

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

PAUL V. AMBROSE, :
Plaintiff, : CASE NUMBER: No. 07-1248
vs. :
Judge Arthur J. Schwab
TRAIN COLLECTORS ASSOCIATION, :
and :
EASTERN DIVISION - T.C.A. :
Defendants.

**PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE IN OPPOSITION TO MOTION FOR
EXTENSION OF TIME**

Plaintiff Paul V. Ambrose hereby files his Reply to Defendants Train Collectors Association ("TCA") and Eastern Division - T.C.A. ("Eastern Division") Opposition to Plaintiff's Second Motion for an Extension of Time to file a Response to Defendants' Motion to Dismiss the Amended Complaint.

**I. Neither Undersigned Counsel, nor the Mediator, breached the
Local Rules of Confidentially:**

Defendants accuses Undersigned Counsel of violating the Local Rules of Confidentially by including in his Second Motion the statements that the extension of time until January 15, 2008 was proposed by the Mediator, and when Defendants' counsel objected to it (even through her averred schedule and her Clients' wishes were why Mediation could not immediately occur and had to be postponed until January 7, 2008), the Mediator stated that Undersigned Counsel had his authority to inform this Court that the Mediator believed that it was a good idea for such an Extension of Time and that it would allow the Court-Ordered Early Mediation a chance to succeed.

First, Undersigned Counsel had the expressed written authority from the Mediator to include the challenged statements in his Second Motion. **Exhibit A** attached is a copy of the e-mail sent to the Mediator on December 3, 2007 along with the attached proposed Motion.

Exhibit B attached is a copy of the forwarded e-mail to the Mediator that was sent at the same time to Defendants' counsel. **Exhibit C** attached is a copy of the e-mail, and its attachment, from the Mediator on December 3, 2007 that included the required changes that the Mediator wanted to include in the proposed Motion. The e-mail from the Mediator noted that a copy of it, as well as its attachment, was also being sent to Defendants' counsel. **Exhibit D** attached is a copy of the e-mail sent to the Mediator on December 3, 2007 along with the attached revised Motion that included the required changes from the Mediator. **Exhibit E** attached is a copy of the forwarded second e-mail to the Mediator that was sent at the same time to Defendants' counsel. It is noted that at no time did Defendants' counsel object to these exchanges of e-mails with the Mediator or the Mediator's express designation of authority to Undersigned Counsel to include such statements. Further, Plaintiff's Motion clearly noted that Defendants opposed the granting of this simple request for an extension of time.

Second, Local Rules of Confidentiality do not apply to such statements as included in the Second Motion. L.R. 16.3.5 (E) imposes a confidentiality requirement as to all written or oral communications made in connection with or at the Mediation Conference. However, in this case, the communications included as authorized in the Second Motion were communications among attorneys regarding the scheduling of the Conference, the Conference has not yet occurred and the parties have not provided the Mediator any of the papers contemplated by Local Rules. Obviously such statements included in the Second Motion had nothing to do with the merits of the action. Further, the Local Rules clearly allows the Mediator to inform the Court (which Plaintiff would respectfully submit would be at any state of the proceedings) as to whether in the Mediator's opinion the parties are in compliance with the good faith requirements of the ADR process. It is noted that this Court has made several observations on the record in this action and in the Krause action of the competency and respect it has as to this Mediator, and as such it is respectfully submitted this Court should

respect the judgment used by this Mediator in his decision to communicate the aforementioned statements and suggestions to this Court through Undersigned Counsel.

II. Plaintiff's desire for Good Faith Mediation has nothing to do with the strong merits of his Amended Complaint:

This should be a simple case as to copyright infringement, especially given that the Publisher of the Infringing Books has recently settled its action before this Court and issued a press release apologizing to the Plaintiff, admitting infringement and stating that it had paid Plaintiff's legal expenses in that separate case.¹ Further Defendant TCA has admitted in an Affidavit filed with its Original Motion to Dismiss that it sold copies of the first Infringing Book.

The Second Amended Complaint further avers that Defendant TCA sold copies of both Infringing Books after receipt of Plaintiff's cease-and-desist letter, that Defendant TCA created a special "David Doyle" page on its website to sell copies of the Infringing Books only after it had been served with the Complaint in this action by a process server, that Defendant Eastern Division distributed copies of both Infringing Books as door prizes, that both Defendants allowed the further distribution of both Infringing Books by table holders at several Toy Train Meets after receipt of Plaintiff's cease-and-desist letter and the filing of this civil action, and that both Defendants sent out tens of thousands of mailings, and thousands of e-mails, promoting Mr. Doyle and/or the Infringing Books after receipt of Plaintiff's cease-and-desist letter.

Count III of the Amended Complaint avers Direct Copyright Infringements by the direct sale and distribution of both Infringing Books by the Defendants. Contrary to Defendants' contentions, the Copyright Act clearly provides to the copyright holder the exclusive right to distribute copies of the copyrighted work to the public by

1. As noted in the Motion seeking approval to file this Reply, Plaintiff is also engaged in active settlement discussions with the "Author" of the Infringing Works and Settlement Proposals are proceeding with good results over the past few days.

sale. 17 U.S.C. Sec. 106 (3). The Third Circuit in Ford Motor Co. v. Summit Motor Products, Inc., 930 F.2d 277, 294 (C.A.3 (N.J.), 1991) held that the sale of an infringing item is infringement itself. This holding is similar to holdings in dozens of cases, including two United State Supreme Court cases, that the sale of an infringing item is violation of the exclusive rights provided for in 17 U.S.C. Sec. 106 (3). **See in part** Woolworth Co v. Contemporary Arts, 344 U.S. 228, 229, 73 S.Ct. 222, 97 L.Ed. 276 (1952); Shapiro, Bernstein & Co. v. Goody, 248 F.2d 260, 264 (2 Cir., 1957), cert. denied, 355 U.S. 952, 78 S.Ct. 536, 2 L.Ed.2d 529 (1958); Ford Motor Co. v. B & H Supply, Inc., 646 F.Supp. 975, 989 (D. Minn., 1986); Midway Mfg. Co. v. Dirkschneider, 571 F.Supp. 282, 285 (D.Neb. 1983); United States v. Wells, 176 F.Supp. 630, 635 (S.D. Texas 1959); United States v. Bily, 406 F.Supp. 726 (E.D. Pa., 1975). A great many of these cases noted Judge Learned Hand's opinion in Foreign & Domestic Music Corp. v. Licht, 196 F.2d 627 (2d Cir. 1952) that while it was not an infringement for the defendant to buy the infringing copy, given that "one does not infringe a copyright by buying an infringing copy of the 'work,' though the buyer will infringe, if in his turn he sells the copy he has bought."

Counts I and II of the Amended Complaint aver that Defendants' admitted actions are violations of the Copyright Act pursuant to theories of Contributory and Vicarious Liabilities. However, it is respectfully submitted that this Court does not need to look further than the Direct Copyright Infringement averments to grant the Second Motion. Count III can not be successfully challenged in a Motion to Dismiss given Defendant's admittance of sales of the Infringing Books. Accordingly, it is respectfully submitted that this action, in whole or in part, will likely continue past the Motion to Dismiss phase.² The

2. Defendants filed Affidavits with its Original Motion to Dismiss suggesting that no Vicarious Liability could be found because no one attends Train Meets sponsored by these Defendants to either purchase books or to buy infringing works. These Affidavits are blatantly false as to these assertions and if Plaintiff has to file a Response to the Motion to Dismiss next week, Plaintiff will spend considerable time discussing these false Affidavits as well as the laundry-list of federal and state statues that

cases cited by the Defendants as to the two additional Infringement Counts are simply not either controlling or on point as to the actual and undisputed averments contained in the Second Amended Complaint.³

III. This is the perfect case for Mediation:

Local Rules note, as to the Mediation Conference, that:

The parties themselves shall attend the conference unless excused for good cause by the adjunct settlement judge. This requirement reflects the court's view that one of the principal purposes of the conference is to afford litigants an opportunity to articulate their position and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the relative strengths of the opposing positions.

Given that any legal expenses that Defendants have recently incurred in this case arose solely from the decision of this particular Defense attorney, who had capriciously rejected on November 12, 2007 an agreement reached with an associate in her law firm that would have allowed both parties not to file anything in this case for more than 30 days so that this case could go into immediate Mediation, one has to wonder why this particular Attorney would do anything, or say anything (as she did in her Response) to prevent her Clients from listening to the Mediator in this action.⁴ It is noted that Plaintiff

Defendant Eastern Division is averred to have violated by its deliberate actions over the past few years.

It is the additional Affidavits and averred facts that Plaintiff would have to include in any Response to the Motion to Dismiss that led the Mediator to believe that if said Response is required to be filed before Mediation, the Response would harden the positions of the parties and would preclude any chance for the Mediation to be successful (this was one of the disclosures authorized by the Mediator).

3. The Third Circuit in Columbia Pictures Industries, Inc. v. Aveco, Inc., 800 F.2d 59 (3rd Cir.1986) found that providing the site and facilities for known infringing activity is sufficient to establish contributory liability. As the Amended Complaint avers, both the TCA and the Eastern Division were apprised of these infringing activities by a cease-and-desist letter, and accompanied evidence, but nevertheless allowed the further sales of these Infringing Books by members who had purchased table space at the Annual Convention in Denver and the York October 2007 Toy Train Meets.

4. Plaintiff has attached as **Exhibit G** a copy of the November 9, 2007 e-mail from Plaintiff's counsel to Sharon Menchyk, Esquire, the associate in Defendants' counsel's firm, that given the Krause Settlement that the parties in this case would agree to a thirty day or so stay so that the Amended Complaint would not need to be filed and the parties could immediately go into Mediation with Attorney Colen. Attorney Menchyk subsequently voiced her acceptance of this offer.

in writing, as part of the agreement he had conditionally reached with the associate, was willing last month to settle this case only for an apology and in-kind contributions towards his expenses before Defendants' counsel caused him \$6,000.00 in additional legal expenses by requiring him to file an Amended Complaint with only two days notice. Likewise, within the past two weeks, Plaintiff offered in writing to settle this case for an apology, payment of his legal expenses and a list of remedial efforts before Defendants' counsel's latest tantrums.⁵ Given these unprofessional actions, one has to suggest that it is very likely that the Board of Directors of both Defendants did not have the complete notice from Defendants' counsel as to these offers to settle an action where Defendants, it is respectfully submitted, have no legal defense. This is the perfect situation cited under the Local Rules for setting forth the neutral assessment by the Mediator of the relative strengths of each position with the actual parties in attendance before the parties harden their positions and settlement becomes impossible in this action.⁶

Plaintiff has also attached as **Exhibit H** a copy of the November 12, 2007 e-mail from Plaintiff's counsel to Attorney Menchyk, as well as an Order and Stipulation, so that both parties could avoid unnecessary legal expenses and go directly into Mediation with Attorney Colen. This was the agreement, as set forth in the Stipulation and Order, that Defendants' counsel subsequently rejected later that day that required the filing of the Amended Complaint with less than two days notice.

5. Allowing the Mediation to occur on January 7, 2008 with a chance of success also likely removes the requirement that would force Plaintiff to engage in extensive Depositions the last two weeks of December 2007 to satisfy the January 4, 2008 date included in the CMO for adding new parties. This would save both parties considerable legal expenses.

Plaintiff also agreed with the Mediator's request that he would offer to withdraw without prejudice the additional counts in his Amended Complaint other than the three Copyright Infringement Counts if Defendants in good faith participated in the Mediation process and satisfied Plaintiff's concerns as to their intentions. Accordingly, giving the Mediation a chance to succeed produces a result that even if this case does not settle in full that said Mediation would likely alleviate this Court from having to rule on Defendants' Motion to Dismiss as to the balance of the Counts in the Second Amended Complaint.

6. Both Plaintiff and Undersigned Counsel are members of Defendant TCA. As such, although Defendant TCA's attorney has caused Plaintiff thousands of dollars worth of unnecessary legal expenses, and the current officials running Defendant TCA have deliberately violated numerous provisions of the Copyright Act, all while stating, sometimes in print, that they could do anything they wanted to because there was not a Judge's Order ordering them to stop, Plaintiff has attempted to moderate his demands because he realizes they would in the end be paid for by the innocent membership of these Defendants. As such, Plaintiff directed his counsel the day before Defendants'

IV. Alternative Relief:

In the event that this Court denies the Second Motion for Extension of Time, Undersigned Counsel, a sole practitioner, will only have a day or two of notice that Plaintiff would actually have to file his Response to the Motion to Dismiss on December 10, 2007. Accordingly, in the event that this Court does not grant the extension to January 15, 2008 so that the Early Mediation could occur, Plaintiff would respectfully request a three day extension of time to December 13, 2007 so that Undersigned Counsel could prepare the twenty-five page Response to Defendants' Motion and the necessary Affidavits.

December 7, 2007

Respectfully submitted,

By: /s/ Drew J. Bauer
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counsel filed her Response to lobby again for Early Mediation. A copy of Plaintiff's counsel's December 4, 2007 e-mail is attached as **Exhibit F**. This e-mail notes that Plaintiff is willing to settle for an apology, his costs and a list of remedial efforts only **before** this Court reaches a decision on the Motion to Dismiss, and that once this Court reaches a decision, and if this action, as expected, continues in whole or in part, Plaintiff would want some of, or all of, the \$900,000 Statutory Damages he is entitled to under the Copyright Act. As the e-mail notes in part:

I believe the chance to resolve this action easily, to try to separate the parties and calm things down, is the time to do this before any decision of Judge Schwab, when both parties might have a slight belief that they will not totally prevail. What is undisputed in this action is that Mr. Doyle copied my Clients books and that your Clients sold these books, distributed these books (gave them out for free as door prizes), engaged in endless promotions of these books and allowed the further distribution of these books. Even if everything you aver is true and none of these actions violate the Copyright Act, which I have a tremendous inability to agree with, these actions are easily in violation of the numerous ethical standards that your Clients have averred that they operate under and which they posted on their websites.

The e-mail also noted as to the Mediator:

I believe it would be productive for all parties to spend the time of Fred Colen wisely, and use the tremendous resources he brings to this matter, and to listen to his review of the copyright issues in this case. I know that both my Client and myself will listen carefully as to any opinions that Fred may give as to these Counts.