

1 Cindy A. Cohn, Esq. (SBN 145997)
Fred von Lohmann, Esq. (SBN 192657)
2 Jason Schultz, Esq. (SBN 212600)
ELECTRONIC FRONTIER FOUNDATION
3 454 Shotwell Street
San Francisco, CA 94110
4 Telephone: (415) 436-9333 x108
Facsimile: (415) 436-9993

5 Attorneys for Plaintiff
6 JIBJAB MEDIA INC.

7
8 **UNITED STATES DISTRICT COURT**
9 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

10 JIBJAB MEDIA INC.,)

11 Plaintiff,)

12 v.)

13 LUDLOW MUSIC, INC.,)

14 Defendant.)

No. _____

**COMPLAINT FOR COPYRIGHT
MISUSE AND FOR DECLARATORY
RELIEF OF NON-INFRINGEMENT OF
COPYRIGHT**

(Jury Trial Demanded)

15)
16)
17)
18)
19 1. This is a civil action seeking damages and relief for copyright misuse and for
20 declaratory relief of non-infringement of copyright.

21 2. This case arises out of legal threats issued by the Defendant Ludlow Music, Inc.
22 (“Ludlow”) against Plaintiff JibJab Media Inc. (“JibJab”), namely threats of copyright litigation
23 made against Plaintiff and Plaintiff’s web hosting service in an attempt to stifle public access to
24 and appreciation of Plaintiff’s artistic expression. These threats have jeopardized Plaintiff’s First
25 Amendment-protected right to free speech and its right to disseminate that speech via its Internet
26 hosting facilities. Plaintiff therefore seeks a judgment that its artistic expression is protected by the
27 First Amendment and copyright’s fair use doctrine, before that expression is silenced by
28 Defendant’s threats.

1 **PARTIES**

2 3. Plaintiff JibJab Media Inc. (“JibJab”) is a Delaware corporation with its principal
3 place of business in the State of California, county of Los Angeles.

4 4. On information and belief, Ludlow Music, Inc. (“Ludlow”) is a New York
5 corporation with its principal place of business in New York, New York.

6 **JURISDICTION AND VENUE**

7 5. This court has subject matter jurisdiction over the federal claims pursuant to the
8 Copyright Act (17 U.S.C. §§ 101 et seq.), 28 U.S.C. §§ 1331 and 1338 and the Declaratory
9 Judgment Act (28 U.S.C. § 2201).

10 6. Plaintiff is informed, believes and thereon alleges that Defendant has sufficient
11 contacts with this district generally and, in particular, with the events herein alleged, that
12 Defendant is subject to the exercise of jurisdiction of this court over its person and that venue is
13 proper in this judicial district pursuant to 28 U.S.C. § 1391.

14 7. Plaintiff is informed, believes and thereon alleges that, based on the places of
15 businesses of the Plaintiff and Defendant, Plaintiff’s hosting service and/or on the national reach of
16 Defendant, a substantial part of the events giving rise to the claims herein alleged occurred in this
17 district and that Defendant and/or an agent of Defendant, may be found in this district.

18 **FACTUAL ALLEGATIONS RELATED TO ALL COUNTS**

19 **JIBJAB MEDIA**

20 8. JibJab Media Inc. is a small partnership between two brothers, Gregg and Evan
21 Spiridellis, located in Santa Monica, California. JibJab creates various artistic products for public
22 consumption, from children’s books and toys to animated cartoons on its website,
23 <http://www.jibjab.com>.

24 9. JibJab Media hosts its cartoons on computer servers run by AtomShockwave’s
25 hosting service AtomFilms, which is located in this district in San Francisco, California. It is
26 through AtomFilms’ San Francisco-based servers and Internet connections that the public accesses
27 JibJab’s work.

28 10. On July 9, 2004, JibJab released its most recent web animation, “This Land,” a

1 parody of the classic Woody Guthrie song “This Land Is Your Land” (“the Guthrie Composition”).
2 The animation features caricatures of President George W. Bush and Democratic presidential
3 candidate John Kerry slinging insults at one another to the tune of the Guthrie Composition. The
4 insults and the surrounding context parody the themes of Guthrie’s original version along with the
5 candidates.

6 11. The reaction to the “This Land” animation has been overwhelming. Hundreds of
7 thousands of Internet users have watched the video, passing links to its location onto friends and
8 colleagues via email and word-of-mouth. The video raises a number of important issues about
9 America, its democracy, and its politics in a humorous manner. The importance of these issues
10 cannot be underestimated, especially in light of the upcoming presidential election. In fact, the
11 video’s message has also become so newsworthy as to merit appearances on news and talk outlets
12 such as Fox News, CNN, *NBC Nightly News*, *Larry King Live*, *ABC World News Tonight with*
13 *Peter Jennings*, *The Today Show*, and *The Tonight Show with Jay Leno*.

14 12. On July 20, 2004, Kathryn Ostien, Director of Copyright, Licensing & Royalties for
15 Defendant, sent a certified letter to Plaintiff accusing it and its “This Land” video of infringing the
16 copyright in the Guthrie Composition. See Exhibit A. Specifically, the letter alleged:

17 It has come to our attention that you are using an unauthorized parody version of the
18 copyrighted work entitled THIS LAND IS YOUR LAND and have broadcast this
19 parody illegally on your website Jibjab.com.

20 ...

21 Use of this copyrighted composition without license or permission is unauthorized
22 and is an infringement under the copyright laws of the United States.

23 ...

24 Ludlow Music, Inc. reserves all rights under United States Copyright Laws in
25 connection with this unlawful use and will exercise its rights to every extent of the
26 law.

27 13. After Plaintiff’s counsel responded to this letter the following day, Plaintiff received
28 a second letter from Defendant’s litigation counsel, Sonnenschein, Nath & Rosenthal on July 23,
2004, attached as Exhibit B. In relevant part, the letter stated:

1 We are informed that Jib Jab Media, Inc. (“Jib Jab”) created and widely broadcast
2 via the internet a derivative version of the Infringed [Guthrie] Composition.... As
3 such, your clients’ conduct constitutes a blatant and willful copyright infringement
4 which has caused, and continues to cause, our client substantial injury.

5 ...

6 We therefore demand that Jib Jab immediately remove the Unauthorized Movie
7 from all associated web-sites, and cease and desist from exploiting the work in any
8 way.... In the event that we do not receive confirmation by July 30, 2004 that Jib
9 Jab will comply with the foregoing, we may conclude that all steps short of
10 litigation are exhausted.

11 14. As noted above, JibJab contracts with AtomShockwave to use its AtomFilms.com
12 website to host its artistic web material, including the “This Land” video.

13 15. On July 26, 2004, litigation counsel for Defendant sent yet another cease-and-desist
14 letter regarding the “This Land” video, this time to AtomShockwave. This letter also referred to
15 the Guthrie Composition as “the Infringed Composition” and accused AtomShockwave of conduct
16 constituting “blatant and willful copyright infringement.” Unless AtomShockwave conceded to
17 Defendant’s demands by July 30, 2004, Ludlow’s litigation counsel stated it “may conclude that all
18 steps short of litigation have been exhausted.” The letter to AtomShockwave is attached hereto as
19 Exhibit C.

20 16. The July 20, July 23, and July 26, individually and collectively, caused great
21 apprehension and concern to JibJab that copyright litigation against it and its website hosting
22 service was imminent, especially in light of the July 30, 2004 litigation deadline mentioned in all
23 letters.

24 **COUNT I: DECLARATORY RELIEF OF NON-INFRINGEMENT**

25 17. Plaintiff repeats and incorporates herein by reference the allegations in the
26 preceding paragraphs of this complaint.

27 18. JibJab contends that the creation and dissemination of its “This Land” video is a fair
28 use of the Guthrie Composition and therefore, not an infringement of the copyright in that
composition. Among other reasons, JibJab believes that the video is a transformative parody of the
Guthrie Composition and not a substitute for the original. Ludlow, on the other hand, believes
JibJab’s parody to be an infringement.

1 19. JibJab is informed and believes that the copyright on the Guthrie Composition has
2 expired or is invalid.

3 20. JibJab is informed and believes that any copyright held in the Guthrie Composition
4 is extremely limited because the majority of the melody of the Guthrie Composition is a derivative
5 work of a song entitled “When the World’s On Fire” recorded by the Carter Family in 1930, ten
6 years before the Guthrie Composition was written.

7 21. JibJab is currently distributing the “This Land” video and intends to continue doing
8 so for as long as there is public interest, at least through the November, 2004 presidential election.

9 22. Thus, there is a real and actual controversy between Plaintiff and Defendant
10 regarding whether the creation and/or dissemination of the “This Land” video constitutes copyright
11 infringement.

12 23. Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 and Federal
13 Rule of Civil Procedure 57 for the purpose of determining and adjudicating questions of actual
14 controversy between the parties.

15 24. Plaintiff contends that creation and distribution of the “This Land” video is lawful,
16 consistent with the Copyright Act of the United States of America, including those laws prohibiting
17 infringement, laws protecting fair use and the First Amendment to the United States Constitution,
18 and judicial decisions construing such laws, doctrines, and provisions.

19 25. Wherefore, Plaintiff requests that the court determine and adjudge that the “This
20 Land” video is a non-infringing fair use of the Guthrie Composition and/or that the Guthrie
21 Composition is no longer protected by copyright and is part of the public domain.

22 **COUNT II: MISUSE OF COPYRIGHT**

23 26. Plaintiff repeats and incorporates herein by reference the allegations in the
24 preceding paragraphs of this complaint.

25 27. Plaintiff is informed and believes and based upon such information and belief
26 alleges that Defendant’s motivation in demanding the removal of the “This Land” video from the
27 Internet was not to protect any market for the Guthrie Composition as an allegedly copyrighted
28 work or any other interest protected by copyright law, but instead to stifle free speech and artistic

1 commentary on the Guthrie Composition.

2 28. Plaintiff is informed and believes and based upon such information and belief
3 alleges that Ludlow is using threats of copyright infringement to restrain JibJab’s free speech and
4 artistic expression and as leverage to force its website service provider to restrict this speech from
5 public access on the Internet.

6 29. Plaintiff is informed and believes and based upon such information and belief
7 alleges that Ludlow knew or should have know that creation and dissemination of the “This Land”
8 video constitutes a fair use of copyrighted material protected under 17 U.S.C. § 107, *et seq.* or is
9 otherwise noninfringing.

10 30. Ludlow engaged in the misuse of its copyright, including in the letters of July 20,
11 23, and 26, by claiming that the creation and dissemination of the “This Land” video constituted
12 copyright infringement when it knew that they did not.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, the Plaintiff prays for judgment for itself and all others similarly situated as
15 follows:

- 16 1. A declaratory judgment that as it relates to the Defendant and the Guthrie
17 Composition that:
- 18 a) Creation of the “This Land” video is a non-infringing or fair use and therefore
19 lawful under the Copyright Laws of the United States;
 - 20 b) Dissemination of the “This Land” video is a non-infringing or fair use and
21 therefore lawful under the Copyright Laws of the United States;
 - 22 c) Hosting or providing colocation services for the “This Land” video is lawful;
23 and
 - 24 d) Providing Internet services to others who host websites that host the “This
25 Land” video is lawful.
- 26 2. The Guthrie Composition is no longer protected by copyright and/or is part of the
27 public domain.
- 28 3. Damages for copyright misuse according to proof;

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- 4. Judgment barring Defendants from enforcing any copyright in the Guthrie Composition unless and until their misuse has ceased;
- 5. Attorneys' fees pursuant to 17 U.S.C. § 505, other provisions of the Copyright Act, or otherwise as allowed by law;
- 6. Plaintiff's costs and disbursements within; and
- 7. Such other and further relief as the Court shall find just and proper.

Plaintiffs hereby request a jury trial for all issues triable by jury including, but not limited to, those issues and claims set forth in any amended complaint or consolidated action.

DATED: July 29, 2004

By _____
Cindy A. Cohn, Esq. (SBN 145997)
Fred von Lohmann, Esq. (SBN 192657)
Jason Schultz, Esq. (SBN 212600)
ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
San Francisco, CA 94110
Telephone: (415) 436-9333 x112
Facsimile: (415) 436-9993

Attorneys for Plaintiff
JIBJAB MEDIA INC.