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25 VCX, Ltd. and David Sutton

26
27 **IN THE UNITED STATES DISTRICT COURT**
28 **FOR THE DISTRICT OF NEVADA**
SOUTHERN DIVISION

20 ARROW PRODUCTIONS, LTD., a
21 Nevada Corporation,
22 Plaintiff,
23 v.
24 V.C.X. LTD., a Nevada Corporation,
25 DAVID H. SUTTON, an Individual and
DOES 1-10,
26 Defendants.

Case Number **2:09-cv-0737-PMP-PAL**

Hon. Philip M. Pro,
United States District Judge

Hon. Peggy A. Leen,
United States Magistrate Judge

JOINT PRETRIAL ORDER

**[Local Rules 16-3(c), 16(4)
and 26-1(e)(5)]**

Pretrial Conference:
TBD

Trial:
TBD

1 Pursuant to Local Rules 16-3(c), 16(4) and 26-1(e)(5), the Parties submit the
2 following Proposed Pretrial Order:

3
4 **Preliminary Statement**

5 This supersedes the Proposed Pretrial Order filed by Plaintiff Arrow Productions, Ltd.
6 on January 30, 2011.

7
8 **Local Rule 16-3(c)(1): A concise statement of the nature of the action and the**
9 **contentions of the parties.**

10 This is a court trial on the underlying action for copyright and trademark infringement.
11 Plaintiff, Arrow Productions, Ltd. (“Arrow”) and Defendant V.C.X., Ltd. (“VCX”) are
12 competitors, each primarily involved in the distribution of classic adult motion pictures.
13 Defendant David H. Sutton is the owner of VCX, holding all of its officer and director
14 positions.

15 Involved is the copyright ownership on two, adult motion pictures that were produced
16 in the early 1970s and have become cult movies, “Deep Throat” and “Devil in Miss Jones.”

17 Each motion picture had a number of sequels and, as such, Plaintiff alleges that the
18 titles each qualify for trademark protection. Indeed, Deep Throat[®] and Devil in Miss Jones[®]
19 each are Plaintiff’s registered trademarks in the United States Patent and Trademark Office.

20 Similarly, Plaintiff contends that Linda Lovelace[®] appears in the titles of a series of
21 motion pictures, is Plaintiff’s registered trademark and, Plaintiff contends and Defendants
22 dispute that it qualifies for protection.

1 **Note as to the Remaining Facts**

2 As to the remainder of the facts, there are some that are in dispute and others that are
3 not. Accordingly, as to the remainder of the allegations, the following is, in tabular form, a
4 list of each of the material facts and a statement of whether each is in dispute; where the
5 defendants have a different version of any disputed fact, the defendants' version is set forth
6 in the right-hand column.

7
8 **PLAINTIFF'S CONTENTIONS**

DEFENDANTS' CONTENTIONS

9 **Relevant Individuals and Entities Who**
10 **Are Not Parties**

/
/

11 5. Anthony "Big Tony" Peraino
12 ("Tony Peraino," May 10, 1915 - October
13 18, 1996) was involved in New York's
14 Colombo crime family.

5. Defendants do not dispute
this contention.

15 6. Joseph C. Peraino ("Joseph
16 Peraino") was the brother of Tony Peraino
17 and was involved in New York's Colombo
18 crime family.

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19 7. Louis "Butch/Butchie"
20 Peraino ("Lou Peraino", 1940 - 1999),
21 who used the pseudonym Lou Perry, was
22 the son of Tony Peraino.

7. Defendants dispute that
Louis Peraino used the pseudonym "Louis
Perry" except in regard to making what
Defendants contend to be a false
application for copyright to Deep Throat.

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24 /

1 8. Joseph Peraino, Tony 8. Defendants do not dispute
2 Peraino and Lou Peraino are collectively this contention.
3 referenced herein as the “The Peraino /
4 Family.” /

5 9. Gerardo Rocco “Gerard” 9. Defendants do not dispute
6 Damiano (“Gerard Demiano,” August 4, this contention.
7 1928 - October 25, 2008) was the director /
8 of Deep Throat. /

9 10. Rudy Sutton (“Rudy Sutton,” 10. Defendants do not dispute
10 1923 - 2006) prior to his death was the this contention.
11 owner of Defendant VCX and the father of /
12 Defendant David H. Sutton. /

13 /

14 **Facts Common to All Claims for Relief** /
15 **– Generally** /

16 11. Plaintiff and VCX are 11. Defendants do not dispute
17 competitors, both in the business of selling this contention.
18 prerecorded sexually oriented motion /
19 pictures for personal home use (presently /
20 and in recent years in DVD format; and /
21 previously in VHS videotape format) and /
22 in licensing such motion pictures for use /
23 over the Internet. /

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1 12. Beginning during or shortly /
2 before 1971, Lou Peraino, with \$25,000 /
3 that he had borrowed from his father, /
4 produced the Deep Throat® Motion /
5 Picture.” /

6 13. During 1995, Lou Peraino,
7 sold to Arrow all rights to The “Deep
8 Throat® Motion Picture” and The “Devil in
9 Miss Jones® Motion Picture.”

10 14. Since acquiring those rights,
11 Arrow never has relinquished or
12 encumbered any of them.

13

14 **The Deep Throat® Motion Picture**
15 **Copyright**

16 15. The “Deep Throat® Motion
17 Picture” is a motion picture work created
18 in approximately 1971. It is a famous
19 motion picture, having enjoyed immense
20 popularity after it was first released for
21 theatrical exhibition in 1972.

22 16. Lou Peraino, with money
23 borrowed from his father, paid Gerard

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13. Defendants contend that
Louis Peraino had no rights in the film
Deep Throat in 1995 and the purported
transfer to Plaintiff is meaningless.

14. Defendants have no
knowledge of this contention and dispute
it on that basis.

Contentions as to Deep Throat

15. *Deep Throat* was theatrically
released in the United States on November
15, 1972 by the Louis “Butchie” Peraino,
a member of the Columbo crime family
under the name Vanguard Films.
Financing for the film was provided by
Louis Peraino’s father Anthony “Big
Tony” Peraino and his brother Joseph
“Joey the Whale” Peraino, both of whom

1 Damiano \$25,000 cash to make Deep
2 Throat[®] Motion Picture.

3 17. The circumstances of that
4 transaction resulted in the Deep Throat[®]
5 Motion Picture being a “work for hire,” as
6 that term is defined and understood in
7 American copyright law, vesting the
8 ownership of the copyright in Lou Peraino.

9 18. Beginning in June of 1972,
10 Lou Peraino exhibited the Deep Throat[®]
11 Motion Picture, first in New York City,
12 then in Los Angeles (Hollywood),
13 California and, thereafter, elsewhere in the
14 United States, by him. The exhibition was
15 controlled entirely by Lou Peraino.

16 19. The exhibition of the Deep
17 Throat[®] Motion Picture described in the
18 previous paragraph was entirely controlled
19 and financed by Lou Peraino. Specifically,
20 that he would lease each theater from its
21 owner for a flat amount, paying cash to the
22 owner of the theater. Then, that he would
23 hire the projectionist, ticket taker, and
24 other personnel necessary to the exhibition

were also members of the Columbo crime
family. At its peak of popularity, the film
was shown in approximately 300 theaters
in the United States and abroad. It ran for
over 9 years at the Pussycat Theater in
Hollywood until it closed on December 12,
1981. The film was shown without visible
copyright notice for the entire theatrical
release period. The only attribution
contained on the theatrical version of the
film was the legend “Vanguard Films
Presents Deep Throat.”

16. On about March 19, 1979,
after the film had been playing for over 6
years, a purported application for United
States Copyright (PA 25-575) was made
by the Perainos in the name of Plymouth
Distributors, Inc. (“Plymouth”). Plymouth
was a corporation set up by Joseph Peraino
to distribute *Deep Throat* and several other
films. (See e.g., *United States v. Peraino*
645 F.2d 548 (6th Cir. 1981). To avoid
prosecution, in their copyright application
the Perainos falsely identified the producer

26 **Page 8**

27 **PLAINTIFF’S PROPOSED PRETRIAL ORDER**
28 **[Local Rules 16-3(c), 16(4) and 26-1(e)(5)]**

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1 of the motion picture and cause those
2 individuals to exhibit it. All box office
3 receipts were retained by the him. All of
4 the foregoing transactions were in cash.
5 The surplus cash (*i.e.*, box office receipts
6 less expenses) was transported to New
7 York and delivered to Lou Peraino him.

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9 **The Deep Throat® Mark**

10 20. Subsequent to the release of
11 the Deep Throat® Motion Picture,
12 numerous motion pictures made and
13 released or licensed by Plaintiff or
14 Plaintiff’s predecessors have also carried
15 the title “Deep Throat,” all with an
16 additional subtitle, collectively the “Deep
17 Throat® Series,” beginning with the Deep
18 Throat® Motion Picture, and as follows:

- 19 i. Deep Throat®
- 20 ii. Deep Throat® # 2
- 21 iii. Deep Throat® # 3
- 22 iv. Deep Throat® # 4
- 23 v. Deep Throat® # 5
- 24 vi. Deep Throat® # 6

as “Lou Perry” and the director as “Jerry
Gerard.” The producer was actually Louis
Peraino and the director was Gerard
Damiano. The registration contained
another blatant falsehood. The registration
was made in the name of Plymouth
Distributors as the “employer for hire” of
Deep Throat. As will be shown at trial
through the Corporate Records of the New
Jersey Secretary of State, Joseph Peraino
did not even form Plymouth Distributors
until January 9, 1975 after the film had
been playing around the country for years.
These are false statements in a Copyright
application subjecting it to cancellation for
the reasons set forth below in the statement
of issues of law.

17. In their copyright
application, the Perainos also falsely
identified the date of first publication as
January 1, 1978. The film had been
obviously playing in theaters around the
country since 1972. As addressed below
in the statement of issues of law, a false

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- vii. Deep Throat® the Quest Begins
- viii. Deep Throat® the Quest Jailbreak
- ix. Deep Throat® the Quest #3
- x. Deep Throat® the Quest #4
- xi. Deep Throat® the Quest #5
- xii. Deep Throat® the Quest #6
- xiii. Deep Throat® the Quest Best of 3-way
- xiv. Deep Throat® the Quest Best of Anal
- xv. Deep Throat® the Quest Best of Oral
- xvi. Deep Throat® the Quest Best of Orgies

representation of a material fact on an application for United States Copyright is a criminal offense. As also addressed below, this false statement alone is also sufficient to cancel the registration.

18. Beyond these issues, the United States Copyright Registration for *Deep Throat* is subject to summary cancellation for other more fatal reasons. As addressed below in the statement of issues of law, a Copyright Registration will be cancelled where : (1) the work was published before March 1, 1989; (2) the work was registered more than 5 years after the date of first publication; (3) the deposit copy does not contain a statutory copyright notice; and (4) the deposit copies of a work published before January 1, 1978 do not contain a copyright notice or the notice is defective.

21. The “Deep Throat® Mark” has been exploited by Arrow since 1996 for motion pictures, including the “Deep Throat® Motion Picture.”

19. Defendants previously retained Government Liaison Services to review the deposit copies made in regard to the March 19, 1979 registration of *Deep*

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1 22. “Deep Throat[®]” is a
 2 common-law mark under Nevada law, a
 3 registered mark under Nevada law,
 4 Registration Number E0094112009-8 and
 5 a mark registered with the United States
 6 Patent and Trademark Office, Registration
 7 Number 2993913. The Deep Throat[®]
 8 Mark is a famous trademark, as that term
 9 is defined and understood under NEV. REV.
 10 STAT. § 600.435 and 15 U.S.C. § 1125(c).
 11 The mark has been licensed to many front-
 12 line motion picture studios, all of which
 13 recognized the validity of the mark.

14
 15 **The Linda Lovelace Mark**

16 23. The central character in the
 17 Deep Throat[®] Motion Picture is Linda
 18 Lovelace[™], portrayed in that original
 19 motion picture by an actress whose real
 20 name was Linda Susan Boreman,
 21 according to a book she published in 1980
 22 about the making of Deep Throat[®] Motion
 23 Picture.

Throat by Plymouth Distributors under PA
 25-575. The deposit copies were two 16
 millimeter reels. Government Liaison
 Services has confirmed that there is no
 copyright notice visible during the playing
 of these deposit copies. Government
 Liaison Services also reviewed the deposit
 copy made in regard to a purported
 derivative work registration of *Deep*
Throat made by International Home
 Entertainment Corporation on March 5,
 1979 under PA 24-166. That deposit copy
 in that case was a 60 minute videocassette
 that purportedly added sound
 synchronization as well as visual and
 sound enhancements to the original motion
 picture. Government Liaison Services has
 confirmed that there is likewise no
 copyright notice visible during the playing
 of the videocassette.

20. Here, the film *Deep Throat*
 was clearly published in 1972 and United
 States Copyright Registration was not
 sought until 1979. Because the deposit

1 24. The Deep Throat® Motion
2 Picture was without exception billed as
3 “Deep Throat, Starring Linda Lovelace.”
4 Two subsequent movies other than the
5 Deep Throat series with the Linda
6 Lovelace™ character in the title are is
7 follows:

- 8 i. Linda Lovelace –
- 9 Confessions of Linda
- 10 Lovelace
- 11 ii. Linda Lovelace –
- 12 Stars Who Do
- 13 Hardcore Throat-
- 14 F*** [Title Edited]

15 25. Additionally, the Linda
16 Lovelace™ character was played by Linda
17 Susan Boreman in one version of Deep
18 Throat #2. Different actresses portrayed
19 Linda Lovelace™ in Deep Throat #2 when
20 it was re-edited, as well as in Deep Throat
21 #3, Deep Throat #4 and Deep Throat #5.

22 26. In neither of those two,
23 subsequent Linda Lovelace™ motion
24 pictures was the Linda Lovelace™

copies contain no copyright notice, the
registrations will be summarily cancelled
once this information is brought to the
attention of this Court or the Registrar of
Copyrights. The film is clearly to be in the
public domain.

21. Beginning in 2004, Plaintiff
began making a series of trademark
registrations related to *Deep Throat*. It is
common in the adult film business to seek
to protect rights in public domain films by
making such registrations. On June 6,
2004 Arrow applied for United States
Trademark Registration for the standard
characters “Deep Throat” pursuant to
Application No. 76596548. In the
application, Plaintiff certified that Arrow
Productions had exclusive use of the mark
and that no other person had the right to
use such mark in commerce either in the
identical form thereof or in such near
resemblance thereto as to be likely, when
used on or in connection with the goods of
such other person, would cause confusion.

1 character played by Linda Susan Boreman,
2 who died in April, 2002, although Linda
3 Susan Boreman’s portrayal of that
4 character appeared in trailers associated
5 with those motion pictures.

6 27. Linda Lovelace™ is thereby
7 a trademark of the “Linda Lovelace™
8 Mark;” it is registered as such with the
9 Secretary of State of the State of Nevada,
10 Registration Number E0139232009-6; an
11 application has been filed in the United
12 States Patent and Trademark Office, Serial
13 Number 78869507, has been published
14 there for opposition in 2008 with no
15 opposition filed, and is awaiting the filing
16 of an affidavit of use. Linda Lovelace™ is
17 a famous trademark.

18 28. The Deep Throat® Motion
19 Picture was made in or about 1971 by
20 Plaintiff. It was filmed on color motion
21 picture film. Plaintiff remains in
22 possession of the internegative.

23 29. For the Deep Throat®
24 Motion Picture, after it was made and

By the time Plaintiff had made its
application, 63 adult films using the words
“Deep Throat” had been released by
various adult film producers. Following
the application, at least 51 other adult
films using the words “Deep Throat” have
been released by various adult film
producers. For these reasons, Plaintiff did
not have exclusive use of the characters
deep throat and its application is subject to
cancellation and Plaintiff is subject to
criminal penalties for making a false
application.

22. Pursuant to 15 U.S.C.
1501(a)(3)(D) Plaintiff was required to
certify that no other person had the right to
use the mark Deep Throat in commerce
and was required to identify any
concurrent use by other competitors, the
goods and the areas in which each
competitor’s concurrent use existed and
the periods of the competitor’s use. In its
application, Plaintiff failed to identify the
over 114 other competitors using the term

1 answer prints struck, Plaintiff maintained
2 control of all of those prints. Each time
3 the Deep Throat[®] Motion Picture played in
4 a theatre, the print never left Plaintiff's
5 control. Rather, it was "four-walled,"
6 meaning that Plaintiff's employees rented
7 the theater, sold tickets to the theatergoers,
8 collected the tickets and operated the
9 projector.

10 30. Therefore the theatrical
11 exhibition of the motion picture by
12 Plaintiff did not constitute "publication"
13 under the Copyright Act, so no copyright
14 notice was required to be affixed to the
15 work.

16 31. When home videotape was
17 introduced in the late 1970s, Plaintiff
18 created videotapes of the Deep Throat[®]
19 Motion Picture, always containing a
20 copyright notice as required. By that time,
21 all prints also contained a copyright notice.

22 32. The first time that Plaintiff
23 voluntarily relinquished control of any
24 copy of the Deep Throat[®] Motion Picture

Deep Throat in regard to adult films
subjecting the application to cancellations
for the reasons set forth below in the
statement of issues of law.

23. On January 1, 2005, the
Trademark Office notified Plaintiff that its
registration was refused because the
proposed mark "Deep Throat" was the title
to a single creative work in violation of
various portions of the Trademark Act and
other applicable law.

24. On February 17, 2005,
Plaintiff responded by certifying that the
"the mark "Deep Throat" is used to
identify a series of Applicant's products
rather than a single work."

25. On February 25, 2005, the
Trademark Office notified Plaintiff that its
application was being amended and that
the proposed mark was not being used to
protect the original film Deep Throat but
that the identification of goods/services to
be covered by the mark "is amended to
read as follows: pre-recorded videotapes

1 was on videotape, and those videotapes all
2 included copyright notices.

3 33. The copyright on the Deep
4 Throat® Motion Picture was registered in
5 March of 1979 in the name of Plaintiff and
6 a copyright certificate subsequently issued
7 in due course.

8 34. In sum, Plaintiff owns the
9 copyright on the Deep Throat® Motion
10 Picture and the trademark rights to the
11 Deep Throat® Mark and the Linda
12 Lovelace™ Mark.

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and DVD’s featuring adult entertainment
programs and movies.”

26. On September 13, 2005, The
Copyright Office issued Registration No.
2,993,913 for the mark “Deep Throat” for
use in pre-recorded videotapes and DVDs
featuring adult entertainment programs
and movies.” Thus, no Trademark for the
original film Deep Throat was ever issued
and does not exist.

27. Plaintiff also made a United
States Trademark application (85187559)
for the standard characters “Linda
Lovelace” on November 30, 2010. Once
again in Plaintiff certified that Arrow
Productions had exclusive use of the mark
and that no other person had the right to
use such mark in commerce either in the
identical form thereof or in such near
resemblance thereto as to be likely, when
used on or in connection with the goods of
such other person, is likely to cause
confusion. As Arrow Productions alleges
in its Complaint, Linda Lovelace was the

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stage name of Linda Boreman who appeared in *Deep Throat*. She died in 2002. Prior to making *Deep Throat*, Boreman appeared in two adult films under the name Linda Lovelace for other studios. Following *Deep Throat* she appeared in at least 17 other films using the name Linda Lovelace. By the time the trademark application was made, Boreman was dead and she had appeared in at least 19 other films, none of which were produced or owned by Arrow Productions, under the name “Linda Lovelace.” Once again the certification of Plaintiff in its trademark application that Arrow Productions had exclusive use of the words “Linda Lovelace” is completely false. Arrow merely distributes one of the 20 films that Boreman appeared in using the name “Linda Lovelace.” As addressed below, that trademark application/registration is subject to summary cancellation and Plaintiff is

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subject to criminal penalties for its false application.

28. On March 8, 2011, the Trademark Office took action to refuse the application for registration of the mark “Linda Lovelace” in regard to use for “downloadable films and movies featuring adult entertainment provided via a video-on-demand service.” The Trademark Office informed Plaintiff that “[r]egistration is refused because the applied-for mark, as used on the specimens of record, identifies only the name of a featured performer(s) on a sound or video recording; it does not function as a trademark to identify and distinguish applicant’s goods from those of others and to indicate the source of applicant’s goods/services. Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§1051-1052, 1127; *see In re Polar Music Int’l AB*, 714 F.2d 1567, 221 USPQ 315 (Fed. Cir. 1983); *In re Spierer*, 225 USPQ 693 (TTAB 1985); TMEP §§904.07(b), 1202.09(a). Sound or

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video recordings include musical and other performances presented in recorded or electronic form. *See* TMEP §1202.09(a). The applicant’s specimens only show use of the mark on one video recording.

29. The Trademark office also informed Plaintiff that it must provide proof that “the name (Linda Lovelace) is used on a series of sound/video recordings, and (b) the name is promoted and recognized by others as the source of the series of sound/video recordings. *See* TMEP §1202.09(a)-(a)(ii)(A); *cf. In re First Draft, Inc.*, 76 USPQ2d 1183, 1190 (TTAB 2005). Evidence of a series includes copies or photographs of at least two different CD/DVD covers or similar packaging for recorded works that show the name sought to be registered. TMEP §1202.09(a)(i); *see In re Polar Music*, 714 F.2d at 1572, 221 USPQ at 318. Evidence that the name is promoted and recognized by others as a source of the series includes advertising that promotes the name as the

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source of the series, third-party reviews showing use of the name by others to refer to the series, and/or declarations from the sound recording industry, retailers, and purchasers showing recognition of the name as an indicator of the source of a series of recordings. TMEP §1202.09(a)(ii)(A); *cf. In re First Draft*, 76 USPQ2d at 1191; *In re Scholastic, Inc.*, 23 USPQ2d 1774, 1777-78 (TTAB 1992).

30. The Trademark Office also informed Plaintiff that it must provide proof that “the name (Linda Lovelace) is used on a series of sound/video recordings, and (b) the performer controls the quality of the recordings and controls the use of the name, such that the name has come to represent an assurance of quality to the public. TMEP §1202.09(a)-(a)(ii), (a)(ii)(B); *see In re Polar Music*, 714 F.2d at 1572, 221 USPQ at 318; *In re First Draft*, 76 USPQ2d at 1189-90....Evidence of control over the quality of the recordings and use of the name includes

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licensing contracts or similar documentation. TMEP §1202.09(a)(ii)(B); *see In re Polar Music*, 714 F.2d at 1568-72, 221 USPQ at 316-18. However, if the sound/video recordings are recorded directly under applicant’s control, applicant may submit solely as evidence of control the following statement, verified with an affidavit or signed declaration under 37 C.F.R. §2.20: “The applicant produces the goods and controls their quality.”

31. Pursuant to 15 U.S.C. 1501(a)(3)(D) Plaintiff was required to certify that no other person had the right to use the mark Linda Lovelace in commerce and was required to identify any concurrent use by other competitors, the goods and the areas in which each competitor’s concurrent use existed and the periods of the competitor’s use. In its application, Plaintiff failed to identify the over 20 other competitors using the Linda Lovelace in regard to adult films

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- iv. The Devil in Miss Jones[®] 4.
- v. The Devil in Miss Jones[®] 5.
- vi. The Devil in Miss Jones[®] 6.

37. The “Devil in Miss Jones[®] Mark” is a common-law mark under Nevada law, and a mark registered with the United States Patent and Trademark Office, Registration Number 3483747. The Devil in Miss Jones[®] Mark is a famous trademark, as that term is defined and understood under NEV. REV. STAT. § 600.435 and 15 U.S.C. § 1125(c).

38. The Devil in Miss Jones[®] Motion Picture was made in or about 1973 by Pierre Productions, Inc. Approximately one year after The Devil in Miss Jones[®] Motion Picture was made, Pierre Productions, Inc. assigned the copyright to Plaintiff. It was filmed on color motion picture film. Plaintiff remains in possession of numerous prints of The

Film would later be shown – and collecting the proceeds. The prints of the Film were cleansed of all identifying information and they had absolutely no copyright notice. This was done intentionally in order to avoid obscenity prosecution.

34. On the opening night at the Pussycat, the Los Angeles Police Department (“LAPD”) was there trying to find the owner of the Film. LAPD officers questioned one of the checkers who directed them to Bernstene. Bernstene was arrested and the Film prints were seized from the Pussycat Theater. Under questioning, Bernstene refused to identify the owner of the Film – the Perraino brothers. The Film prints were examined by the LAPD. However, no U.S. Copyright notice or any other indicia of ownership appeared on the prints. It was Bernstene’s responsibility to make sure that there was none. After that first arrest, Arno bailed Bernstene out of jail and they

1 Devil in Miss Jones[®] Motion Picture,
2 which prints all were struck during or
3 shortly after 1973; each print includes the
4 required copyright notice, conspicuously
5 and consistent with all legal requirements.

6 39. For The Devil in Miss
7 Jones[®] Motion Picture, after it was made
8 and answer prints struck, Plaintiff
9 maintained control of all of those prints.
10 Each time The Devil in Miss Jones[®]
11 Motion Picture played in a theatre, the
12 print never left Plaintiff's control. Rather,
13 it was "four-walled," meaning that
14 Plaintiff's employees rented the theater,
15 sold tickets to the theatergoers, collected
16 the tickets and operated the projector.

17 40. Therefore the theatrical
18 exhibition of the motion picture by
19 Plaintiff did not constitute "publication"
20 under the Copyright Act, so no copyright
21 notice was required to be affixed to the
22 work.

23 41. When home videotape was
24 introduced in the late 1970s, Plaintiff

were also able to obtain the return of the
Film prints. Bernstene returned the Film
prints to the Pussycat Theater for the next
days' showing.

35. This process continued for
the first 3 weeks that the Film ran at the
Pussycat Theater. Each day for 3 weeks:
1) Bernstene was arrested; 2) the prints of
the Film were seized; 3) Arno posted bail;
4) the Film prints and Bernstene were
released; and 5) the prints were returned to
the Pussycat Theater by Professional
Services Corporation. The Film prints had
no copyright notice during this period.
Throughout this period, Bernstene also
refused to identify the Perraino brothers.

36. After about a month of this
initial run at the Pussycat Theater, the Film
was released to about 30 or 40 additional
theaters throughout the State of California.
Professional Services Company delivered
the prints to these theaters – again without
copyright notice. Professional Services
Company also supplied the checkers to

1 created videotapes of The Devil in Miss
2 Jones[®] Motion Picture , always containing
3 a copyright notice as required. By that
4 time, all authorized prints also contained a
5 copyright notice

6 42. The first time that Plaintiff
7 voluntarily relinquished control of any
8 copy of The Devil in Miss Jones[®] Motion
9 Picture was on videotape, and those
10 videotapes all included copyright notices.

11 43. The copyright on The Devil
12 in Miss Jones[®] Motion Picture was
13 registered in March of 1979.

14 44. In sum, Plaintiff owns the
15 copyright on The Devil in Miss Jones[®]
16 Motion Picture and the trademark rights to
17 The Devil in Miss Jones[®] Mark.

18 45. In early 2009, Defendants
19 caused thousands of copies of the Deep
20 Throat[®] Motion Picture using the Deep
21 Throat[®] Mark and the Linda Lovelace[™]
22 Mark and of The Devil in Miss Jones
23 using The Devil in Miss Jones[®] Mark, all
24 of which were made and distributed

count the audience numbers as they went
into the theaters. Bernstene collected the
money from the theaters in cash. He
counted it and delivered it to Arno and
Torchio who then delivered it to the
Perrainos. On at least one occasion,
Bernstene was required to deliver a
briefcase full of the Film proceeds to the
Perraino brothers in New York City.
Professional Services Company performed
these services for about 8 more months
during this theatrical distribution
throughout California. During this entire
period, the Film played without copyright
notice.

37. The first 2 of the obscenity
cases against Bernstene related to the Film
went to trial thereafter in Los Angeles
County Criminal Court. Bernstene was
represented by Los Angeles attorney Elliot
Abelson, Esq. in these 2 criminal cases. In
both cases Bernstene was found not guilty
and acquitted. He did not divulge the

1 throughout at least Nevada and the rest of
2 the United States, and possibly world-
3 wide.

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name of the owners of the Film – the Perraino brothers – at these trials.

38. In 1976, Bernstene was rewarded by the Perraino brothers for his loyalty with a video distribution license for the Film. Bernstene thereafter distributed the Film via home video under the license from the Perrainos through a company called TVX, Inc. (“TVX”). During this period, Bernstene and TVX distributed the Film without Copyright notice for the same reasons as with the theatrical Film prints – to avoid prosecution of the owners. Bernstene was arrested, indicted and tried in 4 obscenity lawsuits related to this video distribution.

39. The first two of this second round of obscenity lawsuits went forward in Los Angeles County Criminal Court in the 1978-1979 time frame. Bernstene was represented by his same attorney, Elliot Abelson, Esq., in the first case and acquitted. He was represented by noted Pasadena attorney Michael Mayock, Esq.

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in the second case and acquitted. Again, Bernstene did not divulge the name of the owners of the Film – the Perrainos – at these trials.

40. Thereafter Bernstene was tried in Federal District Court in Miami, Florida for video distribution of the Film under license from the Perrainos. Bernstene was represented by Robert Eugene Smith, Esq. in both of these trials and acquitted. Again, Bernstene did not divulge the name of the owners of the Film – the Perrainos brothers – at these trials.

41. Based upon these facts, the Film was found to be in the public domain by California District Court Judge James Otero in *V.C.X. Ltd. v. Pierre Productions*, Case No. CV-03-6660-SJO in 2004. The defendant in that case, Pierre Productions was the Copyright owner of the Film. Its Copyright Registration was made on December 12, 1973, which was within 5 years of its publication and is therefore presumed valid under U.S. Copyright law.

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42. Even if the Film were found not to be in the public domain, VCX is the Copyright owner of the Film. On July 31, 1979, VCX acquired by written contract all marketable rights in the Film from Pierre. The territory of the contract was “worldwide” and the grant was “without limitations of any kind or nature.” The term of the grant was for the full first term of copyright and any and all renewal terms so as to make the grant “to the fullest extent now or any time hereafter permitted by law.” Pierre also waived its right to terminate the transfer of copyrights to VCX pursuant to 17 U.S.C. §§ 203 and 304(c).

43. The July 31, 1979 written contract was recorded with the United States Copyright Office on January 1, 1984 at Volume 2051 Page 417-425.

44. The purported transfer of rights in Devil in Miss Jones from Louis Peraino to Arrow Productions was made on August 1, 1996 and was never recorded

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with the Copyright Office. In addition, there are no known transfers of rights, direct or otherwise, from Pierre Productions to Louis Peraino. Thus, the transfer is invalid as addressed below in the Statement of Issues of Law.

Local Rule 16-3(c)(6): Plaintiff’s statement of any other issues of fact or law deemed to be material.

At this time, Plaintiff does not believe there are any further issues of fact not described above. Issues of law will be addressed in Plaintiff’s trial brief.

Local Rule 16-3(c)(7): Defendant’s statement of any other issues of fact or law deemed to be material.

Defendants’ Statement of Issues of Law as to Deep Throat

1 In order to find publication of a film, all the court need find is “tangible copies of a work are sold, leased, loaned, given away, or otherwise made available to the general public.” *Dolman v. Agee*, 157 F.3d 708, 713 (9th Cir. 1998).

2 Pursuant to 37 C.F.R. § 201.7(c)(4), a Copyright Registration will be cancelled in the following instances: (ii) a work published before March 1, 1989 that was registered more than 5 years after the date of first publication and the deposit copy does not contain a statutory copyright notice; and (iii) the deposit copies of a work published before January 1, 1978 do not contain a copyright notice or the notice is defective.

1 “The problem with this argument according special treatment to
2 communicative products is that it causes the Lanham Act to conflict with the
3 law of copyright, which addresses that subject specifically. The right to copy,
4 and to copy without attribution, once a copyright has expired, like the right to
5 make an article whose patent has expired --including the right to make it in
6 precisely the shape it carried when patented--passes to the public.”

7 10 Arrow’s trademark claims should be summarily dismissed under the Ninth
8 Circuit holding in *Comedy III Prods., Inc. v. New Line Cinema*, 200 F.3d 593, 595-596 (9th
9 Cir. 2000), the seminal case in this area. In that case, plaintiff claimed that defendant’s
10 copying and display of a Three Stooges film violated trademarks in the “name, the characters,
11 the likeness, and overall ‘act’ of The Three Stooges.” The Ninth Circuit summarily affirmed
12 the district court’s dismissal of those claims holding as follows:

13 “[T]he footage at issue here was clearly covered by the Copyright Act, 17 U.S.C.
14 § 106, and the Lanham Act cannot be used to circumvent copyright law. If
15 material covered by copyright law has passed into the public domain, it cannot then
16 be protected by the Lanham Act without rendering the Copyright Act a nullity.”
17 See, e.g., *Smith v. Chanel, Inc.*, 402 F.2d 562, 565 (9th Cir. 1968).

18 11 Numerous cases have followed the holding in *Comedy III*. For example in
19 *Felix the Cat Prods. v. New Line Cinema*, 54 U.S.P.Q.2D (BNA) 1856 (C.D. Cal. 2000) the
20 court summarily dismissed a host of trademark claims similar to those raised by Arrow
21 stating as follows:

22 “Reading the allegations of plaintiff’s complaint broadly, it appears that plaintiff
23 presents a straight-forward copyright case. The complaint alleges a copyright
24 interest and unauthorized copying by defendants. In contrast, the complaint’s
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26 **Page 31**

27 **PLAINTIFF’S PROPOSED PRETRIAL ORDER**
28 **[Local Rules 16-3(c), 16(4) and 26-1(e)(5)]**

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1 multiple attempts at invoking trademark law would require the Court to extend
2 trademark law beyond commercial use and make actionable the expression of an
3 idea in a motion picture. The Ninth Circuit has cautioned against “expeditions of
4 trademark protection squarely into the domain of copyright law.” *Comedy III*, 200
5 F.3d at 596. The Court concludes that it must heed the Ninth Circuit’s warning
6 in this case.”

7 12 Pursuant to 15 U.S.C. 1501(a)(3)(D) a trademark applicant must certify “that
8 no other person has the right to use such mark in commerce either in the identical form
9 thereof or in such near resemblance thereto as to be likely, when used on or in connection
10 with the goods of such other person, to cause confusion, or to cause mistake, or to deceive,
11 except that, in the case of every application claiming concurrent use, the applicant shall--

12 (i) state exceptions to the claim of exclusive use; and

13 (ii) shall specify, to the extent of the verifier’s

14 knowledge--

15 (I) any concurrent use by others;

16 (II) the goods on or in connection with which and the
17 areas in which each concurrent use exists;

18 (III) the periods of each use; and

19 (IV) the goods and area for which the applicant desires
20 registration.”

21 13 Federal courts view the use of a mark by competitors in the industry of how the
22 public perceives the mark. *Classic Foods International Corp. v. Kettle Foods Inc.*, 486 F.
23 Supp. 2d 1181, 1190 (C.D. Cal 2007). Evidence of use by competitors in the industry is
24 “probative of generic use” because the more members of the public see the purported mark
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26 **Page 32**

27 **PLAINTIFF’S PROPOSED PRETRIAL ORDER**
28 **[Local Rules 16-3(c), 16(4) and 26-1(e)(5)]**

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1 used by competitors in the field the less likely they will be to identify the mark with one
2 particular producer. *Colt Defense LLC v. Bushmaster Firearms, Inc.*, 486 F. 3d 701, 706 (1st
3 Cir. 2007). Where hundreds of competitors have used the term “Deep Throat” in titles to
4 their films, in marketing of their films and in describing their films before and after
5 Plaintiff’s purported registration, the mark is not valid. *Krav Maga Assn. v. Yanilov*, 464 F.
6 Supp. 2nd 981, 987-989 (C.D. Cal. 2006).

7 14 A successful defendant in a trademark infringement case may recover its
8 attorney’s fees where “the plaintiff’s case is groundless, unreasonable, vexatious or pursued
9 in bad faith.” *Avery Dennison Corporation v. Sumpton*, 189 F. 3d 868, 881 (9th Cir. 1999);
10 *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792, 816 (9th Cir. 2003).

11 15 A prevailing defendant who has been wrongfully sued for trademark
12 infringement has only one source of restitution, recovery of attorneys fees. *Scotch Whiskey*
13 *Association v. Majestic Distilling Co.*, 958 F.2d 594, 600 (4th Cir. 1992). Where a plaintiff
14 pursues trademark claims that “have no reasonable basis,” a prevailing plaintiff is entitled
15 to recovery of legal fees. *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1156 (9th Cir. 2002).

16 16 Pursuant to 17 U.S.C. § 505, Costs and Attorney’s Fees: “In any civil action
17 under this title, the court in its discretion may allow the recovery of full costs by or against
18 any party other than the United States or an officer thereof. Except as otherwise provided by
19 this title, the court may also award a reasonable attorney’s fee to the prevailing party as part
20 of the costs.”

21 17 Attorneys’ fees and costs attributable to the defense of a meritless copyright
22 infringement claim are awardable under § 505 of the Copyright Act. See *Harris Custom*
23 *Builders, Inc. v. Hoffmeyer*, 140 F.3d 728, 730 (7th Cir. 1998).

1 18 “The legislative history of 17 U.S.C. § 505 provides no support for treating
2 prevailing plaintiffs and defendants differently with respect to the recovery of attorney’s
3 fees.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). The factors in determining an attorneys’
4 fees award must be “faithful to the purposes of the Copyright Act and are applied to
5 prevailing plaintiffs and defendants in an evenhanded manner.” *Id.* at 534 n.19.

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7 **Statement of Issues of Law as to Devil in Miss Jones**

8 19 Prior to 1978, publication of a film without copyright notice thrusts the film
9 into the public domain. 37 C.F.R. § 201.7(c)(4).

10 20 A purported assignee of a previously registered statutory copyright bears the
11 burden of proving its chain of title, because nothing in the registration certificate itself
12 establishes its right to claim through the original copyright claimant. *Religious Tech. Ctr. v.*
13 *Netcom On-Line Commun. Servs.*, 923 F. Supp. 1231, 1244 (C.D. Cal 1995); see also 3
14 Melville Nimmer & David Nimmer, *Nimmer on Copyright* § 12.11 [C] (2006).

15 21 In this case, Arrow Productions has the burden of establishing a chain of title
16 to Devil in Miss Jones originating from the registered copyright holder. Because transfers
17 of copyrights are required to be in writing under 17 U.S.C. § 204(a), the transfer(s) at issue
18 must be in writing. Unless Arrow Productions can meet its burden its claim of copyright
19 infringement should be dismissed. *Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.*,
20 923 F. Supp. 1231, 1244 (C.D. Cal 1995); see also 3 Melville Nimmer & David Nimmer,
21 *Nimmer on Copyright* § 12.11 [C] (2006).

22 22 Where the applicant seeks to enforce the trademark in an action in a district
23 court, the district court is empowered to order cancellation of the mark if it is shown that the
24 plaintiff did not have exclusive use of the mark at the time the application is made. *CG*

1 *Roxane LLC v. Fiji Water Co. LLC*, 569 F. Supp. 2d 1019, 1024 (N.D. Cal. 2008). In the *CG*
2 *Roxanne* case, the district court found that the defendant as well as third parties had widely
3 used the mark in question and ordered that the trademark be summarily cancelled and
4 judgment entered for the defendant. The court made its ruling based upon the finding that
5 “defendant provided a substantial amount of evidence regarding competitors’ use of
6 plaintiff’s mark, including almost two dozen competitors using the mark.” *Id.* at 1027.

7 23 Arrow’s various claims as to Devil in Miss Jones under trademark law are
8 squarely foreclosed by the Copyright Act preemption set forth at 17 U.S.C. § 301:

9 “On and after January 1, 1978, all legal or equitable rights that are equivalent to
10 any of the exclusive rights within the general scope of copyright as specified by
11 section 106 [17 USCS § 106] in works of authorship that are fixed in a tangible
12 medium of expression and come within the subject matter of copyright as specified
13 by sections 102 and 103 [17 USCS §§ 102 and 103], whether created before or
14 after that date and whether published or unpublished, are governed exclusively by
15 this title. Thereafter, no person is entitled to any such right or equivalent right in
16 any such work under the common law or statutes of any State.”

17 24 The Supreme Court has ruled that the ploy of Arrow trying to use trademark
18 laws to claim a copyright is futile. In *G. & C. Merriam Co. v. Syndicate Publishing Co.*, 237
19 U.S. 618, 623 (1915) the Supreme Court ruled as follows: “[a]fter the expiration of the
20 copyright of that character, it is well-settled that the further use of the name, by which the
21 publication was known and sold under the copyright, cannot be acquired by registration as
22 a trade-mark; for the name has become public property, and is not subject to such
23 appropriation.

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26 **Page 35**

27 **PLAINTIFF’S PROPOSED PRETRIAL ORDER**
28 **[Local Rules 16-3(c), 16(4) and 26-1(e)(5)]**

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1 court summarily dismissed a host of trademark claims similar to those raised by Arrow
2 stating as follows:

3 “Reading the allegations of plaintiff’s complaint broadly, it appears that plaintiff
4 presents a straight-forward copyright case. The complaint alleges a copyright
5 interest and unauthorized copying by defendants. In contrast, the complaint’s
6 multiple attempts at invoking trademark law would require the Court to extend
7 trademark law beyond commercial use and make actionable the expression of an
8 idea in a motion picture. The Ninth Circuit has cautioned against “expeditions of
9 trademark protection squarely into the domain of copyright law.” *Comedy III*, 200
10 F.3d at 596. The Court concludes that it must heed the Ninth Circuit’s warning
11 in this case.”

12 28 Pursuant to 15 U.S.C. 1501(a)(3)(D) a trademark applicant must certify “that
13 no other person has the right to use such mark in commerce either in the identical form
14 thereof or in such near resemblance thereto as to be likely, when used on or in connection
15 with the goods of such other person, to cause confusion, or to cause mistake, or to deceive,
16 except that, in the case of every application claiming concurrent use, the applicant shall--

17 (i) state exceptions to the claim of exclusive use; and

18 (ii) shall specify, to the extent of the verifier’s

19 knowledge--

20 (I) any concurrent use by others;

21 (II) the goods on or in connection with which and the
22 areas in which each concurrent use exists;

23 (III) the periods of each use; and
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26 **Page 37**

27 **PLAINTIFF’S PROPOSED PRETRIAL ORDER**
28 **[Local Rules 16-3(c), 16(4) and 26-1(e)(5)]**

Case Number 2:09-cv-0737-PMP-PAL

1 (IV) the goods and area for which the applicant desires
2 registration.”

3 29 An application for Trademark will be refused where it identifies only the name
4 of a featured performer(s) on a sound or video recording, it does not function as a trademark
5 to identify and distinguish applicant’s goods from those of others and to indicate the source
6 of applicant’s goods/services. Trademark Act Sections 1, 2 and 45, 15 U.S.C. §§1051-1052,
7 1127; *see In re Polar Music Int’l AB*, 714 F.2d 1567, 221 USPQ 315 (Fed. Cir. 1983); *In re*
8 *Spirer*, 225 USPQ 693 (TTAB 1985); TMEP §§904.07(b), 1202.09(a).

9 30 A Trademark applicant, where the mark is the name of a performer, must
10 provide proof that “the name is used on a series of sound/video recordings, and (b) the name
11 is promoted and recognized by others as the source of the series of sound/video recordings.”
12 *See* TMEP §1202.09(a)-(a)(ii)(A); *cf. In re First Draft, Inc.*, 76 USPQ2d 1183, 1190 (TTAB
13 2005). The applicant must provide evidence that the name is promoted and recognized by
14 others as a source of the series includes advertising that promotes the name as the source of
15 the series, third-party reviews showing use of the name by others to refer to the series, and/or
16 declarations from the sound recording industry, retailers, and purchasers showing recognition
17 of the name as an indicator of the source of a series of recordings. TMEP
18 §1202.09(a)(ii)(A); *cf. In re First Draft*, 76 USPQ2d at 1191; *In re Scholastic, Inc.*, 23
19 USPQ2d 1774, 1777-78 (TTAB 1992).

20 31 A Trademark applicant, where the mark is the name of a performer, must
21 provide proof that “the name is used on a series of sound/video recordings, and (b) the
22 performer controls the quality of the recordings and controls the use of the name, such that
23 the name has come to represent an assurance of quality to the public.” TMEP §1202.09(a)-
24 (a)(ii), (a)(ii)(B); *see In re Polar Music*, 714 F.2d at 1572, 221 USPQ at 318; *In re First*

1 *Draft*, 76 USPQ2d at 1189-90....Evidence of control over the quality of the recordings and
2 use of the name includes licensing contracts or similar documentation. TMEP
3 §1202.09(a)(ii)(B); see *In re Polar Music*, 714 F.2d at 1568-72, 221 USPQ at 316-18.

4 32 A successful defendant in a trademark infringement case may recover its
5 attorney's fees where "the plaintiff's case is groundless, unreasonable, vexatious or pursued
6 in bad faith." *Avery Dennison Corporation v. Sumpton*, 189 F. 3d 868, 881 (9th Cir. 1999);
7 *Mattel Inc. v. Walking Mountain Productions*, 353 F.3d 792, 816 (9th Cir. 2003).

8 33 A prevailing defendant who was been wrongfully sued for trademark
9 infringement has only one source of restitution, recovery of attorneys fees. *Scotch Whiskey*
10 *Association v. Majestic Distilling Co.*, 958 F.2d 594, 600 (4th Cir. 1992). Where a plaintiff
11 pursues trademark claims that "have no reasonable basis," a prevailing plaintiff is entitled
12 to recovery of legal fees. *Cairns v. Franklin Mint Co.*, 292 F.3d 1139, 1156 (9th Cir. 2002).

13 34 Pursuant to 17 U.S.C. § 505, Costs and Attorney's Fees: "In any civil action
14 under this title, the court in its discretion may allow the recovery of full costs by or against
15 any party other than the United States or an officer thereof. Except as otherwise provided by
16 this title, the court may also award a reasonable attorney's fee to the prevailing party as part
17 of the costs."

18 35 Attorneys' fees and costs attributable to the defense of a meritless copyright
19 infringement claim are awardable under § 505 of the Copyright Act. See *Harris Custom*
20 *Builders, Inc. v. Hoffmeyer*, 140 F.3d 728, 730 (7th Cir. 1998).

21 36 "The legislative history of 17 U.S.C. § 505 provides no support for treating
22 prevailing plaintiffs and defendants differently with respect to the recovery of attorney's
23 fees." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994). The factors in determining an attorneys'
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1 fees award must be “faithful to the purposes of the Copyright Act and are applied to
2 prevailing plaintiffs and defendants in an evenhanded manner.” *Id.* at 534 n.19.

3 37 A transfer of copyright ownership, other than by operation of law, is not valid
4 unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing
5 and signed by the owner of the rights conveyed or such owner’s duly authorized agent. 17
6 U.S.C. §204.

7 38 As between two conflicting transfers, the one executed first prevails if it is
8 recorded, in the manner required to give constructive notice under subsection (c), within one
9 month after its execution in the United States or within two months after its execution outside
10 the United States, or at any time before recordation in such manner of the later transfer.
11 Otherwise the later transfer prevails if recorded first in such manner, and if taken in good
12 faith, for valuable consideration. 17 U.S.C. §204(d).

13
14 **Local Rule 16-3(c)(4): A statement of the contested issues of fact in the case as**
15 **agreed upon by the parties.**

16 1. Whether the motion picture Deep Throat was published without a copyright
17 notice and therefore is in the public domain.

18 2. Whether Plaintiff owns the copyright to Deep Throat.

19 3. Whether the motion picture Devil in Miss Jones was published without a
20 copyright notice and therefore is in the public domain.

21 4. Whether Plaintiff owns the copyright to Devil in Miss Jones.

22 5. Whether Deep Throat[®] is an enforceable trademark owned by Plaintiff.

23 6. Whether Devil in Miss Jones[®] is an enforceable trademark owned by Plaintiff.

24 7. Whether Linda Lovelace[®] is an enforceable trademark owned by Plaintiff.

1 8. What is the appropriate measure of damages?
2

3 **Local Rule 16-3(c)(5): A statement of the contested issues of law in the case as**
4 **agreed upon by the parties.**

5 1. What is the identity of the owner of the copyright to DEEP THROAT?

6 2. Is the copyright to the motion picture DEEP THROAT valid?

7 3. What is the identity of the owner of the copyright to DEVIL IN MISS JONES?

8 4. Is the copyright to the motion picture DEVIL IN MISS JONES valid?

9 5. Does Plaintiff Arrow Productions, Ltd. have the right to enforce the trademark
10 DEEP THROAT®?

11 6. Does Plaintiff Arrow Productions, Ltd. have the right to enforce the trademark
12 LINDA LOVELACE™?

13 7. Does Plaintiff Arrow Productions, Ltd. have the right to enforce the trademark
14 DEVIL IN MISS JONES®?

15 8. What is the appropriate measure of damages? The amount of damages.
16 Plaintiff has the right to elect between statutory and actual damages at any time before
17 judgment.

18 Note: Plaintiff does not believe that the issues of attorneys fees and costs are relevant
19 to the pretrial order. However, Defendants insist on including the issue.

20 9. Whether Plaintiff is entitled to attorneys fees as a prevailing party.

21 10. Whether Plaintiff's claim of Trademark infringement in regard to Deep Throat
22 is so lacking in merit as to result in the award of attorneys' fees and costs to Defendants.
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1 11. Whether Plaintiff's claim of Trademark infringement in regard to Linda
2 Lovelace is so lacking in merit as to result in the award of attorneys' fees and costs to
3 Defendants.

4 12. Whether Plaintiff's claim of Trademark infringement in regard to Devil in Miss
5 Jones is so lacking in merit as to result in the award of attorneys' fees and costs to
6 Defendants.

7 13. Whether Plaintiff's claim of Copyright infringement in regard to Deep Throat
8 is so lacking in merit as to result in the award of attorneys' fees and costs to Defendants.

9 14. Whether Plaintiff's claim of Copyright infringement in regard to Devil in Miss
10 Jones is so lacking in merit as to result in the award of attorneys' fees and costs to
11 Defendants.

12
13 **Local Rule 16-3(c)(8): Lists or schedules of all exhibits that will be offered in**
14 **evidence by the parties at the trial. Such lists or schedules shall describe the**
15 **exhibits sufficiently for ready identification.**

16 Note: Because discovery is not complete and because the parties have not exchanged
17 all of the exhibits, each side reserves the right to interpose objections to the exhibits of the
18 other once discovery is complete and exhibits have been exchanged. The parties will
19 accomplish this within 14 days after the conclusion of the impending settlement conference.

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21 **(A) The exhibits the parties agree can be admitted at trial.**

22 None at this time; however the parties will confer and arrive at a stipulation within 14
23 days of the conclusion of the settlement conference.

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(B) Exhibits to which objection is made and state the grounds therefor.

Plaintiff's Exhibits:

1. Filings from the United States Copyright Office concerning the motion picture DEEP THROAT.
2. Filings from the United States Copyright Office concerning the motion picture DEVIL IN MISS JONES.
3. Trademark registration in the United States Patent and Trademark Office for the mark DEEP THROAT®.
4. Trademark registration with the Nevada Secretary of State for the mark DEEP THROAT®.
5. Trademark registration in the United States Patent and Trademark Office for the mark LINDA LOVELACE®.
6. Trademark registration with the Nevada Secretary of State for the mark LINDA LOVELACE®.
7. Copies of DEEP THROAT purchased by Plaintiff and sold by Defendant V.C.X., Ltd.
8. Copies of DEVIL IN MISS JONES purchased by Plaintiff and sold by Defendant V.C.X., Ltd.
9. Financial records of Defendant V.C.X., Ltd. produced in response to Plaintiff's discovery request concerning the exploitation of the copyrights and trademarks associated with the motion picture DEEP THROAT and establishing the amount of income generated by Defendant V.C.X., Ltd. therefrom.
10. Financial records of Defendant V.C.X., Ltd. produced in response to Plaintiff's discovery request concerning the exploitation of the copyrights and trademarks associated

1 with the motion picture DEVIL IN MISS JONES and establishing the amount of income
2 generated by Defendant V.C.X., Ltd. therefrom.

3 11. Videotapes of DEEP THROAT.

4 12. Videotape of DEVIL IN MISS JONES.

5 13. Film print of DEVIL IN MISS JONES.

6 14. Documents establishing the chain of title to DEEP THROAT.

7 15. Documents establishing the chain of title to DEVIL IN MISS JONES.

8 16. Letter concerning Plymouth Distributors, Inc.

9 17. Ruling of United States District Court for the Central District of California in
10 2005, establishing the copyright ownership of DEVIL IN MISS JONES.

11 Plaintiff is unaware what, if any, objections that the Defendants will advance to any
12 of the above.

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14 **Defendants' Exhibits:**

15 1. Nine page printout dated May 26, 2011 from the Internet Adult Film Data Base
16 listing films using the term "Deep Throat;"

17 2. Printouts from various adult film web sites offering for sale numerous films
18 using the term "Deep Throat" in their titles and in advertng;

19 3. May 26, 2011 printout from United States Copyright Office records of
20 registered films and other works using the term "Deep Throat;"

21 4. Copy of Page 449 of The X-Rated Videotape Star Index Volume III by Patrick
22 Riley listing adult films starring Linda Lovelace;

23 5. May 26, 2011 printout from United States Copyright Office records of
24 registered films and other works using the term "Devil in Miss Jones;"

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26 **Page 44**

27 **PLAINTIFF'S PROPOSED PRETRIAL ORDER**
28 **[Local Rules 16-3(c), 16(4) and 26-1(e)(5)]**

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1 15. Copy of New Jersey Secretary of State Corporate Record No. 7094240000
2 related to Plymouth Distributors, Inc. certifying that it was first formed by Joseph Perraino
3 on January 9, 1975;

4 16. Plaintiff's June 10, 2004 Application for Federal Trademark Registration of
5 term "Deep Throat;"

6 17. January 11, 2005 notice from Trademark Office refusing registration of term
7 "Deep Throat;"

8 18. February 17, 2005 response of Plaintiff to Trademark Office notice of refusal
9 of registration for term "Deep Throat;"

10 19. February 25, 2005 Trademark Office amendment of application for registration
11 of "Deep Throat;"

12 20. October 27, 2005 United States Trademark Registration No. 2,993,913 for
13 "Deep Throat" issued to Arrow Productions;

14 21. February 23, 2009 Nevada Trademark Registration Form No. 20090169769-49
15 made by Arrow Productions for the mark "Deep Throat;"

16 22. September 27, 2007 application for Federal Registration of term "Devil in Miss
17 Jones" made by Plaintiff;

18 23. Various communications between the Trademark Office and Plaintiff related
19 to defects in application for "Devil in Miss Jones;"

20 24. August 12, 2008 Federal Trademark Registration for term "Devil in Miss
21 Jones" issued to Plaintiff;

22 25. Notice of abandonment issued by Trademark Office for Application No.
23 78869507 for registration of term "Deep Throat;"

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27 **PLAINTIFF'S PROPOSED PRETRIAL ORDER**
28 **[Local Rules 16-3(c), 16(4) and 26-1(e)(5)]**

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1 26. United States Trademark application No. 85187559 for the standard characters
2 “Linda Lovelace” made by Plaintiff on November 30, 2010;

3 27. Various communications between Trademark Office and Plaintiff regarding
4 Trademark application No. 85187559 for the standard characters “Linda Lovelace;”

5 28. March 17, 2009 Nevada Trademark Registration Form No. 2090259234-96
6 made by Arrow Productions for the mark “Devil in Miss Jones:”

7 29. August 29, 1996 Agreement between Louis Peraino and Arrow Productions
8 transferring the rights that Peraino possessed to certain films;

9 30. Arrow Production Profit and Loss Statements from 1998 through 2010;

10 31. Series of 3 cease and desist letters issued on January 8, 2008 and December 8,
11 2003 on the part of Arrow Productions related to the Trademark “Deep Throat:”

12 32. Arrow Production sales records for the film Devil in Miss Jones from 2006
13 through 2010;

14 33. Arrow Production sales records for the film Deep Throat from 2006 through
15 2010;

16 34. Series of contracts recorded with the United States Copyright Office
17 transferring rights in the film Deep Throat;

18 35. Series of contracts recorded with the United States Copyright Office
19 transferring rights in the film Devil in Miss Jones;

20 36. Copies of videotapes and DVD along with box covers/sleeves for film Devil
21 in Miss Jones offered for sale by VCX since 1979;

22 37. Various correspondence between Plaintiff and Defendants notifying Plaintiff
23 of intent to seek legal fees for frivolous actions related to this matter.

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26 **Page 47**

27 **PLAINTIFF’S PROPOSED PRETRIAL ORDER**
28 **[Local Rules 16-3(c), 16(4) and 26-1(e)(5)]**

Case Number 2:09-cv-0737-PMP-PAL

1 **Defendants' Witnesses:**

2 1 David Sutton, VCX, Inc., Phone (702) 638-4321, 3430 Precision Blvd. N. Las
3 Vegas, Nevada 89032;

4 2 Charles Bernestene, 631 Las Vegas Blvd., South Las Vegas, NV 89101, Phone
5 702-453-7938;

6 3 Raymond Pistol, 631 Las Vegas Blvd., South Las Vegas, NV 89101, Phone
7 702-453-7938;

8 4 Bob Weir, Government Liaison Services, 200 N. Glebe Road, Suite 321,
9 Arlington, VA 22203, Phone (703) 525-8451; Plaintiff objects to this witness for
10 Defendants' failure to make timely disclosure pursuant to FED. R. CIV. PROC. 26(a)(1);

11 5 James Bochis, address and phone number presently unknown; Plaintiff objects
12 to this witness for Defendants' failure to make timely disclosure pursuant to FED. R. CIV.
13 PROC. 26(a)(1);

14 6 Discovery is continuing and Defendants reserve the right to identify and call
15 as additional witnesses persons who may be identified during discovery or whose testimony
16 may be required in regard to issues raised in said discovery; Plaintiff objects to any further
17 defense witness for Defendants' failure to make timely disclosure pursuant to FED. R. CIV.
18 PROC. 26(a)(1) except to the extent that the identity of a new witness becomes first known
19 to the defendant during the remaining depositions of Raymond Pistol or Beau Buchanan.

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(12) A list of motions in limine filed, if any.

Because this is to be a court trial, neither party anticipates filing any motion in limine.

Dated: May 31, 2011.

Respectfully Submitted,

CLYDE DeWITT
LAW OFFICES OF CLYDE DeWITT, APC

ALLEN LICHTENSTEIN, ESQ.

By: /s/ Clyde DeWitt
Clyde DeWitt

Counsel for Plaintiff,
Arrow Productions, Ltd.

TIMOTHY C. RILEY
LAW OFFICES OF TIMOTHY C. RILEY

By: /s/ Timothy C. Riley
Timothy C. Riley

Counsel for Defendants,
VCX, Ltd. and David Sutton