qualified immunity for University employees sued for copyright infringement). Second, the Canning article was included as only a few pages in the Bynum book, and had its own author credit, indicating a stand-alone work, not independently subject to the copyright notice for the Bynum book as a whole. Third, the Bynum book itself is simply a compilation of articles written by other people, collected together with photographs. Such a “compilation work” is entitled to less robust copyright protection than an original writing. *Feist*, 499 U.S. at 348 (describing the copyright in compilation works as “thin”).

Fourth, the employee did give credit to the author, which while not legally a defense to copyright infringement, is a common misunderstanding for many people affiliated with a university, whether as a student or employee. *See Assoc. Info. Media, supra* (finding qualified immunity in part because the court found that the “average person” would not understand that streaming was an act of infringement).

Fifth, the employee did lawfully receive a copy of the draft book several years earlier, directly from Mr. Bynum, in which Mr. Bynum asked for Mr. Marquardt’s help in completing

the book. In that draft, Mr. Bynum gives an acknowledgement credit to Brad Marquardt, along with Alan Cannon, and the “Texas A&M Athletic Media Relations staff.” An employee in this situation could reasonably believe that the University was a co-author of the work, or at least had a license that it could rely on to use the work. *Chavez v. Arte Publico Press*, 59 F.3d 539, 547 (5th Cir. 1995) (granting qualified immunity defense to University employee when terms of license were ambiguous), *rev’d on other grounds, sub nom., Univ. of Houston v. Chavez*, 517 U.S. 1184.

In short, given the many factors at issue here, it cannot be said that “every reasonable employee” facing the constellation of facts that Mr. Marquardt faced, as alleged in the complaint, “would have understood that what he was doing was wrong.” *Ashcroft v. al-Kidd*, 563 U.S. at 741. “Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments,” and “protects ‘all but the plainly incompetent or those who knowingly violate the law.’” *Id.* at 742 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

On the facts as alleged in the complaint, Brad Marquardt is entitled to qualified immunity, and should not have to face personal liability on these claims.

### **CONCLUSION**

Defendants ask that this Court dismiss all claim against them, based on lack of jurisdiction and failure to state a claim.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on May 17, 2017, this document was served on all counsel of record through the Court's CM/ECF system.

/s/ H. Melissa Mather  
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