

**AFFIRMATIVE AND OTHER DEFENSES  
PARTIAL CHECKLIST: RICHARD DANNAY**

**Not the copyright owner (the copyright; particular rights)**

- **joint owners?**
- **work made for hire?**
- **Government work?**

**No standing to sue (e.g., assignment of claims only)**

- **9<sup>th</sup> Cir. Garcia, 2d Cir. 16 Casa Duse (what is “the work”)**
- **No written transfer or inadequate transfer of rights (ambiguous grant)**

**Copyright invalid**

- **Public domain: noncompliance with formalities (notice, renewal)**
- **Not copyrightable subject matter**
- **Pre-1923 U.S. publication (authorized)**
- **Foreign publication without notice (9<sup>th</sup> Cir. Bambi, Renoir cases)**

**Independent creation**

**No access**

**No infringement**

- **No copying**
- **Idea/expression, merger, scenes a faire, etc.**
- **System, method, process, etc.**
- **No substantial similarity**

**No copyright registration issued (or no pending application, e.g., 9<sup>th</sup> Cir.)**

- **Untimely registration: not eligible for statutory damages or attorney’s fees**

**No jurisdiction: (i) personal; (ii) subject matter; (iii) improper venue**

**Fair Use**

- **De minimis**

#### **License**

- **Compulsory (music, cable system, etc.)**
- **Copyright Act exemptions (Section 108 et seq.)**
- **Express license**
- **Implied license (course of dealing)**
- **Is remedy breach of contract only and not infringement?**

#### **SOL (statute of limitations) & Laches (Petrella)**

#### **Misuse & Unclean Hands**

#### **Preemption**

#### **Estoppel**

#### **Waiver, Consent, Acquiescence, Abandonment**

#### **Res Judicata (claim preclusion)**

#### **Collateral Estoppel (issue preclusion)**

#### **Remedies:**

- **No injunction, no irreparable harm**
- **eBay & Winter (Salinger et al.)**
- **ineligible for statutory damages and attorney's fees**
- **no actual damages**
- **no profits, or profits not attributable to infringement**
- **liquidated damages per agreement (e.g., multipliers)**
- **statutory damages: how many works?**

#### **Compilations: No protectable selection or arrangement**

#### **Derivative Works: Not authorized**

#### **Burden of proof. Requirement to plead. Restatement of denials of complaint allegations.**