

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

HBO ENTERTAINMENT COMPANY,
L.P.
Plaintiff,
v.
PETER PAN INDUSTRIES, *etc.*, *et*
al.,
Defendant.

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BRIEF OF PLAINTIFF HBO ENTERTAINMENT COMPANY, L.P. IN SUPPORT OF
ITS APPLICATION FOR AN ORDER TO SHOW CAUSE AND A PRELIMINARY
INJUNCTION

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PRELIMINARY STATEMENT

Plaintiff Time Warner Entertainment Company, L.P., acting by and through its unincorporated division, Home Box Office ("HBO") submits this brief in support of its application for an Order to Show Cause and Preliminary Injunction to enjoin defendant Peter Pan Industries (PPI) from its notorious and intentional infringement of HBO's valuable copyright.

"Notorious" and "intentional" are understatements here. The subject infringement came to HBO's attention through a trade magazine article in which defendant Kasen, the chief executive officer of PPI, frankly stated that PPI would be marketing and distributing videotape copies of HBO's copyright-protected motion picture, THE TROUBLE WITH SPIES. PPI had never sought or received HBO's authorization to make any use of THE TROUBLE WITH SPIES, in which HBO holds all rights and interests, including copyright. HBO's correspondence to PPI demanding that it cease and desist from its violation of HBO's copyright has been met with silence.

As a matter of law, PPI's continued unlawful use infringes PPI's trade name and copyrights and causes HBO severe and irreparable harm. Only a preliminary injunction can ensure that PPI ceases its ongoing misconduct and halt the irreparable harm to HBO.

STATEMENT OF FACTS¹

HBO is in the business of producing and telecasting, series, motion pictures, sporting events, documentaries, television programming and other forms of media content and entertainment, including video cassette distribution. The motion picture that is the subject of this action, THE TROUBLE WITH SPIES, was created by HBO or its predecessors in interest (hereinafter collectively "HBO") in 1983.

THE TROUBLE WITH SPIES was wholly original with HBO, and HBO is and has been the lawful owner of all right, title and interest in and to THE TROUBLE WITH SPIES and the holder of copyright since its creation. HBO received Certificate of Copyright Registration Number PA 936-867 effective April 22, 1997 from the Register of Copyrights for THE TROUBLE WITH SPIES. A copy of the Certificate is annexed to the Verified Complaint.

On March 29, 1997, *Billboard* magazine published an item in its "Picture This" column by Seth Goldstein (the "Billboard piece"). The Billboard piece contained news about a new venture by defendant PPI, acting under the name PPI Entertainment Group. PPI employs approximately 60 people in Newark, New Jersey.

¹ All facts set forth herein are taken from the Verified Complaint.

According to the Billboard piece, PPI was preparing to release a series of home-video versions of motion pictures called the "Movies on Parade" series, which would feature motion pictures on home video at the wholesale price of \$3.00 wholesale, which would amount to a \$5.00 to \$8.00 wholesale price for each video. The article stated that among the motion pictures to be included in "Movies on Parade" was THE TROUBLE WITH SPIES.

The Billboard piece also included an interview with defendant Donald Kasen,² chief executive officer of defendant, PPI. Kasen controls PPI and, as indicated by his prominence in the Billboard piece and by other evidence, that control extends to the decision-making concerning PPI's decision to "get into the movie business" by profiting from the copyright-protected property of HBO. Indeed, Kasen is quoted as saying, "We decided to get into the movie business," adding, not surprisingly, that he expected the Movies on Parade series to be a "profit center."

On or about April 30, 1997, in-house counsel for HBO sent a letter to defendant PPI by facsimile and Federal Express advising it that HBO is the sole owner and copyright holder of THE TROUBLE WITH SPIES, including the video exploitation rights

² HBO has been unable to effect service on defendant Kasen at this time, so this motion is proceeding only against defendant PPI.

therein; that HBO had not licensed the video exploitation rights to any person or entity; and that PPI's distribution of THE TROUBLE WITH SPIES is a gross violation of federal copyright law, for which there are statutory penalties. The letter also communicated HBO's demand, *inter alia*, that defendant PPI cease and desist from any further distribution of THE TROUBLE WITH SPIES.

HBO received no response.

As far as HBO knows, despite notification of its infringing activities and HBO's demand that it cease and desist, defendant PPI willfully and wantonly continues to sell, distribute and market the infringing videocassettes. HBO has suffered damages as the result of defendant PPI's infringing activities by, among other things, the diminution in value of rights to THE TROUBLE WITH SPIES.

Defendant PPI has threatened to, and unless enjoined apparently will continue to, sell, distribute and market the infringing videocassettes. The actions alleged above will cause HBO irreparable harm for which there is no adequate remedy at law.

ARGUMENT

**HBO SATISFIES THE REQUIREMENTS TO
PRELIMINARILY ENJOIN PPI'S UNLAWFUL
INFRINGEMENT AND UNAUTHORIZED USE OF HBO'S
COPYRIGHT-PROTECTED PROPERTY.**

When considering HBO's application for a preliminary injunction in this copyright case, the court is to consider and balance the following three³ factors: (1) Whether HBO is likely to succeed on the merits; (2) whether HBO will suffer irreparable harm in the absence of preliminary injunctive relief; (3) the possibility of harm to other interested persons' and the public interest. *Educational Testing Services v. Katzman*, 793 F.2d 533, 544 (3rd Cir. 1986). As demonstrated below, evaluation of these factors leads to the conclusion that HBO is entitled to the preliminary injunctive relief it seeks.

**A. There Is More Than A Substantial
Likelihood That HBO Will Succeed
On Its Claim Of Copyright
Infringement.**

It is well established that unauthorized copying of copyrighted videotapes is an infringement of copyright in those

³Unlike in other preliminary injunction situations, a court faced with a claim of copyright infringement does not balance the hardships, since doing so "would permit a knowing infringer to construct its entire business around infringement." *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1254 (3rd Cir. 1983). Such a rationale makes eminent sense in the context of this case's facts.

Verified Complaint. Copyright registration is evidence of the validity of a copyright to which the court may give presumptive effect. 17 U.S.C. § 410(c).⁴

Under this clear authority, therefore, HBO has met its burden of demonstrating ownership its copyright in THE TROUBLE WITH SPIES.

2. PPI's unauthorized copying of THE TROUBLE WITH SPIES

PPI told *Billboard* that it was ready to "get into the movie business," and it chose the simplest, most profitable way possible: Selling movies someone else has already made. This would be a brilliant business strategy, but it is complicated by the fact that selling someone else's copyright protected property is against the law.

A copyright owner is granted exclusive rights in a copyrighted work. This includes the exclusive right to authorize reproduction of the copyrighted work and the exclusive right to distribute copies of the work. 17 U.S.C. § 106; see also, *The Value Group*, 800 F. Supp. at 1231.

⁴ HBO's Certificate was obtained more than five years after 1983, the first year of publication of THE TROUBLE WITH SPIES. Thus while HBO does not receive the benefit of the statutory presumption of validity, that presumption would merely shift the burden of proof to the defendant; it does not invalidate the Certificate. See, e.g., *Religious Technology Center, v. Netcom On-Line Communication Services, Inc.*, 923 F. Supp. 1231 (N.D. Cal. 1995). HBO, in any event, has met its burden of providing evidence of the validity of its copyright by both the provision of its copyright certificate and by the other

Despite this, PPI chose to duplicate, market and distribute THE TROUBLE WITH SPIES without authorization from HBO, and to reap the fruits of HBO's investment in the work for itself. PPI's actions are as straightforward an example of unauthorized copying imaginable. Kasen, the company's chief executive officer was quoted in a press article discussing his plans to use HBO's property, THE TROUBLE WITH SPIES, to help establish a new "profit center" at PPI. In doing so, PPI flat-footedly breached the copyright law. See, *Jondora Music Publishing Co. v. Melody Recordings, Inc.*, 506 F.2d 392 (3rd. Cir. 1975) (making identical copy of recorded version of copyright material is infringement).

Though HBO has not seen, first-hand, any unauthorized copies of THE TROUBLE WITH SPIES produced by PPI, the admissions by Kasen are powerful circumstantial evidence of the copying. See *The Value Group*, 800 F. Supp. at 1232 (circumstantial evidence may establish copying.)

HBO, therefore, will have no difficulty establishing PPI's unauthorized copying of THE TROUBLE WITH SPIES. Since, as demonstrated above, HBO can also easily demonstrate the validity of its copyright in the work, HBO meets the two criteria for

factual averments concerning copyright in its Verified Complaint. *Id.* at 1242.

CONCLUSION

For all the foregoing reasons, HBO Entertainment Company, L.P.'s application for an order to show cause and a preliminary injunction should be granted in all respects.

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By: 
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