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# Doctrine of Indivisibility Revived - Ninth Circuit Confirms Copyright Exclusive Licensee Has No Right to Transfer License Absent Owner's Consent: *Gardner v. Nike, Inc.*

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**DOCTRINE OF INDIVISIBILITY REVIVED?  
NINTH CIRCUIT CONFIRMS COPYRIGHT  
EXCLUSIVE LICENSEE HAS NO RIGHT TO  
TRANSFER LICENSE ABSENT OWNER'S  
CONSENT: *GARDNER V. NIKE, INC.***

**Peter H. Kang† and Jia Ann Yang††**

Copyrights are an important and fundamental type of intellectual property.<sup>1</sup> Entire sectors of the economy, from software companies to the entertainment industry, derive substantial value from goods and services by virtue of a coherent and comprehensive copyright system. As such, the transferability of copyrights, either through license or outright sale, is an important area in which the U.S. legal system should set clear guidelines. However, because the concept of transferability of copyrights is in tension with an author's moral or economic motivations to control or restrict downstream use (or misuse) of a copyright, over many decades, the courts and Congress have taken different approaches alternatingly to restrict or liberalize the transferability of copyrights.

Thus, in the early part of the last century, copyright law recognized significant differences between an assignment and a license of a copyright. In this period, if a transfer of a copyright was categorized as a license, the grantee of the right did not have standing

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1. For example, other than patents, copyrights are the only other type of intellectual property specifically enumerated in the Constitution. See U.S. CONST. art. I, § 8, cl. 8.

to sue in her own name, did not have proprietary rights in the license, and did not have the right to re-sell or sublicense unless she was expressly authorized to do so.<sup>2</sup> This so-called doctrine of indivisibility<sup>3</sup> resulted from judicial interpretation of the 1909 Copyright Act. For most of the twentieth century, the doctrine of indivisibility affected the jurisprudence governing assignments and licenses of copyrights, and persisted until the adoption of 1976 Copyright Act (the “1976 Act”).<sup>4</sup>

The 1976 Act, in resolving problems created by the doctrine of indivisibility, eradicated most of the doctrine and expressly provided for the divisibility of copyrights.<sup>5</sup> Therefore, under the 1976 law, an exclusive licensee of a copyright is granted standing to sue,<sup>6</sup> and an exclusive license is considered a transfer of copyright ownership.<sup>7</sup> Thus, under the facial, literal terms of the 1976 Act, there would appear not to be much substantial distinction between an assignment and exclusive license.

Nevertheless, the legacy of more than half a century of the dominance of the doctrine of indivisibility still impacts exclusive licenses, even under the 1976 Act. The Ninth Circuit has recently decided a case that brings back the doctrine of indivisibility from obscurity. In the recent decision of *Gardner v. Nike, Inc.*,<sup>8</sup> the Ninth

2. For a general discussion of the distinction between an assignment and a license under the 1909 Copyright Act, see MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.01 (2001) [hereinafter NIMMER].

3. Under the Doctrine of Indivisibility, the bundle of rights of a copyright was said to be “indivisible.” Therefore, an assignment must be a transfer of the totality of rights. Any transfer of less than a totality of rights would only constitute a mere license. See *id.* § 10.01[A].

4. See NIMMER, *supra* note 2.

5. The 1976 Act defines “transfer of copyright ownership” as an “assignment, mortgage, exclusive license, or any other conveyance, alienation, or hypothecation of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a nonexclusive license.” 17 U.S.C. § 101 (2000). Under this section, an exclusive license is considered a transfer of copyright ownership. In addition, § 201(d)(2) is “said to constitute an explicit statutory recognition of the principle of divisibility of copyright.” NIMMER, *supra* note 2, § 10.02[A]. Section 201(d)(2) provides:

Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

17 U.S.C. § 201(d)(2). However, “some residue of the impact of indivisibility” remains as to nonexclusive licenses under § 101. NIMMER, *supra* note 2, § 10.02[A]. Nonexclusive licenses are outside the scope of the present discussion.

6. 17 U.S.C. § 501(b).

7. See 17 U.S.C. § 101.

8. *Gardner v. Nike, Inc.*, 279 F.3d 774 (9th Cir. 2002).

Circuit held that an exclusive licensee does not have the right to transfer the license absent the copyright owner's consent.<sup>9</sup> Acknowledging that this is a case of first impression under the 1976 Act, the court concluded that the limitation on an exclusive licensee's right to re-sell, imposed by the doctrine of indivisibility, survives the 1976 Act, despite the explicit changes in the new law.<sup>10</sup> Thus, despite the literal language of the 1976 Act, the Ninth Circuit's decision in *Gardner v. Nike, Inc.* has the effect of treating the transferability of exclusive licenses differently from the transferability of assignments of copyrights.

This Case Note will examine the Ninth Circuit's holding and its reasoning, as well as analyze the court's rationale in the case. This Case Note will also examine the court's reliance on patent law and will demonstrate that, in fact, an opposite outcome is likely to result under the patent law. In the end, the question remains whether the court struck a proper balance between the monopoly power and economic benefits conferred to the original copyright holder/licensor and the competing interests favoring free transferability of property for maximum economic efficiency.

#### I. *GARDNER V. NIKE*: FACTS AND PROCEDURAL HISTORY

In 1992, Nike and Sony entered into a licensing agreement under which Nike granted Sony certain rights to a cartoon character, named "MC Teach," created by Nike.<sup>11</sup> The parties agreed that the license was exclusive.<sup>12</sup> The rights under the licensing agreement included

the right to use the character, and any modification or alterations, in perpetuity throughout the world on and in the packaging of phonograph records, in publicity, advertising and allied exploitation of the records, in television programs or motion

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9. *See id.*

10. *Id.* at 776, 781.

11. *Id.* at 776.

12. *Id.* It is interesting to note that the Gardner case was premised on the assumption that the agreement between Nike and Sony was an exclusive license. Plaintiff Gardner seemingly never disputed this characterization. However, the 1976 Act treats the bundle of rights as divisible and thus the distinction between an assignment and an exclusive license is no longer that clear under the current law. In the opinion itself, the Gardner court acknowledged the new law "calls into question the distinctions that were previously drawn." *Gardner*, 279 F.3d at 778. Therefore, it is an open question whether a different result would obtain had Gardner argued the Nike/Sony agreement was in fact an assignment and not a license. Due to the traditional free transferability accorded to assignments, the entire issue of whether an exclusive license could be freely transferred might have been avoided. *See NIMMER, supra* note 2, § 10.01[C][4].

pictures embodying the musical compositions embodied on the records, on educational material and on clothing . . . .<sup>13</sup>

In June 1996, Sony transferred all its rights in the exclusive license to Gardner, who, in turn, used the "MC Teach" character in various educational materials.<sup>14</sup> As a result of Gardner's use, Nike threatened legal action against Sony, Gardner, and their proposed licensees.<sup>15</sup>

After Gardner's initial declaratory relief suit in state court was dismissed for lack of subject matter jurisdiction, Gardner filed again in federal district court seeking declaratory relief in December 1999.<sup>16</sup>

In June 2000, Nike moved for summary judgment, claiming Gardner lacked standing to sue because the transfer of the license by Sony was invalid.<sup>17</sup> Gardner also filed a motion for summary judgment on the same day.<sup>18</sup>

On August 1, 2000, the district court granted Nike's motion and denied Gardner's motion for summary judgment.<sup>19</sup> District Judge Baird agreed with Nike that the assignment of the exclusive license by Sony to Gardner was invalid without Nike's consent under the 1976 Copyright Act.<sup>20</sup> Therefore, Gardner did not have standing to bring the declaratory relief action.<sup>21</sup> Gardner appealed.

## II. GARDNER V. NIKE: NINTH CIRCUIT DECISION

Noting this is a case of first impression under the 1976 Act, the Circuit Court of Appeals began its analysis by examining the state of law under the 1909 Act.<sup>22</sup> In *Harris v. Emus Records Corp.*, a case

13. Gardner v. Nike, Inc., 110 F. Supp. 2d 1282, 1283 n.1 (C.D. Cal 2000).

14. Gardner, 279 F.3d at 776.

15. Id.

16. Id. at 776-77.

17. Id. at 777.

18. Id.

19. Gardner v. Nike, Inc., 279 F.3d 774, 777 (9th Cir. 2002).

20. Id. The District Court's opinion raised some discussion and scholarly comments. See, e.g., Aaron Xavier Fellmeth, *Control Without Interest: State Law of Assignment, Federal Preemption, and the Intellectual Property License*, 6 VA. J.L. & TECH. 8 (2001); Robert W. Clarida, *Negotiating License Agreements*, 7 No. 10 INTELL. PROP. STRATEGIST 1 (July 2001); *Exclusive Copyright Licensee May Not Sublicense or Assign its Rights Without Copyright Owners' Consent, Federal District Court Holds; Nike's Exclusive License to Sony of Rights in Nike's Copyrighted Cartoon Character "MC Teach" Were Not Validly Sub-licensed or Assigned to Third Party, Because Sony's Consent Was Not Obtained*, 22 No. 8 ENT. L. REP. 8 (Jan. 2001).

21. Gardner, 279 F.3d at 777.

22. Id.

decided under the 1909 Act, it was held that “copyright licenses (whether exclusive or not) were ‘not transferable as a matter of law.’”<sup>23</sup> This conclusion was based on three rationales: the doctrine of indivisibility, policy considerations, and analogous rules in patent law.<sup>24</sup>

Under the doctrine of indivisibility, anything less than a transfer of a totality of rights under a copyright was considered a mere license.<sup>25</sup> Unlike an assignee, a licensee was not regarded as a copyright proprietor, and thus did not have standing to sue for copyright infringement.<sup>26</sup> A licensee also had no right to transfer the license unless she was expressly authorized by the original licensor.<sup>27</sup> By prohibiting the transfer of the license without the copyright owner’s consent, the rule preserved the owner’s control over the use of the work downstream.<sup>28</sup> This result was said to strike a balance between two competing interests: anti-monopolization versus the incentive for creativity.<sup>29</sup>

The Circuit Court next addressed the abolition of the doctrine of indivisibility as to exclusive licenses under the 1976 Act. After examining relevant sections under the Act, the court concluded that Congress had solved many problems created by the doctrine of indivisibility under the prior law.<sup>30</sup> For example, Congress explicitly granted an exclusive licensee standing to sue in her own name.<sup>31</sup> Moreover, an exclusive license is considered a transfer of ownership and “this definition calls into question the distinctions that were previously drawn between an assignment and an exclusive license under the indivisibility doctrine.”<sup>32</sup> The Circuit Court, however, pointed to the silence of the statute regarding the exclusive licensee’s right to transfer the license.<sup>33</sup> The issue the court faced, therefore, was whether the doctrine of indivisibility survived as to the transferability of exclusive licenses under the 1976 Act.<sup>34</sup>

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23. *Id.* at 777–78 (quoting *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1333 (9th Cir. 1984)).

24. *Gardner*, 279 F.3d at 778.

25. *Id.*

26. *Id.*

27. *Gardner v. Nike, Inc.*, 279 F.3d 774, 778 (9th Cir. 2002).

28. *Id.*

29. *Id.*

30. *Id.* at 778–79.

31. *Id.* at 779.

32. *Gardner v. Nike, Inc.*, 279 F.3d 774, 778 (9th Cir. 2002).

33. *Id.* at 780.

34. *Id.* at 779.

The Circuit Court looked to the text of the statute in search for the answer. A crucial provision for the court, § 201(d)(1), reads in relevant part, “the ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law . . . .”<sup>35</sup> According to the court, § 201(d)(1) “enables the owner to transfer any fraction of his or her ownership interest to another party, thereby making that party a whole or joint owner.”<sup>36</sup>

Gardner had argued that Sony, as an exclusive licensee, was the “owner” of the “MC Teach” character under § 101,<sup>37</sup> and § 201(d)(1) allows Sony to transfer to Gardner Sony’s interest freely as the owner of that exclusive right.<sup>38</sup> Despite the broad grant of the copyright owner’s right of transfer, the court nevertheless determined that the language in § 201(d)(2) curtailed the application of § 201(d)(1) to exclusive licensees.<sup>39</sup>

In reaching this conclusion, the court’s analysis focused on specific language in § 201(d)(2), the so-called “protection and remedies” clause.<sup>40</sup> The second sentence of § 201(d)(2) provides that, “[t]he owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.”<sup>41</sup> The court interpreted § 201(d)(2) as providing only “protection and remedies” to the owner of the exclusive right and not all the “rights” afforded to a copyright owner.<sup>42</sup> According to the court, the term “protection and remedies” includes the right for an exclusive licensee to sue in her own name, but does not include the right to transfer the exclusive license.<sup>43</sup> Furthermore, relying on the principle of statutory construction, the court held that the more specific term of § 201(d)(2) prevails over the more general language of § 101 and § 201(d)(1).<sup>44</sup> Therefore, the court held that § 201(d)(1) did not apply to the present case, and thus

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35. 17 U.S.C. § 201(d)(1) (2000).

36. *Gardner*, 279 F.3d at 779.

37. For the definition of “transfer of copyright ownership” under 17 U.S.C. § 101, see *supra* note 5.

38. *Gardner v. Nike, Inc.*, 279 F.3d 774, 779 (9th Cir. 2002).

39. *Id.* at 779–80.

40. *See id.* at 780.

41. 17 U.S.C. § 201(d)(2) (2000).

42. *Gardner*, 279 F.3d at 780.

43. *Gardner v. Nike, Inc.*, 279 F.3d 774, 780 n.4 (9th Cir. 2002).

44. *Id.* at 780.

§ 201(d)(2) only provided “protection and remedies” but not the rights.<sup>45</sup>

The court also inferred from Congress’s silence on the issue of transferability of an exclusive license that Congress had no intention to change the prior law.<sup>46</sup> In the court’s view, Congress’s failure to address this issue, coupled with the use of the limited terminology “protection and remedies,” evidenced the survival of the doctrine of indivisibility as to the exclusive licensee’s right to sell or sublicense further.<sup>47</sup>

In addition to the textual statutory argument, the court further presented policy reasons to support its conclusion. Citing *Harris*, the court emphasized the importance of preserving the copyright owner’s control of the identity of licensees.<sup>48</sup> The court evinced concern that disputes over issues such as the solvency of sublicensees and the scope of the use of a copyright by sublicensees would foster further litigation if the original owner were excluded from the negotiations with a sublicensee.<sup>49</sup> Consequently, the court held that the burden should be placed on the exclusive licensee to obtain the licensor’s express consent before the exclusive licensee may assign its rights to a third party (such as Gardner). The court believed this decision struck the balance between preserving the original copyright owner’s control and favoring divisibility of copyright.<sup>50</sup>

### III. DISCUSSION AND ANALYSIS OF *GARDNER V. NIKE*

#### *A. Is the court’s interpretation of § 201(d) consistent with the Congressional intent in favor of divisibility of copyrights?*

In holding against the transferability of an exclusive license without the licensor’s consent, the Ninth Circuit relied heavily on the statutory language, especially the use of the phrase “protection and remedies.” The court viewed this phrase as more limited than the term “rights,” even if the protection and remedies would include the exclusive licensee’s “right” to sue in her own name.<sup>51</sup> This interpretation of the words in the statute (which the district court

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45. *Id.* at 779.

46. *See id.* at 780.

47. *Id.*

48. *Gardner v. Nike, Inc.*, 279 F.3d 774, 781 (9th Cir. 2002).

49. *Id.*

50. *See id.*

51. *Id.* at 780 n.4.

opinion in *Gardner* adopted as well) has been critiqued.<sup>52</sup> One commentator has suggested that “protection and remedies” can be “rights” in a sense, and every “protection” can be a “right” insofar as it is a “right to protection.”<sup>53</sup> Thus, the *Gardner* court’s argument seems more “semantic than substantive.”<sup>54</sup> Moreover, at least one other lower court has read the “protection and remedies” language more broadly than the *Gardner* court to include “the right to transfer.”<sup>55</sup>

Furthermore, when taken together with other sections dealing with an exclusive licensee’s rights, the court’s limited reading of § 201(d)(2) becomes more problematic. As mentioned above, Congress explicitly abandoned the doctrine of indivisibility and made copyrights assignable in whole or in part.<sup>56</sup> Section 101 clearly accorded an exclusive licensee the status of an owner of that particular right.<sup>57</sup> These sections thus eliminated the distinctions that previously existed between an assignment and an exclusive license under the prior law. In the *Gardner* opinion itself, the court acknowledged that there might no longer be distinctions between the two.<sup>58</sup> The Ninth Circuit also cited *Nimmer* for the proposition that “[a]n exclusive license . . . is equated with an assignment [under the current law] . . . .”<sup>59</sup>

Given the unequivocal Congressional intent favoring divisibility of copyrights in the 1976 Act, it would appear inconsistent to hold that Congress would have intended to preserve the doctrine of indivisibility only for an exclusive licensee’s right to sell or

52. See Fellmeth, *supra* note 20, at 22 (discussing the district court’s opinion in *Gardner v. Nike, Inc.*).

53. *Id.*

54. *Id.*

55. See *In re Patient Educ. Media, Inc.*, 210 B.R. 237, 240 (Bankr. S.D.N.Y. 1997). This case was discussed by the *Gardner* district court opinion in a footnote, where the *Gardner* court rejected the *In re Patient* court’s interpretation of the *rights* and *protections* of the copyright owner as being incorrect. *Gardner v. Nike, Inc.*, 110 F. Supp. 2d 1282, 1287 (C.D. Cal. 2000). However, the Ninth Circuit neither addressed this case nor commented on the district court’s interpretation of this case in its opinion.

56. Section 201(d)(2) is “said to constitute an explicit statutory recognition of the principle of divisibility of copyright.” NIMMER, *supra* note 2, § 10.02[A]. In addition, § 201(d)(1) expressly makes the ownership of a copyright assignable in whole or in part. (“The ownership of a copyright may be transferred in whole or in part . . . .”) 17 U.S.C. § 201(d)(1) (2000).

57. “‘Copyright owner’, with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right.” 17 U.S.C. § 101.

58. *Gardner v. Nike, Inc.*, 279 F.3d 774, 778 (9th Cir. 2002).

59. *Id.*

sublicense further. It appears illogical that an exclusive licensee has to suffer this restriction on transferability of the license, while in all other respects an exclusive license is treated like an assignment under the 1976 Act. The court's exacting interpretation of the "protection and remedies" language would appear not to be strongly persuasive of a legislative scheme to treat exclusive licensees so differently from assignees in this one respect.

In addition, Congress has expressly excluded nonexclusive licenses from "transfer of copyright ownership"<sup>60</sup> and thus knew how to manifest clearly an intention to maintain the doctrine of indivisibility for nonexclusive licenses. It therefore can be argued that the disparate legislative treatment of exclusive licenses and nonexclusive licenses demonstrated that the doctrine of indivisibility should have been completely eliminated for exclusive licenses under the 1976 Act.

The court's rationale that Congressional silence was meant to indicate that the prior law should remain unchanged is unsatisfying. The record is not clear whether Congress's failure to address this issue expressly was a deliberate choice or merely an oversight. The court noted that Congress was aware of the limitation on an exclusive licensee's right to transfer, but "chose not to explicitly address this issue in the 1976 Act."<sup>61</sup> However, inferring Congressional intent from Congressional silence is often difficult to do convincingly.<sup>62</sup> Using similar logic, it could be argued that, without doing so consciously, Congress did not *add* an exclusive licensee's right to freely transfer copyrights under the 1976 Act, because the 1909 Act did not address this issue expressly either.<sup>63</sup>

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60. See NIMMER, *supra* note 2, § 10.02[A].

61. *Gardner*, 279 F.3d at 780.

62. Here, the *Gardner* court assumed that Congress expressly granted an exclusive licensee standing to sue, thus Congress's failure to give an exclusive licensee a right to transfer explicitly meant that Congress did not intend to grant that right. As Judge Posner has pointed out, this type of statutory construction is based on the false assumption of legislative omniscience and on the erroneous assumption that all legislative omissions are deliberate. See Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 813 (1983).

63. The *Gardner* court stated that "neither the 1909 or 1976 Act explicitly addresses this issue." *Gardner*, 279 F.3d at 780.

*B. Transferability of Licenses: A different result likely under patent law*

In its discussion of policy concerns, the court cited to analogous situations under patent law to support its conclusion.<sup>64</sup> However, the two patent cases cited by the *Gardner* court (*In re CFLC, Inc.* and *Unarco Industries, Inc. v. Kelley, Co.*, cited by the *Harris* court) both dealt with *nonexclusive* licenses and not exclusive licenses.<sup>65</sup> Because nonexclusive licenses are treated very differently from exclusive licenses under the 1976 Act, it is difficult to equate the policy considerations underlying nonexclusive licenses with policy considerations for exclusive licenses. The court's reliance on these nonexclusive license cases is unsatisfying and was, perhaps, misplaced.

Moreover, it may well be that an opposite result on transferability without consent would be reached under patent law. Like copyright, the bundle of rights that make up a patent are also divisible.<sup>66</sup> Unlike copyright, however, the distinction between an assignment and a license of a patent is determined by the extent to which these rights were transferred.<sup>67</sup> If all substantial rights under the patent were granted, the grantee will be considered the owner, regardless of the label or characterization of the transfer.<sup>68</sup> That is, an exclusive patent license will be treated like a patent assignment if all substantial rights were transferred to the licensee. Therefore, an exclusive licensee with substantial rights under the patent will be able to sublicense the patent rights in the same way an assignee is able to, without consent of the original patent owner.<sup>69</sup>

This demonstrates the difference in treatment accorded to an exclusive patent licensee with substantial rights under the patent law. While the *Gardner* court reiterated the appropriateness of looking to

64. *Gardner*, 279 F.3d at 780–81.

65. *In re CFLC, Inc.*, 89 F.3d 673 (9th Cir. 1996); *Unarco Indus., Inc. v. Kelley, Co.*, 465 F.2d 1303 (7th Cir. 1972).

66. *See Intellectual Prop. Dev., Inc. v. TCI Cablevision of Cal., Inc.*, 248 F.3d 1333, 1342 (9th Cir. 2001).

67. *See id.* at 1344.

68. *See id.*

69. It would be interesting to examine whether the “substantial right test” in patent law could be applied to copyright law. Under the doctrine of indivisibility of the 1909 Act, this test could have provided arguments helping to avoid the harsh results for exclusive licensees in some cases. Under the 1976 Act, though, since an exclusive license is “equated with an assignment,” *see Gardner v. Nike, Inc.*, 279 F.3d 774, 778 (9th Cir. 2002), there would appear to be little need to adopt this test from the patent law absent further restrictions on exclusive licensees.

patent law for guidance,<sup>70</sup> a closer examination of patent law reveals that the opposite result would obtain and thus undercuts the *Gardner* court's analysis.

#### IV. CONCLUSION

The *Gardner* case is the first appellate decision nationwide discussing an exclusive copyright licensee's right to transfer without consent of the original copyright owner.<sup>71</sup> It therefore remains to be seen whether the Ninth Circuit's position will be followed in other circuits. As this Case Note has discussed, the court's statutory interpretation relied on fine distinctions between semantically similar terms. It is also unclear whether the court's proffered policy considerations are consistent with Congressional intent. Although the practical effect of the *Gardner* decision is to impose the burden to negotiate for the copyright owner's consent either as part of the original exclusive license or in subsequent negotiations to attempt to transfer the license, the monopolistic power of the original copyright and the economic benefits thus conferred upon the original licensor cannot be easily dismissed as insignificant in many commercial contexts.

Accordingly, the *Gardner* decision leaves open to question whether a fair or economically optimal balance has really been reached between the creator's rights and the public interest in general. As we approach nearly a century of jurisprudence and legislative action in the arena of transfers of copyrights, it is now apparent that further evolution and exploration of these complex legal issues will continue. For companies in the software, media, content-providing, entertainment, and on-line industries, counseling and proper analysis in this complex area at the intersection between transactional, licensing, and copyright law will be necessary to ensure maximum protection of rights and opportunities.

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70. *Gardner v. Nike, Inc.*, 279 F.3d 774, 778, 780–81 (9th Cir. 2002).

71. *In re Patient* addressed the same issue in dicta, because that case involved a nonexclusive license in the bankruptcy context. *In re Patient Educ. Media, Inc.*, 210 B.R. 237, 240 (Bankr. S.D.N.Y. 1997).

