

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN**

SCOTT BOEHM; and DAVID STLUKA,

Plaintiffs,

v.

SCHEELS ALL SPORTS, INC.; SCOTT SVEHLA;
SCOTT'S BREWERY COLLECTIBLES; NICHOLAS
MARTIN; SPORTS-4-LESS; LUKE WEIN; BEYOND
STUDIO + PUBLISHING, LLC; JOHN DOE 1 (aka
"SCOOTER G"); SCOOTER G SPORTS; MICHAEL
LOVELACE; 22 PROMOTIONS, LLC; SIGNATURE
SPORTS; ANDREW WREDBERG; AW
ARTWORKS LLC; JESSE WINIECKI; AMANDA
McVEIGH; JOHN GEORGE; GAMEDAY SPORTS;
ANGELA CLEARY; EVENT USA CORP. (dba "THE
VAULT"); BRIAN BOPREY AND NANCY BOPREY
(dba "BALLS AND STRIKES"),

Defendants.

Case No. 15-cv-0379 (JDP) (SLC)

Hon. James D. Peterson
Hon. Stephen L. Crocker

ECF Case
Electronically Filed

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION**

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Attorneys for Plaintiffs

Plaintiffs SCOTT BOEHM and DAVID STLUKA (“Plaintiffs”), by and through undersigned counsel, respectfully submit this Memorandum of Law in support of their Motion for Preliminary Injunction (“Motion”) pursuant to Federal Rule of Civil Procedure 65 and Sections 502(a) and 503(a) of the Copyright Act against all Defendants.

RELIEF REQUESTED

Pursuant to Fed. R. Civ. P. 65 and 17 U.S.C. §§ 502(a) and 503(a), Plaintiffs request an order of preliminary injunction against all Defendants. Plaintiff request that the Court enjoin all Defendants from copying or using Plaintiffs’ photos identified in the Complaint (including all photos in Exhibits 1-10) (hereinafter the “Photos”) and to refrain from displaying or selling any products that include any of Plaintiffs’ Photos during the pendency of this action.

Plaintiffs specifically request that the Court order that Defendants are prohibited from (i) creating any further products featuring Plaintiffs’ Photos; (ii) displaying or selling any existing inventory or products featuring Plaintiffs’ Photos; (iii) distributing to any other retailers any copies of or products featuring copies of Plaintiffs’ Photos; and (iv) immediate impoundment of any products and inventory featuring copies of Plaintiffs’ Photos as well as any digital or electronic copies of Plaintiffs’ Photos and all records documenting the manufacture, sale, or receipt of any infringing products that are in the possession, custody, or control of any Defendants.

FACTUAL BACKGROUND

This is the second copyright infringement case Plaintiffs have been forced to bring in this District against sports memorabilia dealers and retail store owners who have used unlicensed and otherwise infringing copies of Plaintiffs’ copyrighted photographs to create sports merchandise for their stores. Plaintiffs’ first case, *Boehm, et al. v. Zimprich, et al.*, No. 14-cv-00016 (JDP), was transferred to this Court on January 9, 2014. (*Id.* Dkt. No. 22.) On December 17, 2014,

after nearly a year of discovery and briefing, this Court entered summary judgment on liability against multiple retail defendants and store owners and specifically held that the license violations and unlicensed uses of Plaintiffs' photos by certain defendants was willful. (*Id.* Dkt. No. 171.) The Court also subsequently entered default judgment against two additional defendants on February 20, 2015 and also held that the infringements were willful, ultimately awarding Plaintiffs \$100,000 in statutory damages for each infringement, as well as their attorneys' fees and costs. (*Id.* Dkt. No. 183.)

The claims in this case are essentially identical to those in the *Zimprich* action, the only difference is that different defendants are involved. In each case, several sports memorabilia retail stores, store owners, and suppliers used unlicensed and infringing copies of Plaintiffs' copyright photographs to create merchandise for their stores. In each case, there is absolutely no doubt that the defendants' conduct constitutes copyright infringement and that the defendants have no defense.

PRELIMINARY STATEMENT

This is an open-and-shut case of copyright infringement. Plaintiffs are professional photographers who make their living taking and licensing photographs. Plaintiffs primarily photograph sporting events, including games and events for Major League Baseball ("MLB"), the National Football League (NFL), and the National Collegiate Athletics Association ("NCAA"). (Compl. ¶¶ 1-2.) Although Plaintiffs photograph sporting events around the country, they primarily photograph games and events for Wisconsin professional and collegiate teams, including the Wisconsin Badgers (NCAA), Green Bay Packers (NFL), and Milwaukee Brewers (MLB). (*Id.* ¶ 3.)

Plaintiffs' Complaint alleges that Defendants infringed Plaintiffs' copyrights by using their photographs without permission to create canvases, posters, and other sports memorabilia

products that they sold to in their retail stores or supplied to other defendants. (*See* Compl. ¶¶ 4-162.) Plaintiffs are the registered owners of copyrights in all photographs at issue in this action. (*Id.* ¶¶ 165 & 167.) Prior to filing this lawsuit, Plaintiffs issued cease and desist demands to many of the defendants. (*See* McCulloch Decl. Exs. 1-3.) Notwithstanding these demands, the Complaint includes substantial proof of ongoing infringements by the Defendants. (*See* Compl. ¶¶ 135-145 & Exs. 2-9.)

Plaintiffs require a preliminary injunction to prevent the Defendants from continuing to profit from their illegal conduct during the pendency of this action. A preliminary injunction also is necessary to prevent the Defendants from selling, transferring, or even destroying evidence of their illegal conduct prior to discovery. Defendants have no possible defense in this case, and there are no plausible grounds to permit them to continue to sell infringing merchandise during this action.

ARGUMENT

I. STANDARD FOR ORDERING PRELIMINARY INJUNCTION.

Section 502(a) of the Copyright Act provides that the Court may grant injunctive relief “on such terms as it may deem reasonable to prevent or restrain infringement of a copyright.” 17 U.S.C. § 502(a). Section 503(a)(1) further provides that, “[a]t any time while an action under this title is pending, the court may order the impounding, on such terms as it may deem reasonable: (A) of all copies . . . claimed to have been made or used in violation of the exclusive right of the copyright owner; (B) of all . . . master[copies] . . . or other articles by means of which such copies . . . may be reproduced; and (C) of records documenting the manufacture, sale, or receipt of things involved in any such violation, provided that any records seized under this subparagraph shall be taken into the custody of the court.” 17 U.S.C. § 503(a)(1). This authority also is reflected in Fed. R. Civ. P. 65(f).

As in any other context, whether to grant or deny a preliminary injunction in a copyright suit lies within the sound discretion of the Court. *See FoodComm Int'l v. Barry*, 328 F.3d 300, 303 (7th Cir. 2003); *accord S.C. Johnson & Son, Inc. v. Clorox Co.*, 241 F.3d 232, 237 (2d Cir. 2001). In exercising this discretion, the Court is required to apply a well-established four-factor test, without resort to general or categorical rules. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 395 (2006) (Kennedy, J., concurring). “In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 24 (2008) (quotation marks and citations omitted).

Following *eBay* and *Winter*, to obtain a preliminary injunction, the moving party must establish that: (1) it “is likely to succeed on the merits”; (2) that it is “likely to suffer irreparable harm in the absence of preliminary relief”; (3) that “the balance of equities tips in [its] favor”; and (4) “that issuing an injunction is in the public interest.” *United States v. NCR Corp.*, 688 F.3d 833, 837 (7th Cir. 2012); *see also Michigan v. U.S. Army Corps of Engrs.*, 667 F.3d 765, 769 (7th Cir. 2011) (citing *Winter*, 555 U.S. at 20); *accord Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010).

In applying this standard to requests for preliminary injunctive relief, the Seventh Circuit has adopted a “sliding-scale” approach under which the stronger the case is on its merits the less irreparable harm must be shown. *See Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992); *see also Ty, Inc. v. Jones Group, Inc.*, 237 F.3d 891, 895 (7th Cir. 2001) (“[T]he more likely plaintiff will succeed on the merits, the less the balance of irreparable harms need favor plaintiff’s position.”); *Judge v. Quinn*, 612 F.3d 537, 546 (7th Cir. 2010) (“These considerations are interdependent: the greater the likelihood of success on the merits, the less net

harm the injunction must prevent in order for preliminary relief to be warranted.”) (citation omitted). “The sliding scale approach is not mathematical in nature, rather it is more properly characterized as subjective and intuitive, one which permits district courts to weigh the competing considerations and mold appropriate relief.” *Ty, Inc.*, 237 F.3d at 895-96 (internal quotation marks and citations omitted).

II. A PRELIMINARY INJUNCTION IS WARRANTED.

A. Success On The Merits Is Guaranteed.

A party seeking a preliminary injunction must demonstrate “that it has a ‘better than negligible’ chance of success on the merits of at least one of its claims.” *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S.A.*, 549 F.3d 1079, 1096 (7th Cir. 2008). Given the overwhelming evidence of infringement, Plaintiffs easily satisfy this “admittedly low requirement.” *Id.* Indeed, Plaintiffs’ success on the merits is certain.

The Copyright Act guarantees to copyright owners certain “exclusive rights” over their original works, including the rights to copy and display their works and to distribute copies of their work by sale. 17 U.S.C. § 106. This bundle of rights is reserved by federal statute exclusively to the copyright owner and “[a]nyone who violates any of the exclusive rights of the copyright owner, that is, anyone who trespasses into his exclusive domain by using or authorizing the use of the copyrighted work in one of the five ways set forth in the statute, ‘is an infringer of the copyright.’” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 432 (1984) (quoting 17 U.S.C. § 501). To prevail on an infringement claim, copyright claimants must demonstrate (1) that they own a valid copyright interest in the subject works; and (2) that the defendants violated any one of the exclusive rights guaranteed to copyright owners under Section 106 of the Copyright Act. *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991); *Scott v. WKJG, Inc.*, 376 F.2d 467, 469 (7th Cir. 1967). Thus, once Plaintiffs

demonstrate that they own copyrights in the subject photos, the only remaining question is whether Defendants copied, displayed, or sold their copyrighted works. *See JCW Investments, Inc. v. Novelty, Inc.*, 482 F.3d 910, 915 (7th Cir. 2007). Although courts often note that such evidence typically is difficult to come by, all courts agree that unauthorized “copying may be proven by direct evidence.” *Id.*

As to the first element, Plaintiffs have registered their copyrights in all of the subject photographs. (Compl. ¶ 167 & Ex. 1.) The certificates of registration are attached as Exhibit 4 to the McCulloch Declaration. These certificates of registration from Copyright Office constitute *prima facie* evidence of ownership of a valid copyright. *See* 17 U.S.C. § 410(c); *Wildlife Express Corp. v. Carol Wright Sales, Inc.*, 18 F.3d 502, 507 (7th Cir. 1994).

As to the second element, Plaintiffs’ pleadings include substantial evidence that Defendants have used and continue to use Plaintiffs’ Photos in commercial products. (*See* Compl. Exs. 2-9.) As alleged in the Complaint, none of the Defendants ever had a license to use Plaintiffs’ Photos for any purpose and thus all uses of Plaintiffs’ Photos by the Defendants are infringing. (*Id.* ¶¶ 149-53.)

Because Plaintiffs have offered substantial evidence of direct copying, Defendants bear the burden of coming forward with evidence of a valid license. *See* Fed. R. Civ. P. 8(c) (license is affirmative defense); *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996) (noting that license is “an affirmative defense to a claim of copyright infringement”); *Tasini v. New York Times Co.*, 206 F.3d 161, 171 (2d Cir. 2000) (“Where the dispute turns on whether there is a license at all, the burden is on the alleged infringer to prove the existence of the license.”); *Bourne v. Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995) (same); *Baisden v. I’m Ready Productions, Inc.*, 693 F.3d 491, 499 (5th Cir. 2012) (same). Defendants cannot offer any

evidence of a license to use Plaintiffs' Photos because Defendants never obtained a license. Accordingly, Plaintiffs' success on the merits is guaranteed.

B. Plaintiffs Will Suffer Irreparable Harm From Continued Infringements.

1. Difficulty In Calculating Damages.

Injunctive relief is appropriate here because, as in many copyright suits, actual damages will be difficult to calculate and prove. *Graphic Design Mktg., Inc. v. Xtreme Enterprises, Inc.*, 772 F. Supp. 2d 1029, 1034 (E.D. Wis. 2011) (citing *General Leaseways, Inc. v. National Truck Leasing, Ass'n.*, 744 F.2d 588, 591 (7th Cir.1984)); accord *Omega Importing Corp. v. Petri-Kine Camera Co.*, 451 F.2d 1190, 1195 (2d Cir. 1971) (Friendly, C.J.) (noting that courts tend to issue injunctions in the copyright context because “to prove the loss of sales due to infringement is . . . notoriously difficult”). Damages will be difficult to determine with specificity in this case because Defendants used Plaintiffs' copyrighted photographs in numerous products being sold to the public. Defendants likely did not track past sales by the photo featured in the memorabilia item being sold. Plaintiffs also have no records of those sales and cannot track future sales. Plaintiffs have not received any license fee or royalty from those sales. All three of these factors demonstrate irreparable harm to Plaintiffs. See, e.g., *Designer Skin, LLC v. S & L Vitamins, Inc.*, 2008 WL 4174882, at *5-7 (D. Ariz. Sept. 5, 2008) (granting injunction after finding irreparable harm due to difficulty of proving damages from copyright infringements). Similarly here, the difficulty of calculating and proving damages requires that a preliminary injunction be imposed on the Defendants' to prevent any further unauthorized use of Plaintiffs' copyrighted photographs. See *Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 16 (7th Cir. 1992) (“it is virtually impossible to ascertain the precise economic consequences of intangible harms, such as damage to reputation and loss of goodwill”); *Graphic Design Mktg.*, 772 F. Supp. 2d at 1034

(finding irreparable harm due to loss of good will and damage to reputation due to market confusion).

2. Direct Market Competition.

Plaintiffs also will suffer irreparable harm in the absence of injunctive relief due to direct market competition from Defendants' illegal operations. *See Graphic Design Marketing*, 772 F. Supp. 2d at 1034 (finding irreparable harm due to competition in the same market); *Jano Justice Sys., Inc. v. Burton*, 636 F. Supp. 2d 763, 767 (C.D. Ill. 2009) ("The insufficiency of a damages award is particularly pronounced in this case, where the universe of potential customers is limited to the 102 counties of the state. As such, a loss of three customers, as alleged here, is quite significant, and an adequate damages remedy would prove difficult to fashion.")

As alleged in the Complaint, Plaintiffs specialize in photographing sporting events involving Wisconsin sports teams. (Compl. ¶¶ 3, 118.) Each of the Defendants either operates entirely in Wisconsin or caters heavily to Wisconsin sports fans. (*Id.* ¶¶ 4-113.) Given the limited market, Plaintiffs' ability to license their works involving Wisconsin sports teams to sports memorabilia retailer is directly and seriously harmed by the unlicensed use of their works by the Defendants. This harm is all the more pronounced given the massive scope of the infringements involved and the number of retail stores involved in this massive copyright infringement scheme. (*Id.* ¶¶ 131-145 & Exs. 2-9.)

C. The Balance Of Hardships Is Decidedly In Plaintiffs' Favor.

Given Plaintiffs' strong showing of their likelihood of success on the merits, "an injunction will be proper unless the injunction would inflict a much greater harm on the Defendants than the denial of the injunction would inflict on [Plaintiffs]." *Jano Justice Sys.*, 636 F. Supp. 2d at 767. Against the numerous factors showing potential irreparable harm to

Plaintiffs, Defendants cannot point to any rational or legal reason that they should be permitted to continue to profit from their infringing uses of Plaintiffs' works.

Even if an injunction were to severely impact Defendants' business, that is not a relevant "hardship" where, as here, the products being impacted involve the illegal use of Plaintiffs' intellectual property. *See WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 621 (S.D.N.Y. 2011) ("Having found that [defendant] has infringed plaintiffs' copyrights, it follows that [defendant] is not legally harmed by the fact that it cannot continue streaming plaintiffs' programming, even if this ultimately puts [defendant] out of business."). Defendants thus cannot claim any "hardship" resulting from being required to discontinue the unlicensed use of Plaintiffs' photos because "such unsanctioned use is precisely the harm that the copyright laws seek to avoid." *Id.* In other words, regardless of the effect on their business, it is not a "hardship" for Defendants to be required to *follow the law*.

Even if Defendants were to point to a valid hardship that the Court could consider, the Court must apply the "sliding scale" standard in balancing such hardships. Therefore, the strength of Plaintiffs' showing of their likelihood of success on the merits requires that Defendants—as the party committing the illegal copying—rather than Plaintiffs—the innocent victims—bear the brunt of the hardship. *See Jano Justice Sys.*, 636 F. Supp. 2d at 767 ("The harm, for both parties, is seeing their business curtailed. . . . Since [plaintiff] has established that it will more than likely prevail, it is Defendants who should have to suffer this harm.").

D. The Public Interest Is Not Affected By The Requested Relief.

Given the nature of the unlicensed uses at issue, the relief requested by Plaintiffs does not implicate any important public interest. Defendants are not using Plaintiffs' photos for any public interest purpose, such as education, commentary, reporting, research, etc. Instead, Defendants are using Plaintiffs' photos for the sole purpose of creating sports memorabilia which

serves only their own personal financial interests. As such, granting Plaintiffs' motion would not impact any public interest.

CONCLUSION

For the forgoing reasons, Plaintiffs request that the Court **GRANT** the Motion and issue a preliminary injunction order as requested herein.

Dated: June 23, 2015

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