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13 **UNITED STATES DISTRICT COURT**  
14 **DISTRICT OF NEVADA**

15 THE SCO GROUP, INC. ) Case No.: 2:04-cv-0237-RCJ-GWF  
16 )  
Plaintiff, )  
17 )  
v. ) **DEFENDANT’S MOTION TO DISMISS IN**  
18 ) **PART PLAINTIFF’S CLAIMS FOR**  
19 AUTOZONE, INC, ) **ACTUAL DAMAGES, STATUTORY**  
20 Defendant ) **DAMAGES, AND ATTORNEYS’ FEES**  
\_\_\_\_\_ )

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22 Defendant AutoZone, Inc. (“AutoZone”) hereby moves this Court, pursuant to Rule  
23 12(b)(6) of the Federal Rules of Civil Procedure, for dismissal of certain relief Plaintiff The SCO  
24 Group, Inc. (“SCO”) requests in its First Amended Complaint (“Amended Complaint”).  
25 Specifically, AutoZone moves as follows:

- 26 1. AutoZone moves that SCO’s request for statutory damages and attorneys’ fees on  
27 its claim for infringement of the copyrights identified in Paragraph 44 of the  
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Amended Complaint be dismissed on the grounds that the Amended Complaint fails to set forth facts sufficient to support a claim for such relief; and

- 2. AutoZone moves that SCO’s request for actual or, in the alternative, statutory damages related to alleged acts of copyright infringement by AutoZone in Mexico be dismissed because SCO is not entitled to such relief as a matter of law.

For these reasons and the reasons set forth herein, AutoZone respectfully requests that the Court grant this Motion.

DATED this 31st day of August, 2009.

/s/ Nikki L. Wilmer  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. SCO is Not Entitled To Statutory Damages or Attorneys’ Fees as to Certain Works**

SCO claims to own copyrights in the works set forth in Paragraph 44 of the Amended Complaint (the “Works”). SCO claims that AutoZone has infringed SCO’s copyrights in the Works, and SCO prays for statutory damages pursuant to 17 U.S.C. § 504(a) and attorneys’ fees pursuant to 17 U.S.C. § 505 as relief on this claim. (See Amended Complaint, ¶ 55, Prayer for Relief, §§ 2, 3.)

Section 412 of the Copyright Act provides that

no award of statutory damages or of attorney’s fees, as provided by sections 504 and 505, shall be made for — ... (2) any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.

17 U.S.C. § 412.

SCO’s Amended Complaint contains no allegation that it secured registration for the Works prior to the alleged acts of infringement or within three months of first publication of the Works (nor could it again amend its Amended Complaint to so plead). Because these are predicate elements to an award of statutory damages and attorneys’ fees under the Copyright Act, SCO’s Complaint fails to set forth a valid cause of action for the requested relief, and SCO’s request for the relief should be dismissed. See *Leone v. Williams*, No. 2:06-cv-1459-RLH-RJJ, 2007 WL 1521032 at \*2 (D. Nev. May 22, 2007) (District Court *sua sponte* dismissed all claims asserted by plaintiff because "plaintiff failed to plead the proper elements of all of his causes of action"); see also *Cutler v. Enzymes, Inc.*, No. 08-04650 JF (RS) 2009 WL 482291 at \*3 (N.D. Cal Feb. 25, 2009) (court granted defendant's motion to dismiss copyright claim where the complaint did not state “enough facts to state a claim to relief that is plausible on its face”).

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**II. SCO’s Prayer for Damages Related to Alleged Infringements in Mexico Should be Dismissed as a Matter of Law.**

SCO alleges that AutoZone has copied and installed on its store servers in the United States and Mexico certain programs that allegedly infringe copyrights that SCO purports to own under U.S. law. (See Amended Complaint, ¶ 32.) As a general matter, the U.S. Copyright Act does not apply extraterritorially. See *Subafilms Ltd v. MGM-Pathe Commn'ns Co.*, 24 F.3d 1088 (9th Cir. 1994). A limited exception to this rule exists in the Ninth Circuit for the recovery of profits attributable to infringement in the United States that has consequences extraterritorially. See *Los Angeles News Service v. Reuters*, 340 F.3d 926, 931 (9th Cir. 2003). That exception does not apply to the recovery of damages, which are specifically excluded. *Id.* (“We conclude therefore that the Copyright Act does not provide LANS recovery for actual damages resulting from Reuters's and Visnews's infringement.”).

Here, SCO’s Amended Complaint pleads generally for recovery of actual damages or, in the alternative, statutory damages on its copyright claim, including for damages that it has allegedly suffered as a result of AutoZone’s copying and use of certain software in Mexico. (See Amended Complaint, ¶ 32.) Because SCO is not entitled to recovery of such damages as a matter of law, SCO’s prayer for such damages should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

DATED this 31st day of August, 2009.

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**CERTIFICATE OF SERVICE**

I am employed by the law firm of Brownstein Hyatt Farber Schreck, LLP in Clark County. I am over the age of 18 and not a party to this action. My business address is 100 City Parkway, Suite 1600, Las Vegas, Nevada 89106-4614.

On the August 31, 2009, I served the document(s), described as: **DEFENDANT’S MOTION TO DISMISS IN PART PLAINTIFF’S CLAIMS FOR ACTUAL DAMAGES, STATUTORY DAMAGES, AND ATTORNEYS’ FEES.**

by placing the  original  a true copy thereof enclosed in a sealed envelope addressed as follows:

a. **ECF System** (You must attach the “Notice of Electronic Filing”, or list all persons and addresses and attach additional paper if necessary)

b. **BY U.S. MAIL.** I deposited such envelope in the mail at Las Vegas, Nevada. The envelope(s) were mailed with postage thereon fully prepaid.

I am readily familiar with Brownstein Hyatt Farber Schreck, LLP. practice of collection and processing correspondence for mailing. Under that practice, documents are deposited with the U.S. Postal Service on the same day which is stated in the proof of service, with postage fully prepaid at Las Vegas, Nevada in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date stated in this proof of service.

c. **BY PERSONAL SERVICE.**

d. **BY DIRECT EMAIL**

e. **BY FACSIMILE TRANSMISSION**

**I declare under penalty of perjury that the foregoing is true and correct.**

Date: August 31, 2009

/s/ Carol E. Jorvig  
An employee of Brownstein Hyatt Farber Shreck, LLP

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