

**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 BRIEF IN OPPOSITION TO DEFENDANTS' MOTION
TO DISMISS THE AMENDED COMPLAINT**

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**PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION
TO DISMISS THE AMENDED COMPLAINT**

Plaintiff Paul V. Ambrose, by and through his attorney, hereby files his Brief in Opposition to Defendants' Motion to Dismiss the Amended Complaint.

I. STANDARD OF REVIEW:

In considering a motion to dismiss for failure to state a claim on which relief can be granted, the court must accept as true all well-pleaded factual allegations in the Complaint. Elmore v. Cleary, 399 F.3d 279, 281 (3rd Cir. 2005).

II. PLAINTIFF'S COPYRIGHT INFRINGEMENT COUNTS ARE PROPERLY BEFORE THIS COURT:

Plaintiff is the current holder, by assignment, contract or pursuant to applicable law, of three copyrights, and any resulting litigation rights arising therefrom, to three different books that he solely wrote about Lionel Post-War Sets: (i) Greenberg's Guide to Lionel Trains 1945-1969, Volume III: Catalogued Sets, Second Edition, ISBN: 0-89778-449-9 ("Second Edition"); Greenberg's Guide to Lionel Trains 1945-1969, Volume III: Catalogued Sets, ISBN: 0-89778-172-4 and 0-89778-173-2 ("First Edition"); and Greenberg's Pocket Price Guide and Inventory Checklist to Lionel Catalogued Sets, 1945-1969), ISBN: 0-89778-209-7 (the "Pocket Guide"). All three of these works are referred to in the Amended Complaint as the "Copyrighted Works" (¶17).¹

In April, 2007, Krause Publications, Inc. ("Krause") published a book averred to be "authored" by Mr. David Doyle ("Doyle") titled the "Standard Catalog of Lionel Train Sets 1945-1969", by David Doyle, ISBN: 978-0-89689-444-0, Library of Congress Number: 2006925056 ("Infringing Work") (¶9). In September 2007 Krause published a derivative of this book, also "authored" by Mr. Doyle, titled "Collectors Guide to Postwar Lionel Trains 1945-1969 (Collector's Edition)", by David Doyle, ISBN: 978-0-89689-541-6, Library of Congress Number: 2007922994 ("Additional Infringing Work (derivative)"). The

1. Denotes the Paragraph of such averment(s) in the Amended Complaint.

Amended Complaint details in very specific averments that these two books (herein collectively referred to as the "Infringing Works") infringed the copyrights Plaintiff has as to the Copyrighted Works in that Mr. Doyle engaged in actionable copying by transcribing dozens of paragraphs, and hundreds of sentences, from the Copyrighted Works into the Infringing Works as well as virtually copying all of Plaintiff's original compilation choices (¶¶28-43).²

To prove copyright infringement pursuant to the Copyright Act, 17 U.S.C. § 501, the plaintiff must demonstrate two elements: (i) ownership of a copyright and (ii) copying by the defendant. Dam Things from Denmark v. Russ Berrie & Co., Inc., 290 F.3d 548, 561 (3rd Cir. 2002); Whelan Associates, Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1231 (3rd Cir. 1986). Copying is a "shorthand reference to the act of infringing any of the copyright owner's five exclusive rights set forth at 17 U.S.C. § 106. Dun & Bradstreet Software v. Grace Consulting, 307 F.3d 197, 206 (3rd Cir. 2002). Plaintiff previously filed in the Krause action copies of the Assignments of the Copyrights and of the Author Contracts with his publishers that gave Plaintiff sole ownership of the copyrights and litigation rights arising from the Copyrighted Works. Defendants in their Motion to Dismiss the Amended

2. Plaintiff filed an earlier Complaint in Copyright Infringement against Krause and Doyle at 07-0873, styled Paul V. Ambrose v. Krause Publications, Inc. et al., on June 22, 2007. On December 1, 2004 this Court approved the Notice of Dismissal of Amended Complaint against Defendant Krause and of the Counterclaims of Krause. The Notice included the statement that the parties had entered into a Confidential Settlement Agreement dated November 30, 2007 (D.E. #86 - Krause). Plaintiff attaches to this Response Brief the Affidavit (**Exhibit "A"**), the First Declaration (**Exhibit "B"**) and the Second Declaration (**Exhibit "C"**) of Plaintiff that were previously filed in the Krause Action. As noted in the Ambrose Third Declaration (attached as **Exhibit "D"**), upon the execution of the November 30, 2007 Settlement Agreement Krause released a press statement that apologized to the Plaintiff, admitted infringement and stated that it had paid Plaintiff's legal expenses in that separate case. A copy of said Release is attached to the Ambrose Third Declaration as "D-1".

As this Court is aware, new counsel for the Defendant David Doyle filed on December 12, 2007 a Stipulated Motion for Extension of Time in which counsels informed the Court that the parties were in settlement discussions as to the remaining portion of the Krause action.

Complaint do not contest Plaintiff's standing as the copyright holder to the Copyrighted Works.³

The second element, actionable copying, has already been admitted by Krause in the companion 07-0873 action. However, Plaintiff in the Amended Complaint included over thirty pages of detailed averments as to the averred actionable copying in the Infringing Works and seeks in the instant case for the Court to find such direct infringement from the publication of the Infringing Works (See Page 73, Amended Complaint). Defendants in their Motion to Dismiss the Amended Complaint do not contest the basis of the actionable copying claim.

Instead, Defendants argue that since no finding of actual infringement has yet been found in the Krause, or any other, action that no infringement action can be brought at this time against these Defendants. This argument was previously dismissed by this Court last month at the time of the dismissal of Defendants' Alternative Motion for Stay (D.E. #12). Defendants in their Brief failed to properly cite a single case dealing with secondary liability under the Copyright Act that has been dismissed because a Court had not found prior direct copyright Infringement.⁴ Plaintiff is unaware of a single holding by any

3. Defendants admit that Plaintiff's alleges a valid copyright in the alleged infringed material (Page 3, Brief in Support of Motion to Dismiss the Amended Complaint (D.E.#22)).

4. Since secondary liability for copyright infringement does not exist in the absence of direct infringement by a third party, it is appropriate for the Court to first find whether there is such direct infringement. See A&M Records v. Napster, 239 F.3rd 1004, 1013 n. 2 (9th Cir. 2001); Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F. Supp. 1361, 1371 (N.D. Cal. 1995).

As Plaintiff noted at the time of argument on the Motion for Stay, under Defendants' argument no infringement action could ever be brought since no first action would ever be allowed to find the actual first occurrence of infringement. This chicken-or-the-egg argument has no application to the Copyright Act. The Act provides liability for any party who violates the exclusive rights held by the copyright holder. It is clear that a copyright owner may sue "any member of the distribution chain." Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd., 647 F.2d 200, 207 (D.C.Cir. 1981). See, e. g., Wells v. Universal Pictures Co., 166 F.2d 690, 692 (2nd Cir. 1948); Grocers Baking Co. v. Sigler, 132 F.2d 498, 502 (6th Cir. 1942); Columbia Broadcasting Sys., Inc. v. Scorpio Music Distributors, Inc., 569 F.Supp. 47, 48-49 (E.D.Pa. 1983), aff'd without op., 738 F.2d 424 (3rd Cir.

Court that has supported Defendants' argument. In fact, the dozens of cases cited in this Response Brief (other than those cited to support the averments contained in Count III as to Direct Infringements) virtually all deal with claims seeking secondary infringement liability where no prior direct infringement had been found by a Court. In each case, the Court has merely first considered the averments as to direct infringement (as requested by the Amended Complaint), and then when found, proceeded to address the issues of secondary infringements as to the named defendants.

III. COUNT III: DIRECT COPYRIGHT INFRINGEMENTS:

Count III of the Amended Complaint avers Direct Copyright Infringements by the sale and distribution of the Infringing Works by the Defendants.

The Amended Complaint avers that Defendant TCA sold copies of the Infringing Work both before and after receipt of Plaintiff's June 22, 2007 cease-and-desist letter, and copies of the Additional Infringing Work (derivative) after receipt of said letter and the filing of this civil action (¶45(x)); that Defendant TCA created a special "David Doyle" page on its website to sell copies of the Additional Infringing Work (derivative) only after it had been served with the Complaint in this action (¶45(xvi); ¶54); that Defendant Eastern Division distributed copies of the Infringing Work as door prizes at the April 2007 York Train Meet and that Defendant Eastern Division distributed

1984) ("It is well established that a suit for infringement is analogous to other tort actions and infringers are jointly and severally liable; hence plaintiff need sue only such participants as it sees fit", quoting Costello Publishing Co. v. Rotelle, 670 F.2d 1035, 1043 (D.C.Cir. 1981)).

Defendants do cite In re Aimster Copyright Litigation, 334 F.3rd 643, 646 (7th Cir. 2003) in support of their position. However, an actual reading of this case reveals the opposite holding and that the Seventh Circuit actually sustained injunction relief as to secondary infringements by third parties without a prior direct infringement finding. **See Also** Metro-Goldwyn-Mayer v. Grokster Ltd., 380 F.3rd 1154, 1164 (9th Cir. 2004).

Defendants also cite Arista Records, Inc. v. Flea World, Inc., No. 03-2670, 2006 WL 842883 (D. N.J. Mar. 31, 2006) in their Brief even through the Court in that case found both contributory and vicarious copyright infringements as to certain Defendants operating a swap meet and specifically noted that "the direct infringer need not be named as a defendant."

copies of both Infringing Works as door prizes at the October 2007 York Train Meet after it had been served with the Complaint in this Action (¶77).⁵ Defendant TCA admitted in the Burke Affidavit filed with its Original Motion to Dismiss that it sold 85 copies of the first Infringing Book just in April 2007 alone (D.E. #13-2).⁶ Further the Amended Complaint avers that both Defendants had constructive knowledge of the infringements prior to the June 22, 2007 cease-and-desist letter and sold and distributed copies of the Infringing Work (including the admitted 85 copies), and as such, the sales were willful and made with full knowledge of the aforementioned copyrights and the infringements thereof (¶35; ¶67; ¶95; ¶98).⁷

The Copyright Act provides in 17 U.S.C. Sec. 106, titled "Exclusive rights in copyrighted works", provides in part:

Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (3) to distribute copies or phonorecords of the copyrighted work to the public by **sale** or other transfer of ownership, or by rental, lease, or lending; . . .

(Emphasis Added).

The Third Circuit in Ford Motor Co. v. Summit Motor Products, Inc., 930 F.2d 277, 294 (3rd (N.J.), 1991) held in a copyright claim against a

5. Each of these averments is further confirmed by the Ambrose Third Declaration and its Exhibits.

6. Although the Burke Affidavit only notes the amount of \$1,370.00 in net profit received from the 85 sales of the Infringing Work in April 2007, given the number of copies of the Infringing Work that Defendant TCA admitted it sold at the Retail Price of \$29.99 per copy, the gross sales revenue of \$2,549.15 satisfies one of the requirements of 18 U.S.C. §2319 (relating to criminal infringement of a copyright).

7. See Also Ambrose Third Declaration for information Defendant TCA had as to the infringements of the Infringing Work at the time said Defendant first sold the book in April 2007. The Declaration also details that Defendant TCA offered for sale on its website and bookstore, and presumably sold, additional copies of the Infringing Work after receipt of the June 22, 2007 cease-and-desist letter and the letter's accompanied evidence of actionable copying. An offer to sell an infringing item is the same as an actual sale. See Independent Film Distrib., Ltd. v. Chesapeake Industries, Inc., 250 F.2d 951, 953-954 (2nd Cir. (N.Y.) 1958).

seller for selling a copied item that the sale of an infringing item is infringement itself ("Since it is undisputed that Altran sold parts in boxes with trade dress resembling the Ghosted GT, Ford's right under 17 U.S.C. Sec. 106 (3) to distribute copies to the public by sale is obviously implicated"). The Third Circuit noted a similar holding in Ford Motor Co. v. B & H Supply, Inc., 646 F.Supp. 975, 989 (D.Minn. 1986).⁸ This holding is similar to holdings in dozens of 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** Midway Mfg. Co. v. Dirkschneider, 571 F.Supp. 282, 285 (D.Neb. 1983) (The Copyright Act clearly comprehends resale of unlawfully copied machines within the ambit of activities prohibited); Albert E. Price, Inc. v. Metzner, 574 F.Supp. 281 (E.D. Pa. 1983) (sale of infringing duck card set was a violation was infringing under the Copyright Act); Getaped.Com, Inc. v. Cangemi, 188 F.Supp.2d 398, 401 fn. 2 (S.D.N.Y. 2002) ("'Publication' is a technical term under the Copyright Act and is defined as 'the distribution of copies ... of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending,' or the 'offering to distribute copies ... to a group of persons for purposes

8. The second Ford court noted, in part:

The defendants also seek to avoid liability by contending that they did not design, manufacture, or package the parts or packaging in question. By this argument, defendants assert that if anyone copied Ford's speeding car design it was not any of the defendants involved in this case. Defendants' argument on this point totally ignores that Ford's claim of copyright infringement is based upon their exclusive right to distribute copies of their speeding car design to the public by sale. 17 U.S.C. § 106(3); Midway Mfg. Co. v. Dirkschneider, 571 F.Supp. at 285-86.

All of the corporate defendants sell or distribute the infringing packaging. The various telephone-marketing defendants do the actual selling of the automotive parts to the customer-dealers. The warehousing defendants then ship the parts according to the customers' orders. Each of the corporate defendants is therefore an essential element in the chain of distribution and as such is jointly and severally liable for the copyright infringement. Costello Publishing Co. v. Rotelle, 670 F.2d at 1043. This liability is predicated upon the primary liability of each of the corporate defendants for their distribution of the infringing packaging, rather than on the contributory or vicarious liability of such defendants.

Id. At 899.

of further distribution ... or public display." Section 106(3) therefore gives copyright holders the exclusive right of publication, among the other exclusive rights). **See Also** 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 (2nd Cir. 1957), cert. denied, 355 U.S. 952, 78 S.Ct. 536, 2 L.Ed.2d 529 (1958); United States v. Bily, 406 F.Supp. 726 (E.D. Pa. 1975); United States v. Wells, 176 F.Supp. 630, 635 (S.D. Texas 1959). A great many of these cases noted Judge Learned Hand's discussion in Foreign & Domestic Music Corp. v. Licht, 196 F.2d 627 (2nd 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."

Defendants next contend in their Brief that their sale and distribution of the Infringing Works are not actionable because Plaintiff did not aver *volitional* conduct by these Defendants. However, the Defendants in their Brief seem hopelessly confused between the age-old concept of selling a book (as noted addressed by dozens, if not hundreds, of cases to find direct infringement) and the new analysis that the Courts are attempting to develop in order to deal with copyright infringements in cyberspace.⁹ Although Defendants' conduct may at times seem robotic to

9. "Cyberspace is a popular term for the world of electronic communications over computer networks." Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., supra at 1365 n. 1 (N.D.Cal. 1995).

The Courts have come up with special rules dealing with infringement cases in cyberspace that are not necessarily applicable to the old brick-and-mortar world. **See** Parker v. Google, Inc., 422 F.Supp.2d 492, 497 (E.D. Pa. 2006) (Courts have drawn an analogy between an internet service provider which maintains "a system that automatically transmits users' material but is itself indifferent to the material's content," and the owner of a copy machine who makes its use available to the public"); Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc., supra, at 1369-70 (direct infringement requires a volitional act by defendant; automated copying by machines occasioned by others not sufficient); CoStar Group, Inc. v. LoopNet, Inc., 373 F.3rd 544, 555 (4th Cir. 2004) ("Agreeing with the analysis in Netcom, we hold that the automatic copying, storage, and transmission of copyrighted materials, when instigated by others, does not render an ISP strictly liable for copyright infringement under §§ 501 and 106 of the Copyright Act.").

some pertaining to their conduct of this litigation, it is obvious from the averments contained in the Amended Complaint that both Defendants knew that at the time they were selling or offering to sell copies of the Infringing Works, or distributing copies of the Infringing Works as door prices, that they were selling, offering, or giving away these books. It is respectfully submitted that the issue of volitional conduct goes to the deliberate act of selling, offering or giving away these books, which are unquestioned and undisputed, and not as to whether at the time of such deliberate and voluntary acts that these Defendants knew that these Books were Infringing.

Finally, it is noted that the question posed in the last paragraph of whether Defendants knew these Books were Infringing at the time they sold, offered or distributed them (i.e. willfulness) is actually irrelevant at this stage of the proceeding.¹⁰ Once a plaintiff has proven that he or she owns the copyright on a particular work, and that the defendant has infringed upon those "exclusive rights," the defendant is liable for the infringement and this liability is absolute. The defendant's intent is simply not relevant: the defendant is liable even for "innocent" or "accidental" infringements.¹¹ **See**, e.g., Coleman v. ESPN, Inc., 764 F.Supp. 290, 294 (S.D.N.Y. 1991); Little Mole Music v. Spike Investors, Inc., 720 F.Supp. 751, 754-55 (W.D.Mo. 1989). "[E]ven where the defendant believes in good faith that he is not infringing a copyright, he may be found liable." Pye v. Mitchell, 574 F.2d 476, 481 (9th Cir. 1978). Intent is not an element of copyright infringement and, thus, absence of intent is not a valid defense to a claim of copyright infringement. Costello Publishing Co. v. Rotelle, supra at 1044 n. 13; Wihtol v. Crow, 309 F.2d 777, 780 (8th

10. Under 17 U.S.C. § 501(a) intent or knowledge is not an element of infringement. Innocence is only significant to a trial court when it fixes statutory damages, which is a remedy equitable in nature.

11. Plaintiff agrees that this standard has been slightly modified by recent cases as to averred infringements in Cyberspace, which obviously are not applicable to the instant action dealing with physical books that change hands and were sold or distributed by one human being to another, or at least to a Train Collector.

Cir. 1962). Ignorance of the fact of copyright is no defense in a suit for copyright infringement where a defendant deliberately copies the copyrighted material. Albert E. Price, Inc. v. Metzner, supra at 288. See Knickerbocker Toy Co., Inc. v. Genie Toys, Inc., 491 F.Supp. 526, 529 (E.D.Mo. 1980). Intent to violate the copyright law is not an element of copyright infringement. Costello Pub. Co. v. Rotelle, supra at 1044 n. 13 (D.D.C. 1981).

IV. COUNT II: VICARIOUS COPYRIGHT INFRINGEMENT:

A defendant is vicariously liable for copyright infringement if he enjoys a direct financial benefit from another's infringing activity and has the right and ability to supervise the infringing activity. Ellison v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004); Parker v. Google, Inc., supra, 422 F.Supp.2d at 499-500 (E.D. Pa. 2006). Accordingly, there are two elements to a successful claim of vicarious copyright infringement: (1) "the right and ability to supervise the infringing conduct" and (2) "an obvious and direct financial interest in the exploitation of copyrighted materials." Nimmer, supra, § 12.04[A][1] (quoting Shapiro, Bernstein & Co. v. H.L. Green Co., 316 F.2d 304, 307 (2nd Cir. 1963)).¹²

a. Defendants received a financial benefit from the Infringing Activities:

Financial benefit exists where the availability of infringing material acts as a "draw" for customers. A & M Records v. Napster, Inc., 239 F.3d 1004, 1023 (9th Cir. 2001); Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 263-264 (9th Cir. 1996). The Ninth Circuit in Ellison, supra at 1078-79, specifically noted that there is no requirement that the draw be "substantial" and that it was sufficient that such infringing activities only be a "draw". The Supreme Court has recently offered (in dictum) an alternate formulation of the test: "One

12. A defendant can be liable for both direct and indirect infringement based on the same conduct. See, e.g., Alcatel USA, Inc. v. DGI Technologies, Inc., 166 F.3d 772, 791 (5th Cir. 1999); Perfect 10, Inc. v. Visa Intern. Service Ass'n, 494 F.3d 788 n.3 (9th Cir. 2007).

. . . infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it." Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd, 545 U.S. 913, 930, 125 S.Ct. 2764, 162 L.Ed.2d 781 (2005) (internal citations omitted).¹³

13. Defendants in their First Brief spend almost three pages urging this Court to follow the decision stated in Abode Systems, Inc. v. Canus Productions, Inc., 173 F.Supp. 2d 1044 (C.D. Cal. 2001) that the alleged infringing activity had to be the "main" draw for customers to attend a swap meet (See Brief, Pages 7 - 9).

However the Ninth Circuit in Ellison, supra, specifically rejected this addition of "main" or "substantial" to the holding of that Court in Fonovisa as set forth in the Abode case and a sister case from the same Court, Ellison v. Robertson, 189 F.Supp.2d 1051 (C.D. Cal. 2002). The District Court in Ellison adopted at supra, n.11 a portion of the Abode rationale: ("The Adobe Court noted that unless the counterfeit goods constituted "the main customer `draw' to the venue, Fonovisa would provide essentially for the limitless expansion of vicarious liability into spheres wholly unintended by the court." Id. at 1051. While the provision of unauthorized copies of copyrighted material need not necessarily be the main customer draw, the infringing activity must be at least a substantial draw"). The Ninth Circuit expressly rejected both cases, stating in Ellison, supra 1078-1079 that:

"Financial benefit exists where the availability of infringing material `acts as a "draw" for customers.'" Napster II, 239 F.3rd at 1023 (quoting Fonovisa, 76 F.3rd at 263-64). In Napster II, we found that Napster increased its userbase by providing its customers with access to pirated copies of protected works and that "[a]mple evidence support[ed] the district court's finding that Napster's future revenue [was] directly dependent upon increases in userbase." Id. (quotations omitted). But in this case, the district court sought to distinguish Napster II. The district court emphasized that virtually all of Napster's "draw" of customers resulted from Napster's providing access to infringing material. Because AOL's USENET group access constituted a relatively insignificant draw when cast against AOL's vast array of products and services, the district court reasoned, AOL did not receive a direct financial benefit from the infringing activity.

The district court interprets Fonovisa and "direct financial benefit" to require a "substantial" proportion of a defendant's income to be directly linked to infringing activities for the purpose of vicarious liability analysis. Ellison, 189 F.Supp.2d at 1062-64. We disagree with the addition of this quantification requirement. We concluded in Fonovisa that "the sale of pirated recordings at the Cherry Auction swap meet is a `draw' for customers," which we held sufficient to state the financial benefit element of the claim for vicarious liability. Fonovisa, 76 F.3rd at 263-64. There is no requirement that the draw be "substantial."

The District Court in Ellison, supra, noted that popularity of the newsgroup at issue was minuscule and remote, and that as the pro rata "draw" of any single newsgroup (AOL carries more than 43,000 total) "constitutes approximately 0.00000596% of AOL's total usage." Id at 1062. This "minuscule" amount was later found sufficient by the Ninth Circuit in Ellison to qualify as a "draw" under Fonovisa.

The Amended Complaint avers that the Defendants sold table space to members at their various Toy Train Meets who only sold books, or primarily sold books, over the past few years and secured over \$40,000.00 in revenue (¶17). The Amended Complaint also specifically notes that the offering of books at these Meets was a sufficient draw that members at these meets sold thousands of copies of the "Doyle" books over the past few years to members who attended the meets only to purchase such books.¹⁴ The Ambrose Third Declaration specifically notes that the various TCA meets have been a draw in the past for infringing materials (including non-authorized Lionel parts) and that many members regularly attended these meets solely, or principally, to purchase such material.¹⁵ Plaintiff noted that when he was at York Train Meet on April

A similar finding that a "minuscule" number qualified as a "draw" was reached in Polygram Int'l Publ'g, Inc. v. Nevada/TIG, Inc., 855 F. Supp 1314, 1331-1332 (D.Mass. 1994) where the court found that trade show organizers benefited from exhibitors' infringement even through only four out of 2000 exhibitors played music in violation of the plaintiff's copyrights.

The Court in Artista Records, Inc. v. Flea World, Inc., supra, which as noted was cited by Defendants for some reason not known, also found that even if it accepted Defendants' expert opinion as credible that only nine percent of customers coming to the swap meet expected to purchase CDs (and not necessarily infringing ones), that such a small amount would nevertheless served as a "draw" under Fonovisa (Page 12).

14. The Amended Complaint notes that both Defendants sent out over 100,000 mailings and e-mails promoting the Doyle Books and notifying members that the Infringing Works would be distributed as Door Prizes and available at these Meets (¶72). The Ambrose Third Declaration poses the question: "If the Infringing Works were not intended to be a "draw" for members to attend the York Train Meet, and to purchase the required paid Admission badge, than why did these Defendants go through such considerable expenses in promoting the Infringing Works and noting their availability at the York Train Meets?"

15. Defendants are correct in their argument that Plaintiff did not use the word "draw" in the Amended Complaint. As this Court is aware, because of the rejection by Defendants' counsel of an agreement her associate had reached that would have had both parties proceed with a 30 day stay and into immediate Mediation, Plaintiff had less than two days notice to file the Amended Complaint. As such, due to sloppy editing at 3:00 a.m. the word "draw" was inadvertently removed when Undersigned Counsel mistakenly deleted a portion of a sentence from Paragraph 73 (that is why the last sentence of that paragraph makes no sense). The last sentence was intended to state that members who had purchased admissions to these various Toy Train Meets and Shows from these Defendants were drawn by the availability of infringing material and have over the past years purchased thousands of books averred to have been "authored" by Doyle. Given that pleading in Federal Courts is based on Notice requirements, Plaintiff would respectfully submit that Defendants had notice from the averments contained in the entire Amended Complaint that their Train Meets and

20, 2007 for just one hour he spotted at least five members who left one hall after only purchasing copies of the Infringing Work. As such, the offering of the Infringing Work was a sufficient 'draw' for such members to come to that Meet just to purchase it and as such clearly satisfies the Ninth Circuit test as stated in Ellison, supra. The payments these Defendants received from book sellers who rented their tables and principally sold these Infringing Works, as well as the admissions paid by members to attend these Meets to purchase these Books, also satisfies the potential Grokster test that these Defendants directly profited as a result of the infringement activities.¹⁶

b. Defendants had the right to control the infringing acts of others:

The Amended Complaint notes that Defendants have full authority to control the items that members exhibit and/or offer for sale at tables that they purchase at Train Meets run by the Defendants (¶48).¹⁷ Defendant TCA has instituted a "Compliance policy" on table holders of any train meet sponsored by either it or any of its Divisions, with said policy policed by mandatory inspections by members of the TCA's Standards Committee (¶49). The "Compliance Policy" requires that in order to sell reproduction trains and/or train parts at TCA meets, a

Shows were "draws" to purchase infringing items, (including the infringing Doyle Books) which is why Plaintiff spent so many pages extensively detailing Defendants' "Compliance policy" that they use to protect the Lionel Corporation's Intellectual Property but refuse to use to protect Plaintiff's Intellectual Property.

To the extent that this Court believes the omission of the word "draw" is material, Plaintiff would respectfully request that he be allowed to further amend his Complaint and fix the last sentence of Paragraph 73 to include, as it was originally drafted, said word.

16. The York Train Meets are for three days in length and are offered by Defendant Eastern Division the April and October of each year. The Dealer Halls are open for over 20 hours during the three-day meet. The Meet is only open to TCA members and each member must purchase an Admission Badge to gain admission (See Ambrose Third Declaration).

17. The Defendants knowledge of the infringing activity is not a required element of vicarious liability. American Tel. & Tel Co. v. Winback and Conserve Program, Inc., 42 F.3rd 1421, 1441 (3rd Cir. 1994). Moreover, a party with the ability to supervise or control infringing activity cannot avoid liability by failing to exercise such supervision or control. See Gershwin Publ'g Corp. v. Columbia Artists Mgmt, Inc., 443 F.2d 1159, 1161 (2nd Cir. 1971).

Standards Committee Inspection Report must be completed by a Standards Committee member and such trains or parts must be properly marked (¶49). Defendant Eastern Division sent out a Registration Packet as to the October 2007 York Meet that required table holders to obey the rules of the Meet and that the table holders had to have a "Certification of Compliance" from Defendant TCA to evidence satisfaction with the aforementioned "Compliance policy" (¶¶50-51). The Amended Complaint notes that both Defendants have in the past regularly sanctioned and disciplined members who did not follow the Meet's rules (¶52).¹⁸

V. COUNT I: CONTRIBUTORY COPYRIGHT INFRINGEMENT:

A party may be liable for contributory infringement where "with knowledge of the infringing activity, [it] induces, causes or materially contributes to the infringing activity of another." Columbia Pictures Indust., Inc. v. Redd Horne, Inc., 749 F.2d 154, 160 (3rd Cir.1984); Metzke v. May Dept. Stores Co., 878 F.Supp. 756, 760 (W.D. Pa., 1995). The party may be liable where it knows, or has reason to

18. The Ninth Circuit noted that the swap meet operator in Fonovisa and the software operator in Napster both had the right to remove individual infringers from the very place the infringement was happening. Perfect 10, Inc. v. Visa Intern. Service Ass'n, 494 F.3rd 788, 806 (9th Cir. 2007). The averments contained in the Amended Complaint, as well as the Exhibits attached to the Ambrose Third Declaration, clearly substantiates that both Defendants had the right to remove individual infringers from the very place the infringement was happening, and in fact had hundreds of Standard Committee members ready and authorized to so act.

This action in one way substantially differs from Fonovisa and Napster to the extent that Defendants TCA and Eastern Division are significantly more involved with the infringing actions than either the swap meet operator in Fonovisa or the software operator in Napster. Besides actually selling or distributing substantial numbers of copies of the Infringing Works, both Defendants also allowed their names to be featured on the back cover of the Infringing Work (¶46(ii)), provided material support to the actual production of both Infringing Works (¶45; ¶46), provided toy trains to be photographed for the Infringing Works (¶45(iv)), made the averred "author" Mr. Doyle a member of their Standards Committee (¶45(ii)), promoted Mr. Doyle and the Infringing Works on their websites, and sent out over 100,000 mailings and e-mails promoting the Infringing Works and Mr. Doyle over the past year (¶45; ¶46). These benefits, which the Amended Complaint aver were substantially worth more than \$20,000.00 (¶20), are more fully discussed in Count I averring Contributory Infringement.

know of the infringement. Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829, 845 (11th Cir.1990).¹⁹

The Amended Complaint avers that these Defendants materially contributed to the infringing activities of the sale and distribution of the Infringing Works under two separate theories: (i) by providing resources and facilities for known infringing activities as to the Infringing Works by authorizing the distribution of these Books at their Train Meets and Shows and (ii) by assisting with the preparation and promotion of the actual Infringing Works to such an extent that without Defendants' noted contributions, the Infringing Works would not have been published and/or been as successful commercially as they have been.²⁰

a. Defendants provided the facilities for Known Infringing Activities:

The Third Circuit in Columbia Pictures Industries, Inc. v. Aveco, Inc., 800 F.2d 59 (3rd Cir. 1986) found that providing the site and

19. The definition of contributory liability may have recently been modified in part as enunciated in Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., supra. Within the general rule that "[o]ne infringes contributory by intentionally inducing or encouraging direct infringement," Grokster, 545 U.S. at 930, the Court has defined two categories of contributory liability: "Liability under our jurisprudence may be predicated on actively encouraging (or inducing) infringement through specific acts (as the Court's opinion develops) or on distributing a product distributees use to infringe copyrights, if the product is not capable of 'substantial' or 'commercially significant' noninfringing uses." Id. at 942 (Ginsburg, J., concurring) (quoting Sony, 464 U.S. at 442); see also id. at 936-37. The Ninth Circuit earlier this month found that under Grokster an actor may be contributory liable for intentionally encouraging direct infringement if the actor knowingly takes steps that are substantially certain to result in such direct infringement. See Perfect 10, Inc. v. Amazon.com, Inc., No. 06-55405, Page 32 (9th Cir. 12/3/2007) (9th Cir., 2007)

20. The Third Circuit has held that "[a]n officer or director of a corporation who knowingly participates in [copyright] infringement can be held personally liable, joint and severally, with the corporate defendant." Columbia Pictures Indust., Inc. v. Redd Horne, Inc., supra, 749 F.2d at 160. Given the continued averred criminal violations of Plaintiff's Intellectual Property by these Defendants, who as noted have boasted that they could do anything they wanted since no Court has ordered them to stop, it might be time for the Plaintiff to add the officers of both Defendants as additional Defendant parties in this action.

facilities for known infringing activity is sufficient to establish contributory liability.²¹ Defendant TCA after receipt of the June 22, 2007 cease-and-desist letter, and its accompanied evidence of actionable copying, nevertheless provided the resource for known infringing activities by allowing the offering and sale of the Infringing Work at the Denver 2007 Annual Convention.²² Defendant Eastern Division, after service of the Complaint in this action, provided the resource for known infringing activities by allowing the offering and sale of the Infringing Works at the October 2007 York Train Meets.²³

21. The Ninth Circuit in Fonovisa, supra at 264, stated that "we agree with the Third Circuit's analysis in Columbia Pictures Industries, Inc. v. Aveco, Inc., 800 F.2d 59 (3rd Cir. 1986) that providing the site and facilities for known infringing activity is sufficient to establish contributory liability. See 2 William F. Patry, Copyright Law & Practice 1147 ("Merely providing the means for infringement may be sufficient" to incur contributory copyright liability)." Further, providing such an environment and services, "is all that is required to satisfy the requirement of material contribution necessary to establish contributory liability" UMG Recordings, Inc. v. Sinnott, 300 F.Supp.2d 993, 1001 (E .D.Cal. 2004). Defendants need only provide a central "hub" for infringing activity to materially contribute to infringement. See Fonovisa, 76 F.3rd at 264 ("it would be difficult for the infringing activity to take place in the massive quantities alleged without the support services provided by the swap meet"); see also PolyGram Int'l Publ'g, Inc. v. Nevada/TIG, Inc., supra, 855 F.Supp. at 1323.

22. The knowledge element for contributory copyright infringement is met in those cases where a party has been notified of specific infringing uses and fails to act to prevent future such infringing uses, or willfully blinds itself to such infringing uses. Aimster, 334 F.3rd at 650; Fonovisa, 76 F.3rd at 264.

23. As noted in the Ambrose Third Declaration, Defendant TCA responded through statements made by its various current or former officials that it could do anything it wanted to as to the continued sale and distribution of the Infringing Works because there was not a Court Order ordering them to stop.

This action is very similar to the one in Habeeba's Dance of the Arts, Ltd. v. Knoblauch, 430 F.Supp.2d 709, 714 (S.D. Ohio, 2006). There the Court found that the complaint sufficiently states a claim for contributory infringement against the YWCA. "The complaint alleges that the Plaintiff's written notice gave the YWCA advance knowledge of Knoblauch's plans to engage in infringing conduct at the YWCA. The complaint further supports the inference that the YWCA had enough control over Knoblauch to have prevented the infringing event from taking place. Finally, the complaint alleges that the YWCA did in fact allow the infringing event to take place at its facilities. This is sufficient to state a claim for contributory infringement." Although Knoblauch dealt with the issue of a trademark contributory infringement claim, the tests for secondary trademark infringement are even more difficult to satisfy than those required to find secondary copyright infringement. See Sony Corp. v. Universal City Studios, 464 U.S. 417, 439 n. 19, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984);

b. Defendants assisted with the preparation and promotion of the Infringing Works:

The Amended Complaint avers that the Infringing Works would not have been able to be published without the material contributions of both Defendants (¶61). The Amended Complaint further states in Paragraphs 45 and 46 twenty-seven different actions that these Defendants undertook to materially contribute to the infringements of Plaintiff's copyrights including both Defendants allowing their names to be featured on the back cover of the Infringing Work (¶46(ii)), providing material support to the actual production of both Infringing Works (¶45; ¶46), providing toy trains to be photographed for the Infringing Works (¶45(iv)), making the averred "author" Mr. Doyle a member of their Standards Committee (¶45(ii)), promoting Mr. Doyle and the Infringing Works on their websites, and sending out over 100,000 mailings and e-mails promoting the Infringing Works and Mr. Doyle over the past year (¶45; ¶46). The Amended Complaint also states another fourteen material and contributory actions undertaken by these Defendants in Paragraph 60.²⁴

The Court does not have to merely accept Plaintiff's averments as to these material contributions by these Defendants as Mr. Doyle himself has stated in writing that these books would not have been possible without Defendants' help. In the acknowledgement to the Additional Infringing Work (derivative) Mr. Doyle stated, in part, that:

The late Gary Lavinous and his team of dedicated volunteers stayed until midnight at the National Toy Train Museum helping me photograph many of the rarest pieces shown in this volume. Though their day was nearing 18 hours long, they

Fonovisa, 76 F.3rd at 265 (noting that "trademark infringement liability is more narrowly circumscribed than copyright infringement"). Perfect 10, Inc. v. Visa Intern. Service Ass'n, 494 F.3rd 788, 806 (9th Cir., 2007).

The Knoblauch Court rested the rationale of its decision, in part, on the Third Circuit's decision Columbia Pictures Industries, Inc. v. Aveco, Inc., supra.

24. The Third Amended Complaint notes that these Defendants materially participated in the preparation and promotion of the Infringing Works to such a degree that many members believed that the Infringing Works were published by Defendant TCA (¶60(v)). As the Ambrose Third Declaration notes, Defendant TCA has in the past published several books about Toy Trains, including one that was authored by Mr. Joseph P. Algozzini, Plaintiff's expert in this action.

dismantled display cases to allow access, not only without complaining, but with genuine enthusiasm.

Jan Athey, reference librarian for the Train Collectors' Association, graciously located and allowed us to photograph many of Lionel's pre-war catalogs. Former TCA president Dr. Paul Wassermann supplied additional images for that, and other chapters as well. . . . With the date of the world's largest train show, the Eastern Division TCA meet in York, Pa., just around the corner - a show he runs as a volunteer - Clem Clement allowed us to photograph his wonderful Standard Gauge collection.²⁵

c. Defendants provided the material assistance when they had, or should have had, knowledge of the infringing activities:

Contributory infringement "requires that the secondary infringer 'know or have reason to know of direct infringement'" See Napster, 239 F.3d at 1020 (quoting Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829, 845-46 (11th Cir. 1990)). In addition, turning a "blind eye" to infringement is the equivalent of knowledge. Aimster, 334 F.3d at 650.²⁶

As noted earlier, most of these martial contributions occurred after Defendants' receipt of Plaintiff's cease-and-desist letter, and accompanied evidence of actionable copying, or the service of the Complaint in this Action. As such, there is no dispute that Defendants knew exactly of the infringing activities but nevertheless not only turned a blind eye to it but actually boasted of their blindness! Further, although the Defendants may have allowed the use of their names on the covers and in the contents of both Infringing Works prior

25. The National Toy Train Museum is owned by Defendant TCA and is located in its headquarters' Building near Strasburg, Pennsylvania.

As noted in the Ambrose Third Declaration, Photographing in the TCA Museum for commercial purposes may only be done with proper authorization from the TCA Museum and History Committees (TCA Board Policy Book, Item 11). Further, the TCA Board Policy Book further states in Item 16 that TCA Intellectual Property is the sole property of the TCA and may not be used without compensation approved by the TCA Board of Directors.

26. The Court in Artista Records, Inc. v. Flea World, Inc., supra, also found that Grokster requirement of knowledge of specific infringement "at the time the Defendants materially contributed to the direct infringement" was not applicable to the operator of a swap meet given that the operator had such a high degree of control over the vendors and what merchandise the vendors sell at the market, as well as where and when they sell it (Page 13).

to the date of the case-and-desist letter, it is undisputed that after that date neither Defendant requested either Krause or Doyle to remove Defendants' names from said books. Further, as noted in the Third Ambrose Declaration, certain officers of the Defendants received "tear" copies of the Infringing Works months prior to their publication and had the ability to review these Works prior to publication and easily determine that these books had been copied from Plaintiff's Books. The Amended Complaint notes in Paragraph 35 that "Any knowledgeable and unbiased Train Collector who examined the Infringing Work and Edition 2 for at least one hour would have concluded that Doyle had substantially copied and transcribed Edition 2 to use as the basis of the Infringing Work." The Third Ambrose Declaration also notes that some of the same individuals who had approached Plaintiff on Tuesday, April 17, 2007 to inform Plaintiff of the "rip-off" book of Doyle also approached Defendant TCA's officials at its April 18, 2007 Book Signings, who as usual turned a deaf ear to such complaints and allowed the book signing to continue.²⁷

VI. COUNT IV: LANHAM ACT VIOLATIONS:

To state a claim pursuant to 15 U.S.C. § 1125(a) of the Lanham Act, a plaintiff must allege: (1) that the defendant uses a false designation of origin; (2) that such use of a false designation of origin occurs in interstate commerce in connection with goods or services; (3) that such false designation is likely to cause confusion, mistake or deception as to the origin, sponsorship or approval of the plaintiff's goods and services by another person; and (4) that the plaintiff has been or is likely to be damaged. **See** AT & T Co. v. Winback & Conserve Program, Inc., 42 F.3d 1421, 1428 (3rd Cir. 1994).²⁸

27. The averred arrogance of Defendant TCA is best evidenced by the fact that on the weekend this Brief is being filed with the Court, and weeks after Krause acknowledged that the Infringing Work infringed Plaintiff's copyrights and publicly apologized to the Plaintiff, Defendant TCA is still promoting the Infringing Work on its website. See Ambrose Third Declaration and its Exhibits.

28. The Amended Complaint avers that Defendants violated the false advertising provisions of the Lanham Act by their sale, distribution and promotion of the Infringing Works by false stating that the Infringing Works were authored by

Defendants aver that Plaintiff failed to aver a valid claim under the Lanham Act because he failed to aver commercial advertising.²⁹ However the Amended Complaint clearly avers in Paragraph 81, in part:

Defendants TCA and Eastern Division have in various **commercial** advertising or promotions have constantly and continually made certain material misstatements of facts about the goods and services used in commerce that they provided purchases and/or potential purchases of the Infringing Work and the Additional Infringing Work (derivative). . .

(Emphasis Added).

Next, these Defendants content that Plaintiff did not aver that the commercial speech was for the purpose to influence consumers to buy Defendants' goods. Again, Plaintiff would point out the averments contained in Paragraph 81, which clearly aver that Defendants used actionable false advertising so that consumers would purchase the Infringing Book and the Additional Infringing Book (derivative) from these Defendants. Again Defendants' counsel seem totally unaware that Defendants have sold and distributed copies of both Infringing Works, and have so admitted in the Burke Affidavit as well as extensively detailed in the Ambrose Third Declaration.

Mr. Doyle when they were actually authored by Plaintiff (¶81(i)); that Mr. Doyle was "THE Authority for Lionel Sets" when he was not, since he had to copy his books from Plaintiff's Books (¶81(ii)); that the Infringing Work was "the most complete and thorough identification and price guide to postwar Lionel sets" when it was not given that it left out approximately ten percent of what was included in Plaintiff's Edition 2 (¶81(iii)); that Mr. Doyle was a "Lionel train expert" when in fact Mr. Doyle is not an expert on Lionel Trains and had to virtually copy all material facts in his books about Lionel Post-War Trains from Plaintiff and other authors (¶81(iv)) and that Mr. Doyle was the "author of the best-selling Standard Catalog of Lionel Trains series" when in fact Mr. Doyle was not the author of at least two books in that series, where Mr. Doyle instead copied from Plaintiff's Copyrighted Works (¶81(v)).

29. In deciding whether representations were commercial advertising or promotion within the Lanham Act, courts in this jurisdiction have applied the test from Seven-Up Co. v. Coca-Cola Co., 86 F.3d 1379, 1384 (5th Cir. 1996), which defines "commercial advertising or promotion" as "(1) commercial speech; (2) by a defendant in commercial competition with the plaintiff; (3) for the purposes of influencing consumers to buy the defendant's goods or services; and (4) that is sufficiently disseminated to the relevant purchasing public to constitute advertising or promotion within the industry." Synggy, Inc. v. Scott-Levin, Inc., 51 F.Supp.2d 570, 576 (E.D.Pa. 1999), aff'd, 229 F.3d 1139 (3rd Cir. 2000) (adopting the Seven-Up test).

Finally, Defendants aver that Plaintiff's claims under the Lanham Act fail because Defendants are not competitors to Plaintiff (Defendants aver that Plaintiff's true competitor is Mr. Doyle). But Defendants are averred in the Amended Complaint to have engaged in material false advertising to promote the Doyle books that the Defendants were selling and/or distributing for the sole purpose to make a profit for the Defendants! The Third Circuit has clearly found that commercial interest which is subject to injury need not be in direct competition with the alleged perpetrator's commercial interest, (Thorn v. Reliance Van Co., Inc., 736 F.2d 929, 933 (3rd Cir. 1984), but that there must be some reasonable and cognizable commercial interest which has been or potentially will be injured by the Lanham Act violation. Serbin v. Ziebart Intern. Corp., Inc., 11 F.3d 1163, 1166 (3rd Cir. (Pa.) 1993). "The dispositive question should be whether plaintiff has a reasonable interest to be protected against false advertising." Conte Bros. Automotive, Inc. v. Quaker State-Slick 50, Inc., 165 F.3d 221, 231 (C.A.3 (N.J.), 1998). Given that Defendants were selling and/or distributing Mr. Doyle's books, and engaged in material false advertising, it is obvious that under the Lanham Act Plaintiff had a reasonable and cognizable commercial interest to protect from the averred thievery of these Defendants.

VII. COUNT V: PENNSYLVANIA UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT VIOLATIONS:

Defendants content that Plaintiff failed to state a private right of action under the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. C.S.A. § 201-1 et seq. because Plaintiff did not aver he purchased either Infringing Works from the Defendants. Plaintiff, who did aver in Paragraph 87 of the Amended Complaint that he as a consumer purchased a copy of the Infringing Work, is not required under the UTPCPL to prove that he purchased a copy of the Infringing Work from either Defendants, but rather has to prove, and so averred in his Amended Complaint, that his purchase arose

from the use or employment of a method, act or practice declared unlawful by §201-3.

The general purpose of the UTPCPL is to protect the public from fraud and unfair or deceptive business practices. Pirozzi v. Penske Olds-Cadillac-GMC, Inc., 413 Pa.Super. 308, 605 A.2d 373, 376, appeal denied, 532 Pa. 665, 616 A.2d 985 (1992). Among the prohibited practices noted in §201-3 are: (i) Passing off goods or services as those of another; (ii) Causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval or certification of goods or services; (iii) Causing likelihood of confusion or of misunderstanding as to affiliation, connection or association with, or certification by, another; (v) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have; and (xxi) Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding. Each of these deceptive business practices were averred to have been undertaken by these Defendants in the massive amount of false and misleading promotions they engaged in order to sell or distribute the Infringing Work.

While the UTPCPL may require the existence of a "buyer", a "seller" and an "unfair or deceptive business practice", an actual reading of the UTPCPL does not require the "buyer" to have actually purchase the covered item from the "seller". Rather, what is required is noted in §201-9.2 (a), which states in full:

- (a) Any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, **as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act** [§ 201-3], may bring a private action, to recover actual damages or one hundred dollars (\$100), whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained, but not less than

one hundred dollars (\$1001, and may provide such additional relief as it deems necessary or proper. The court may award to the plaintiff, in addition to other relief provided in this section, costs and reasonable attorney fees.

(Emphasis Added).

As such, Plaintiff would respectfully suggest that the operative requirement for an action under the UTPCPL is that the purchase occurs as a result of the use or employment **by any person** of an unlawful act or practice prohibited by the Act. Plaintiff would note that it would have been very easy for the Pennsylvania legislature to include the word "seller" instead of the use of the phrase "any person" but the legislature in its wisdom decided not to do so.³⁰ As such, it is submitted that the legislature was concern about the use of the unlawful act or practice rather than any legal relationship between the person violating the act and the person who made the resulting sale of item. Since Plaintiff in the Amended Complaint noted that he was aware of the averred prohibited acts and practices implored by the Defendants as to the Infringing Work, and heard and read their false advertisements, Plaintiff's resulted purchase of the Infringing Work,

30. Plaintiff would submit this hypothetical that should be covered by the UTPCPL under the exact language written by the Pennsylvania legislature: A group of Holiday Purchasers are walking downtown when they walk past a hawker on the sidewalk trying to sell a box of new blenders. The hawker does such a good job portraying these blenders as being made of solid gold and being the best blenders that have ever been made that the hawker sells all of his benders and disappears into the crowd. One of the Holiday Purchasers, disappointed because all of these blenders were sold before she got to the front of the line, subsequently buys the same-make blender from the store down the street. When she gets home, she is disappointed that the blender is neither made of solid gold nor is the finest blender ever manufactured. The Holiday Purchaser obviously has no cause of action against the store where she purchased the blender from since the store did not engage in any prohibited acts under the UTPCPL (it neither told her the blender was made of solid gold or that it was the finest blender ever made). However if the Holiday Purchaser could find the true identify of the hawker, the Holiday Purchaser should be able to sue the hawker under the UTPCPL because the hawker is the person who employed a prohibited act under the UTPCPL which resulted in the Holiday Purchaser purchasing an item in which she sustained an ascertainable loss of money.

although not from the Defendants, was nevertheless influenced by Defendants' use of the prohibited acts and practices.³¹

VIII. COUNT VI: CIVIL CONSPIRACY:

IX. COUNT VII: RACKETEER INFLUENCED AND CORRUPT ORGANIZATION ACT:

X. COUNT VIII: BREACH OF CONTRACT:

Defendants in their Brief principally aver that Plaintiff did not specifically aver with sufficient specificity his averments in these three Counts: Count VI Civil Conspiracy, Count VII RICO and Count VIII Breach of Contract.

Given the length of this Response Brief, and the fact that the Amended Complaint was prepared with less than two days notice because of the acts of Defendants' counsel, Plaintiff would respectfully request that this Court allow him to further amend his Complaint. As Plaintiff has clearly evidenced as to his Copyright claims, where he spent more than twenty pages in the Amended Complaint extensively detailing the actionable copying engaged in by Defendant TCA's favorite author, Mr. Doyle, Plaintiff has not lightly pursued any claim in this action without overwhelming legal and factual authority. As such, Plaintiff's request to further amend his complaint is not made for either delay or bad faith reasons.

Finally, Plaintiff notes in his Third Declaration that:

120. In the last few weeks, I have been in receipt of a considerable amount of written statements by various individuals who have participated in the concerted efforts to damage my business in an attempt to force me to stop pursuing

31. Plaintiff is aware of only one case, Schwarzwaelder v. Fox, 895 A.2d 614, 619-20 (Pa. Super. Ct. 2006), which in dicta required a contractual relationship between the "Buyer", the "Seller" and the prohibited act or practice. Plaintiff would note that this case, obviously not controlling on this Court, failed to address in any manner the use of the words "by any person" instead of "seller." This issue has not yet been addressed by the Pennsylvania Supreme Court. See National Surety Corp. v. Midland Bank, 551 F.2d 21, 30 (3d Cir. 1977) where the Third Court stated that "an intermediate appellate court holding is presumptive evidence, rather than an absolute pronouncement, of state law. We are not obliged to give any such source more precedential value than would be given to it by the state's highest court." While this case is not a diversity action, the same principal does control as to this Court's determination of state law where the Pennsylvania Supreme Court has not addressed the issue.

my copyright infringement actions against these Defendants. I would like an opportunity to further amend my Complaint so that I could bury these Defendants in the specificity they requested in their Motion to Dismiss.

XI. COUNT IX: DECLARATORY JUDGMENT ACTS:

Plaintiff seeks this Court to hold that certain By-Laws of Defendant TCA pertaining to terminating a member's membership in said Defendant are unlawful under Pennsylvania Law. Plaintiff further seeks this Court to hold that Defendant TCA may not terminate the membership of Plaintiff, or his counsel, as members of the TCA as a result of Plaintiff suing Defendant for averred violations of the Copyright Act. Defendant TCA avers that Plaintiff is not entitled to the requested relief under the Case and controversy requirement, specifically under the concepts of standing and ripeness.

The constitutional component, derived from the Article III "case" or "controversy" requirement, requires a plaintiff to demonstrate that he or she suffered "injury in fact," that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 118 S.Ct. 1003, 1016-17, 140 L.Ed.2d 210 (1998).

Standing is the "irreducible constitutional minimum" necessary to make a justifiable "case" or "controversy" under Article III, §2. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351. It contains three requirements: injury in fact to the plaintiff, causation of that injury by the defendant's complained-of conduct, and a likelihood that the requested relief will redress that injury. The Third Circuit has summarized the constitutional requirements as follows:

(i) the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;

(ii) there must be a causal connection between the injury and the conduct complained of – the injury has to be fairly traceable to the challenged action of the

defendant and not the result of the independent action of some third party not before the court; and

(iii) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc., 140 F.3d 478, 484-85 (3rd Cir. 1998).

The relevant issue before this Court is whether Plaintiff has suffered a current injury in fact, an invasion of a legally protected interest that is concrete and particularized, and is actual or imminent, and not conjectural or hypothetical. Lujan v. Defenders of Wildlife, supra, at 560 (1992). Plaintiff notes in his Third Declaration that:

111. I am aware of communications from various current or former officers of the Defendants in which they state they would terminate the membership in the Train Collectors Association of my attorney for the sole purpose to force me to drop my meritorious copyright infringements claims that have been filed with this Court.

112. I am aware of communications from various current or former officers of the Defendants in which they state they would terminate my membership in the Train Collectors Association for the sole purpose to force me to drop my meritorious copyright infringements claims that have been filed with this Court.

113. My toy train expert in this action, Mr. Joseph P. Algozzini, has been approached by several current or former officials of Defendant TCA who informed him of the pending plans to terminate the membership of myself and my attorney next June, only three weeks before the trial date in this action. I believe Defendant TCA undertook such disclosures to my expert in a bad-faith attempt to disqualify Mr. Algozzini as my expert.

114. So many individuals have discussed these plans to terminate the membership of myself and my attorney, some of which have been subsequently posted on various blogs on the Internet, that my business has been damaged by certain gullible TCA members refusing to do business with my firm on a belief that I or my attorney have violated some provision of the TCA By-Laws. I note that several gullible TCA members have also posted on the internet that they have instructed their executors to not give their collections to my firm for auction as a result of an averred belief, confirmed by Defendant TCA's publicized plans to terminate my membership,

that I have somehow violated some TCA rule in my civil action about the unethical and criminal conduct of certain TCA officials deliberately allowing the thievery of my Intellectual Property.

115. Before I filed the Amended Complaint my attorney offered the TCA Attorney a chance to agree to a Joint Stipulation to present to this Court that Defendant TCA would agree not to undertake any action against my membership, or my counsel's membership, while this civil action was before this Court. The TCA Attorney refused this offer.

While it is admitted that as of the date of the filing of this Response Brief that neither Plaintiff nor his attorney have been served with written notice of such termination plans as required by the TCA By-Laws, it is also known as a fact to both Plaintiff and his attorney that Defendant TCA has in the past disciplined members and attempted to terminate their membership without following exactly their By-Law provisions or even providing the name of the member filing the complaint.

As noted by the Ambrose Third Declaration, Plaintiff's reputation is currently being damaged and his business is losing money because of these published and stated plans of Defendant TCA to unlawfully discipline him and his counsel for filing a meritorious action against these Defendants before this Court. As such, Plaintiff is currently sustaining actual legal damages, these actual legal damages are being caused by the averred illegal conduct of the Defendant, this Court has the ability to stop these legal damages from continuing by finding that Defendant TCA's By-Laws are unlawful under Pennsylvania Law (therefore precluding Defendant TCA from disciplining Plaintiff and his counsel), and Plaintiff, it is respectfully averred, is likely to have his injury redressed by a favorable decision by this Court. **See in part:** Pennsylvania Prison Society v. Cortés, No. 06-3354, Page 8 (11/5/2007) (3rd Cir. 2007) (At an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, . . . and that the injury fairly can be traced to the challenged action and is likely to be redressed by a

favorable decision); Pennell v. City of San Jose, 485 U.S. 1, 8, 108 S.Ct. 849, 855, 99 L.Ed.2d 1 (1988) (holding that because it is not unduly speculative to conclude that the ordinance at issue will be enforced against members of the Association, this is a sufficient threat of actual injury to satisfy Article III); Pennsylvania v. West Virginia, 262 U.S. 553, 593, 43 S.Ct. 658, 663, 67 L.Ed. 1117 (1923) ("[O]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough."); Public Interest Research Group, Inc. v. Powell Duffryn, 913 F.2d 64, 71 (3rd Cir. 1990) (plaintiffs' asserted injury, that they would use the water for boating and aesthetic enjoyment if it was not polluted, was sufficient to confer standing, even though they had not used the water in its polluted state); Joint Stock Soc'y v. UDV N. Am., Inc., 266 F.3d 164, 177 (3rd Cir. 2001) (All that the Article III's injury-in-fact element requires is 'an identifiable trifle' of harm"); Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118, 137-38, 59 S. Ct. 366, 369 (1939) (A plaintiff must point to just some type of cognizable harm, whether such harm is physical, economic, reputational, contractual, or even aesthetic).³²

32. Defendant suggests that Plaintiff does not have constitutional standing because Plaintiff is still a member in good standing with the TCA and therefore can't seek this court from enjoining the TCA from suspending, modifying or terminating his membership! Obvious since Plaintiff is attempting to stop Defendant TCA from unlawfully changing his status as a member in good standing, and Plaintiff is sustaining current damages from the publication of Defendant TCA's averred plans to unlawfully strip him and his counsel of membership, this argument by Defendant TCA has no merit.

Defendant TCA also suggests that Plaintiff has no interest in whether his counsel's membership in Defendant TCA is terminated. However it should be obvious even to this Defendant and its attorney that Plaintiff is harmed by a meritless attack on his counsel that was, as specially averred in the Amended Complaint, undertaken only in an attempt to intimidate Plaintiff and force him to drop his Copyright Infringement claims against Defendant TCA. While Undersigned Counsel can obviously fight his own battles if necessary, it is Plaintiff's averment that any attack on his counsel is an underhanded attack on him. As this Court is aware, Krause made the same threats against Plaintiff and his counsel and in fact without merit sued Plaintiff's business in a Counterclaim in an attempt solely designed to sue Plaintiff's counsel directly. As the Krause November 30, 2007 Press Release stated, Krause subsequently apologized to Plaintiff for its actions in this matter and noted that it paid all of Plaintiff's legal expenses incurred in that action.

XII. CONCLUSION:

For the reasons set forth herein, Plaintiff respectfully request this Court to deny Defendants' Motion to Dismiss with prejudice as to Count I (Contributory Copyright Infringement); Count II (Vicarious Copyright Infringement); Count III (Direct Infringement); Count IV (Lanham Act); Count V (Pennsylvania Unfair Trade Practices and Consumer Protection Act) and Count IX (Declaratory Act) of the Amended Complaint. Further, Plaintiff respectfully request leave to further amend Count VI (Civil Conspiracy); Count VII (Racketeer Influenced and Corrupt Organization Act) and Count VIII (Breach of Contract).

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Respectfully submitted,

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