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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

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9 AFL Telecommunications LLC,
10 Plaintiff,

No. CV11-1086-PHX-DGC

ORDER

11 vs.

12 SurplusEQ.com, Inc., Tech Sales, LLC, and
13 Daniel Parsons and Jane Doe Parsons,
14 Defendant.

15 On January 27, 2012, Plaintiff AFL Telecommunications LLC (“AFL”) filed a
16 First Amended Complaint (“FAC”). Doc. 55. Defendants have filed a motion to dismiss
17 Count 4. Doc. 56. Plaintiff has responded (Doc. 58) and Defendants have replied
18 (Doc. 59). Neither party has requested oral argument. For the reasons that follow, the
19 Court will deny the motion.

20 **I. Background.**

21 AFL is a wholly-owned subsidiary of Fujikura Ltd. (“Fujikura”), a Japanese
22 manufacturer of fiber optic equipment. One of Fujikura’s products is a fusion splicer, a
23 device that it sells under the FUJIKURA trademark. AFL is the exclusive North
24 American licensee for Fujikura fusion splicers. Defendants sell fusion splicers and
25 related equipment online. Each Fujikura fusion splicer contains operating software that is
26 installed on the splicers during the manufacturing and licensed in the country to which it
27 is shipped.

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1 **II. Standard.**

2 When analyzing a complaint for failure to state a claim to relief under
3 Rule 12(b)(6), the well-pled factual allegations are taken as true and construed in the light
4 most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th
5 Cir. 2009) (citation omitted). Legal conclusions couched as factual allegations are not
6 entitled to the assumption of truth, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009), and
7 therefore are insufficient to defeat a motion to dismiss for failure to state a claim, *In re*
8 *Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2010) (citation omitted). To avoid a
9 Rule 12(b)(6) dismissal, the complaint must plead “enough facts to state a claim to relief
10 that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This
11 plausibility standard “is not akin to a ‘probability requirement,’ but it asks for more than
12 a sheer possibility that a defendant has acted unlawfully.” *Iqbal*, 129 S. Ct. at 1949
13 (quoting *Twombly*, 550 U.S. at 556). “[W]here the well-pleaded facts do not permit the
14 court to infer more than the mere possibility of misconduct, the complaint has alleged –
15 but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” *Id.* at 1950 (quoting Fed.
16 R. Civ. P. 8(a)(2)).

17 **III. Analysis.**

18 To establish a prima facie case of copyright infringement, a plaintiff must show
19 (1) ownership of the allegedly infringed material and (2) a violation of at least one
20 exclusive right granted to copyright holders under 17 U.S.C. § 106. *A & M Records v.*
21 *Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001). AFL alleges that Defendants
22 distributed fusion splicers in the United States which incorporated the Fujikura operating
23 software. Defendants make two primary arguments to support dismissal of this claim:
24 (1) AFL has not adequately alleged ownership of a valid copyright on the operating
25 software at the time of the alleged infringement, and (2) AFL has not adequately alleged
26 how Defendants infringed the copyright.

27 **A. Ownership.**

28 AFL’s claim of ownership arises from a combination of (1) Fujikura’s ownership

1 of a copyright and (2) Fujikura’s licensing to AFL of the exclusive right to distribute the
2 copyrighted work in the United States. A work is copyrightable under the Copyright Act
3 when it is original and fixed in a tangible medium. 17 U.S.C. § 102(a). “Original, as the
4 term is used in copyright, means only that the work was independently created by the
5 author (as opposed to copied from other works), and that it possess at least some minimal
6 degree of creativity.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345
7 (1991). AFL alleges that all versions of the operating software since its creation in 2008
8 “constitute original works of authorship that were created by Fujikura employees, who
9 wrote the code constituting the software in Japan and within the scope of their
10 employment.” Doc. 55 ¶75. An employer owns the copyright to any copyrightable work
11 created by employees within the scope of their employment. 17 U.S.C. § 101 (definition
12 of “work made for hire”). AFL has sufficiently alleged that the operating software is
13 owned by Fujikura and is copyrightable.

14 The Copyright Act provides that “no action for infringement . . . shall be instituted
15 until preregistration or registration of the copyright claim has been made in accordance
16 with this title.” 17 U.S.C. § 411(a). On May 26, 2011, Fujikura obtained U.S. Copyright
17 Registration No. TX 7-400-942, which covers version 1.32b of the operating software for
18 the splicers. Plaintiff argues that the 2011 copyright registration is insufficient to
19 maintain the current action because the alleged infringement occurred in 2009. AFL cites
20 two cases which adopt the “effective registration doctrine” and hold that a plaintiff need
21 not produce a separate registration relating to a pre-existing work in order to maintain an
22 action for infringement of the preexisting work. *See Streetwise Maps v. Vandam, Inc.*,
23 159 F.3d 739, 747 (2d Cir. 1998) (holding that “the registration certificate relating to the
24 derivative work . . . will suffice to permit [the plaintiff] to maintain an action for
25 infringement based on defendants’ infringement of the pre-existing work”); *Salestraq*
26 *Am., LLC v. Zyskowski*, 635 F. Supp. 2d 1178, 1181 (D. Nev. 2009) (holding that a
27 registration of a 2008 version of a compilation of floor plans and locations was sufficient
28 to maintain an action for infringement of the 2007 unregistered version).

1 Defendants rely on an Eleventh Circuit case which holds that when the registration
2 of a work entirely fails to identify the unregistered preexisting work in the copyright
3 registration, an action for infringement of the unregistered preexisting work cannot be
4 maintained. *Oravec v. Sunny Isles Luxury Ventures, L.C.*, 527 F.3d 1218, 1229-30 (11th
5 Cir. 2008). *Oravec* recognized, however, that cases applying the effective registration
6 doctrine all involve “derivative or collective works that incorporated material from
7 unregistered preexisting works.” *Id.* at 1229.

8 In this case, the FAC alleges that “[a]lthough each new numbered version [of the
9 operating software] incorporates some original, copyrightable content not included in the
10 immediately preceding version, all versions share substantial original, copyrightable
11 content.” Doc. 55 ¶ 76. It is reasonable to infer from this allegation that each successive
12 version incorporates the preceding versions. Given this allegation, the Court concludes
13 that the law stated in *Streetwise* and *Salestraq* should be applied in this case. In addition
14 to those cases, other courts have held that registration of a derivative work permits legal
15 actions on preceding versions of the work. *See, e.g., In re Indep. Serv. Orgs. Antitrust*
16 *Litig.*, 964 F. Supp. 1469, 1473 (D. Kan. 1997) (holding that registration of derivative
17 service manuals and software was sufficient to allow infringement claim based on
18 preexisting works authored by same party); *Greenwich Film Prods. v. DRG Records,*
19 *Inc.*, 833 F. Supp. 248, 251-52 (S.D.N.Y. 1993) (holding that registration for motion
20 picture was sufficient to cover musical compositions contained therein where plaintiff
21 owned copyrights in both); 2 Melville B. Nimmer & David Nimmer, *Nimmer on*
22 *Copyright* § 7.16[B][2][c] (2008) (“When the same party owns the derivative or
23 collective work plus the underlying elements incorporated therein, its registration of the
24 former is sufficient to permit an infringement action on the underlying parts, whether
25 they be new or preexisting.”) (citation and internal quotation marks omitted)).

26 The Court also notes that in *Oravec* the plaintiff sought to assert copyright
27 infringement of unregistered three-dimensional models of an architectural work based on
28 registration of architectural drawings. 527 F.3d at 1230. In *Streetwise*, the plaintiff was

1 asserting infringement of prior unregistered street maps based on a registration of a later
2 version of the same map. 159 F.3d at 747. The allegations in the FAC suggest that an
3 updated version of the splicer operating software is more like the street maps in
4 *Streetwise* – some or all of the prior versions are still part of the work.

5 The FAC alleges that Fujikura “grants to AFL the right to bring suit for
6 infringement, including infringement claims existing as of the date of the agreement.”
7 Doc. 55 ¶ 77. AFL argues that this allegation is sufficient to allow AFL to pursue an
8 infringer for infringement that occurred prior to the assignment. The Court agrees. *See*
9 *Co-Opportunities, Inc. v. Nat’l Broadcasting Co., Inc.*, 510 F. Supp. 43, 46-47 (N.D. Cal.
10 1981) (assignment of existing causes of action entered into after commencement of
11 litigation was valid to transfer accrued claims back to the filing of the complaint).

12 **2. Infringement.**

13 Defendants argue that AFL does not plausibly allege how they violated any
14 exclusive and protectable right. In particular, Defendants argue that it is impossible to
15 determine whether the products that it allegedly sold included the original aspects of the
16 copyrighted software or even part of the software. AFL has alleged that Defendants
17 distributed fusion splicers in the U.S. which incorporated Fujikura’s operating software.
18 Doc. 55 ¶ 78. The exclusive rights granted to a copyright owner are found in § 106 of the
19 Copyright Act, and include the exclusive right to distribute the copyrighted work. 17
20 U.S.C. § 106(3). Accepting AFL’s allegations as true, as the Court must at this stage,
21 AFL has adequately alleged a violation of its exclusive right to distribute.

22 **IT IS ORDERED** that Defendants motion to dismiss (Doc. 56) **is denied.**

23 Dated this 9th day of April, 2012.

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28 David G. Campbell
United States District Judge