

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION**

In Re SLEP-TONE
ENTERTAINMENT CORP.
consolidated cases.

**CASE NO.
5:11cv32-RS/CJK**

MOTION FOR DEFAULT FINAL JUDGMENT

Plaintiff Slep-Tone Entertainment Corporation (“Slep-Tone”), by and through counsel, hereby moves the Court pursuant to Fed.R.Civ.P. 55(b)(2) for entry of a default judgment against Defendants Jada Investment Group, Inc.(“Jada”), individually, and against Robert L. Paynter, Sr. (“Paynter”) and Big Bob’s Music Machine (“Big Bob’s”), jointly and severally¹ (collectively, “the Defaulting Defendants”).

INTRODUCTION

After several years of efforts to police the unauthorized use of its trademarks in Florida and elsewhere, on April 2, 2010, Slep-Tone commenced a case, No. 5:10cv71,² against a number of named defendants, including Jada, Paynter, and Big Bob’s, alleging trademark infringement involving counterfeiting and federal unfair competition. Both of those causes of action arise under the Trademark Act

¹ Paynter is a general partner of Big Bob’s; the other known general partner, Robert L. Paynter, Jr., was also named but could not be located for timely service of process and was therefore dismissed.

² Now consolidated with several other cases, as indicated in the caption of this paper.

of 1946, as amended, commonly referred to as the Lanham Act. Slep-Tone also alleged violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), Fla. Stat. § 501.211.

On July 20, 2010, the Clerk issued summonses directed to each of the Defaulting Defendants. (Doc. No. 11.) The summonses were duly delivered to each of the Defaulting Defendants by personal service effected by a private process server on October 18, 2010. Each of the Defaulting Defendants failed to file an answer or other response to the Complaint, timely or otherwise, and the Plaintiff applied (Doc. No. 41) for entry of default as to each of them on February 4, 2011. On February 7, 2011, the Clerk entered default as to each of the Defaulting Defendants in this action. (Doc. No. 43.)

Shortly prior to being served with the Complaint, in response to the Plaintiff's efforts to resolve its claims through settlement, each of the Defaulting Defendants made initial contact with the Plaintiff's counsel, but efforts to resolve the claims were unsuccessful, and no contact has been made with the Plaintiff or its counsel by any of the Defaulting Defendants in at least 10 months.

The facts alleged in the Complaint, as supplemented by evidence supplied herewith, conclusively establish these Defendants' liability for trademark infringement involving counterfeiting and for unfair competition under the Lanham Act and for unfair trade practices under FDUTPA.

The Plaintiff therefore moves the Court to enter judgment by default against each of the Defaulting Defendants and in favor of the Plaintiff on the question of liability for those claims. The Plaintiff also moves the Court to award statutory damages pursuant to 15 U.S.C. § 1117(c), for trademark infringement involving counterfeiting, in the following amounts:

- As to Jada, \$25,000 individually;
- As to Paynter and Big Bob's, \$150,000, jointly and severally.

The Plaintiff further moves the Court to enter a permanent injunction against the Defaulting Defendants' further infringement of the Plaintiff's trademarks, pursuant to 15 U.S.C. § 1116; and to order the delivery and/or seizure and destruction of such infringing articles as may be in the Defaulting Defendants' possession, pursuant to 15 U.S.C. § 1118.

ARGUMENT

When a defendant is served with the complaint and fails to respond, Rule 55(a) requires the entry of default by the Clerk. *See* Fed. R. Civ. P. 55(a). The decision to enter a default judgment is within the district court's discretion. *See Mitchell v. Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1316 (11th Cir. 2002) (reviewing grant of default judgment under abuse of discretion standard).

Jarvis' failure to respond to the Complaint is grounds for this Court to enter a default judgment.

Default judgment is available when the defendant has abdicated its role in the adversary process by failing to raise a defense of the action, and the complaint and other evidentiary items establish the plaintiff's right to relief. "The effect of a default judgment is that the defendant ... admits the plaintiff's well-pleaded allegations of fact, is concluded on those facts by the judgment, and is barred from contesting on appeal the facts thus established." *Buchanan v. Bowman*, 820 F.2d 359, 361 (11th Cir. 1987).

In accordance with Rule 55(c), which provides that a "judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment," the proposed Order of Default Judgment submitted herewith is based on the relief the Plaintiff requested in the Complaint: monetary relief (Complaint, ¶¶ F-I, L), seizure and destruction of the infringing articles (¶ J), and a permanent injunction (¶ K).

I. The allegations in the Complaint and the evidence submitted herewith conclusively establishes the Defendants' liability for trademark infringement and unfair competition.

The Complaint sets forth claims for federal trademark infringement involving counterfeiting and for unfair competition under the Lanham Act. The facts alleged in support of those claims, as supplemented and substantiated by the

evidence submitted herewith, are conclusive on the question of the Defendants' liability on the claims.

A. Facts sufficient to state a claim for trademark infringement were stated in the Complaint and are therefore deemed admitted by the Defaulting Defendants by virtue of their default in this matter.

The Lanham Act expressly prohibits the use of a registered trademark in connection with “the sale, offering for sale, distribution, or advertising of any goods or services.” 15 U.S.C. § 1114(1)(a).

The Complaint alleges the following facts that are material to the claim for trademark infringement (references are to paragraphs of the Complaint in No. 5:10cv71):

- Plaintiff Slep-Tone is the owner of U.S. Trademark Registration No. 1,923,448, for SOUND CHOICE®, and of U.S. Trademark Registration No. 2,000,725, for a display trademark SOUND CHOICE & Design® (“the Marks”). (¶¶ 64,65.)
- The Plaintiff has consistently used the ® symbol to denote the registration of the Marks and thereby to give notice to the public that the Marks are federally registered. (¶ 66.)
- Jada, Big Bob's, and Paynter have used a reproduction, counterfeit, or copy of the Marks in connection with their providing karaoke services, by

displaying that reproduction, counterfeit, or copy during the provision of their services. (¶¶ 114, 119.)

- Neither Jada, Big Bob's, nor Paynter had a license to create digitized copies of the Plaintiff's karaoke discs or of the music tracks contained thereon. (¶¶ 115, 120.)
- An unauthorized digitized copy of the Plaintiff's karaoke discs or music tracks is a counterfeit. (¶ 48.)
- The Defaulting Defendants did not have a license to use counterfeit tracks in connection with their provision of karaoke services. (¶¶ 48, 115, 120, 177.)
- The Defaulting Defendants' unauthorized use of counterfeits of the Marks is likely to cause consumer confusion by deceiving their customers and/or patrons into believing that the services are being provided with the Plaintiff's authorization. (¶¶ 178, 183.)
- The Plaintiff has been harmed by the Defaulting Defendants' infringing activities. (¶¶ 180, 186, 192.)

B. The Defendants' activities involve and constitute counterfeiting because of the character and method of use.

The process of creating a karaoke music track in CD+G format involves the creation of two parallel pieces of digital information, one being the digital encoding to produce the sound, and the other being the digital encoding to produce

the on-screen graphics. *See* Exh. A, Declaration of Kurt Slep, ¶ 4. The on-screen graphics include the song lyrics, graphical cues that indicate when to sing, and other information about the track. *See id.* The other information typically encodes a title card that includes the song title, the associated artist whose style is being used, and the Marks, as well as encoding to display the Marks³ during any instrumental break (i.e., a non-singing section) in the song. *See id.*

In this case, the tracks stored on the Defendants' respective hard drives were copied ("ripped") from original Slep-Tone karaoke discs, either directly to those hard drives or from original discs to the hard drives via one or more (or many) intermediate media. *See id.*, ¶ 6. As such, those tracks are virtually identical copies of the information encoded on the original discs, including the encoding that constitutes the Marks and enables the display of the Marks upon a computer monitor. *See id.*, ¶¶ 4, 6-7. The Marks are displayed at the beginning and the end of each track as it is played, as well as during any instrumental break that occurs in the song. *See id.*, ¶ 4.

Although Slep-Tone created the original music and digital encoding as stored on the discs it produced, it did not create or authorize the creation of the digital copies stored on the hard drives. *See id.*, ¶ 10. This essential fact is true whether these Defendants ripped the discs directly to their hard drives themselves,

³ The display of the mark SOUND CHOICE & Design®, which consists of the stylized words "SOUND CHOICE" superimposed over a representation of a musical staff, constitutes the display of the other registered mark, SOUND CHOICE® (registered without claim to any particular style or font), as well.

bought pre-loaded hard drives, or obtained digital copies of Slep-Tone karaoke tracks from a third-party source.

C. Consumer confusion is established as a matter of law.

Although the default establishes that these Defendants' actions were likely to cause consumer confusion because of the admission of the fact of confusion, the character of their use of the Marks—namely, the identical reproduction of the marks on virtually identical goods—raises a strong presumption of actual confusion. *See Monsanto Co. v. Campuzano*, 206 F. Supp. 2d 1252, 1262 (S.D. Fla. 2002); *Polo Fashions, Inc. v. Craftex, Inc.*, 816 F.2d 145, 148 (4th Cir. 1987) (affirming the district court's entry of summary judgment stating that “the likelihood of confusion was so unassailably established” where the defendant sold shirts bearing a logo “substantially identical” to the plaintiff's mark).

D. The Defendants' activities were willful and knowing.

By virtue of their default, these Defendants have admitted that their actions in infringing the Plaintiff's trademarks were willful. (Complaint, ¶ 179.) Aside from this deemed admission, there is ample evidence that these Defendants' conduct was willful and knowing.

The Defaulting Defendants each had at least constructive knowledge, if not actual knowledge, of the Plaintiffs' claim of trademark rights based upon their

observation of the use of the counterfeit marks in the shows they produced. The Plaintiffs' consistent use of the ® symbol in connection with the Marks means that when the Plaintiffs' CD+G tracks were copied in an unauthorized manner, the ® symbol was copied along with the Marks.

The Defaulting Defendants have had actual knowledge of the Plaintiff's claims of infringement at least since the complaint and summons were served upon them. Slep-Tone has been unable to determine whether Jada remains in business. However, Big Bob's and Paynter continue to advertise their availability to provide karaoke services through a Facebook page, on which they admit playing three simultaneous shows on Thursday nights.⁴ *See* Exh. B. Paynter's and Big Bob's karaoke activities have thus continued unchanged—or have expanded—since being put on notice of Slep-Tone's claims.

Big Bob's and Paynter's post-litigation conduct—including their continuation of the business with knowledge that their karaoke activities were conducted in violation of the Plaintiff's rights, and their default—justifies a finding that their infringing activities were knowing and willful. *See Arista Records, Inc. v. Beker Enters.*, 298 F. Supp. 2d 1310, 1313 (S.D. Fla. 2003) (finding willfulness when "Plaintiffs repeatedly contacted Defendants regarding their infringing

⁴ The advertisement reads "Thursday Night @ Po'Boys in Killearn from 8 til 12, Taproom 9 -1 an tomahawk 9-2," which refers to Thursday night karaoke shows at Po' Boys Creole Café in Killearn from 8 p.m. until midnight; the Fifth Avenue Tap Room in Tallahassee from 9 p.m. until 1 a.m.; and the Tomahawk Sports Bar & Grill in Tallahassee from 9 p.m. until 2 a.m. *See* Exh. B.

conduct and Defendants ignored Plaintiff's communications" and inferring willfulness from default); *Petmed Express, Inc. v. Medpets.com, Inc.*, 336 F. Supp. 2d 1213, 1220 (S.D. Fla. 2004) (inferring willfulness from defendant's continued infringing behavior after being given notice).

E. The allegations of the Complaint and the evidence presented herewith also establish Slep-Tone's claims against the Defendants under 15 U.S.C. § 1125(a) and Fla. Stat. § 501.211.

The existence of the likelihood of confusion establishes the Defaulting Defendants' liability not only for trademark infringement as discussed above, but also for false designation of origin. *See John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 981 (11th Cir. 1983) (elements of a claim for trademark infringement and for federal unfair competition are the same).

Likewise, acts of trademark infringement are unfair and deceptive trade practices. *See TracFone Wireless, Inc. v. Access Telecom, Inc.*, 642 F. Supp. 2d 1354, 1365 (S.D. Fla. 2009) ("Engaging in trademark infringement is an unfair and deceptive trade practice that violates" FDUTPA).

Because the Plaintiff is not seeking a double recovery, it respectfully submits that the acts of unfair competition and unfair trade practices merely bolster the underlying claim for trademark infringement and serve as an alternative ground for the damages and other relief it seeks.

II. Slep-Tone is entitled to entry of an award of statutory damages, seizure of the infringing articles, and a permanent injunction.

Under the statutory damages provision of the Lanham Act, a trademark owner may elect, at any time before final judgment is rendered, to recover an award of statutory damages for any use of a counterfeit mark in connection with the sale, offering for sale, or distribution of goods or services. *See* 15 U.S.C. § 1117(c).

“Counterfeiting is the act of producing or selling a product with a sham trademark that is an intentional and calculated reproduction of the genuine trademark.” 3 J.Thomas McCarthy, *McCarthy on Trademarks* § 25:10 (3d ed. 1997). The term “counterfeit mark” means:

a counterfeit of a mark that is registered on the principal register in the United States Patent and Trademark Office for such goods or services sold, offered for sale, or distributed and that is in use, whether or not the person against whom relief is sought knew such mark was so registered.

15 U.S.C. § 1116(d)(1)(B)(I).

Slep-Tone elects to receive an award of statutory damages from these Defendants.

In addition to the recovery of statutory damages, the Lanham Act provides that a court may grant a trademark owner injunctive relief, “according to the principles of equity and upon such terms as the court may deem reasonable, to

prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office" 15 U.S.C. § 1116(a).

A. Slep-Tone is entitled to significant statutory damages for intentional and knowing trademark infringement.

Courts have broad discretion in setting the amount of statutory damages. *See Cable/Home Communication Corp. v. Network Prod., Inc.*, 902 F.2d 829, 852 (11th Cir. 1990); *Microsoft Corp. v. Tierra Computer, Inc.*, 184 F. Supp. 2d 1329, 1331 (N.D. Ga. 2001).

Under the Lanham Act, the present statutory minimum and maximum amounts are \$1,000 to \$200,000, respectively, for each counterfeit trademark. *See* 15 U.S.C. §1117(c). In cases involving willful infringement, the maximum is increased to \$2,000,000. *See id.*

The Plaintiff has, *supra* section I(B), demonstrated that Big Bob's and Paynter had knowledge of their infringement from well prior to the filing of this suit, that they had actual knowledge of Slep-Tone's specific claims almost immediately after the filing of the suit, and that they continued to infringe. A strong deterrent to this type of behavior is warranted.

Courts have recognized deterrence of the particular defendant and deterrence of others as proper objectives of a statutory damages award. *See, e.g., Petmed Express, Inc.*, 336 F. Supp. 2d at 1220 (stating that statutory damages are intended both as compensation for losses and to deter wrongful conduct). The deterrent

effect of statutory damages also serves to put the defendant and the public on notice that it costs less to obey the laws than to violate them.

As the Plaintiff noted in the Complaint, infringement of the type this defendant has committed is widespread and has had a devastating impact upon the Plaintiff's business and the industry generally. (Compl., ¶¶ 80-89; *see also* Exh. A, ¶ 3.) A significant award of damages is necessary to make Slep-Tone whole and to deter others from this kind of unlawful conduct.

Because this is willful infringement, the Court has the discretion to make an award of up to \$2,000,000 for each registered mark infringed by these Defendants' conduct, which is up to \$4,000,000 total. The Plaintiff respectfully suggests that a statutory damages award of \$25,000 against Jada is appropriate, in view of Jada's apparent discontinuation of its business, and that a base award of statutory damages of \$75,000 against Big Bob's and Paynter is appropriate for this default judgment, and that the award should be enhanced by a multiplier of two based upon the willfulness of the infringement, to a total award of \$150,000. These figures are appropriate because (1) the base award is well within the limits of statutory damages even for non-willful infringement, (2) the multiplier used to account for the willfulness of Big Bob's and Paynter is only one-fifth of that envisioned under the Trademark Act, (3) it is reasonable in view of the extent of these Defendants' infringing operations, (4) this award will provide a meaningful

recovery to Slep-Tone for the damage to its business resulting from these Defendants' misconduct, and (5) as a penalty this award is sufficient to deter this defendant and others from engaging in similar behavior.

If these Defendants had participated in this case, the Plaintiff would have been able to ascertain with certainty, through discovery, the extent to which they profited from their infringement. In the absence of discovery, neither the Plaintiff nor the Court can be certain of the financial impact of the infringement. The precise number, however, is not necessarily material to the determination of the award, because statutory damages are awarded on a per-mark basis.

Nevertheless, the reasonableness of the Plaintiff's proposed award can be tested through fact-based estimates. Specifically, the typical market for services that these Defendants provide will bear a per-show price of between \$150 and \$250 for public shows and significantly more for private shows. (Exh. A, ¶ 16.) Jada is known to the Plaintiff to have provided at least two public shows weekly for a significant period of time, perhaps as long as five years. *See* Exh. C (listing show schedule and copyright date of 2006). Paynter and Big Bob's regularly provide at least six shows weekly and have advertised, at times, as many as 9 weekly karaoke shows. *See* Exh. D (listing show schedule on Facebook page).

Taking the low end of these figures, the Court could conservatively estimate⁵ that Jada's revenue from its activities over the past five years has exceeded \$75,000, not including revenue from private engagements, and that Big Bob's and Paynter's revenues over the same period have exceeded \$200,000.

Additionally, if a karaoke host such as this defendant were to outfit a karaoke system with legal Slep-Tone media to the degree these Defendants have outfitted their systems with unlawful counterfeit media, that host could expect to spend up to \$50,000 over time per system. (Exh. A, ¶ 15.) Thus, the respective suggested amounts of \$25,000 and \$150,000 are compatible with what Jada and Paynter/Big Bob's would have paid to acquire the Slep-Tone media in their libraries legally, with Jada's single system and Paynter/Big Bob's three.

The Plaintiff therefore respectfully suggests that the suggested statutory damage awards are eminently supportable by the record and meet all of the criteria established by the statute and by case law.

B. The Court should enter a permanent injunction barring the unauthorized use or display of the Sound Choice Marks.

In addition to the statutory damages award, the Plaintiff is entitled to injunctive relief. Under the Lanham Act, when a trademark owner's rights are

⁵ Statutory damages are, by their nature, intended to be approximations of damages in situations, as this one, in which actual damages cannot be definitively ascertained. These figures are provided simply to aid the Court in determining the reasonableness of the suggested damage award, not to suggest a rote calculation that should be applied.

being violated, that party may be entitled to an injunction. *See* 15 U.S.C § 1116(a).

The Eleventh Circuit has noted:

Under traditional equitable principles, a plaintiff seeking a permanent injunction must demonstrate (1) it has suffered an irreparable injury; (2) remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) the public interest would not be disserved by a permanent injunction.

Angel Flight of Ga., Inc. v. Angel Flight Am., Inc., 522 F.3d 1200, 1208 (11th Cir. 2008) (citing *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)).

However, in trademark infringement actions, permanent injunctions are ordinarily “the order of the day.” *SunAmerica Corp. v. Sun Life Assurance Co. of Can.*, 77 F.3d 1325, 1336 (11th Cir. 1996); *see also First Fed. Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 929 F.2d 382, 384-85 (8th Cir. 1991); *Selchow & Righter Co. v. Decipher, Inc.*, 598 F. Supp. 1489, 1494 (E.D. Va. 1984) (“an injunction is the preferred remedy to insure that future violations will not occur while damages may also be granted to compensate for past injuries”).

Although damages are important to compensate the Plaintiff for these Defendants’ past infringement, it is equally important for them to be stopped from continuing that wrongful conduct. Each of the elements of the *eBay* test for permanent injunctive relief has been met, and all four factors strongly counsel the entry of a permanent injunction. The damage done to the Plaintiff is irreparable

because the exclusivity of the Plaintiff's right to use and to control the use of the registered marks has been violated. A damage award will be insufficient if these Defendants can continue to use the Plaintiff's trademarks with impunity. Such an arrangement would require the Plaintiff to re-sue these Defendants continually for the later infringement, and it would call into question the Plaintiff's right to control the use of its marks to prevent consumer confusion and to designate properly the origin of the goods.

An injunction against these Defendants would impose a hardship upon them, in that they would not be able to use the Plaintiff's karaoke accompaniment tracks to provide karaoke entertainment services. But there are other manufacturers of karaoke accompaniment tracks who are presumably willing to permit their materials to be used, provided that the Defendants make the appropriate arrangements—including obtaining lawful materials and permission—for that privilege. Most importantly, as the Eleventh Circuit has recognized, “the public interest in preventing confusion around the marketplace is paramount to any inequity caused the [enjoined party].” *Coach House Restaurant, Inc. v. Coach & Six Restaurants, Inc.*, 934 F.2d 1551, 1564 (11th Cir. 1991).

Based upon the Defendants' conduct—and particularly so with respect to Paynter and Big Bob's—the Plaintiff is unwilling for its trademarks to be displayed in association with their activities. Accordingly, the Plaintiff

respectfully requests entry of a permanent injunction against the display of the Sound Choice Marks by these Defendants, together with all of those acting in privity or concert with them who have knowledge of the injunction, during their provision of karaoke entertainment services.

Moreover, the Plaintiff believes that these Defendants are in possession of a substantial number of karaoke tracks counterfeited from other manufacturers, as illustrated by the sheer number of tracks the Defendants have admitted possessing. The possession and use of additional unlawfully obtained tracks by these Defendants would permit them to compete unfairly with the legitimate karaoke operators who are the Plaintiff's customers and thus to deprive the legitimate operators of revenue that could and would be used to purchase material from the Plaintiff. Accordingly, an injunction forbidding the use of all such unlawful tracks, regardless of the manufacturer and not simply those of the Plaintiff, as an additional remedy for the federal unfair competition and state unfair trade practices violations, would be appropriate to protect the rights of the Plaintiff, its downstream customers, and the public at large—including the manufacturers whose tracks are being infringed.

C. The Court should order the destruction of the Defendants' equipment containing the means by which they infringe the Sound Choice Marks to provide a concrete deterrent to their further infringement.

The Plaintiff urges the Court additionally to order the destruction of the Defaulting Defendants' equipment containing the means by which they infringe the Sound Choice Marks, specifically their hard drives and other media containing unauthorized counterfeits of the Sound Choice Marks (and, as indicated above, those of other manufacturers), both as a mechanism to support enforcement of the aforementioned permanent injunction and as a deterrent of future acts of infringement.

The Trademark Act provides for the destruction of infringing articles:

In any action arising under this Act, in which a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, a violation under section 43(a), or a willful violation under section 43(c), shall have been established, the court may order that all labels, signs, prints, packages, wrappers, receptacles, and advertisements in the possession of the defendant, bearing the registered mark or, in the case of a violation of section 43(a) or a willful violation under section 43(c), the word, term, name, symbol, device, combination thereof, designation, description, or representation that is the subject of the violation, or any reproduction, counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices, and other means of making the same, shall be delivered up and destroyed.

15 U.S.C. § 1118.

Although the destruction provided for in § 1118 is not mandatory, destruction is appropriate in this case because of the relative ease with which the

Defendants could utilize their equipment to conduct additional counterfeiting activities in a manner that avoids ready detection. *See Playboy Enterprises, Inc. v. P.K. Sorren Export Co. of Fla., Inc.*, 546 F. Supp. 987, 997 (S.D. Fla. 1982) (ordering the destruction of all infringing goods in addition to a damage award and a permanent injunction).

If the Court enters the permanent injunction to which the Plaintiff is entitled, then the Defendants will be barred from the use and sale of the infringing articles. However, their continued possession of hard drives containing infringing content, which are small and easily duplicated, would allow them to make numerous additional counterfeit copies of the Sound Choice Marks in a manner that avoids easy detection. Permitting them to keep the hard drives would impose an additional monitoring cost upon the Plaintiff, who would be expected to apprise the Court if it suspected one of the Defendants had been violating that order, before any action would be taken.

While some courts have determined that when a permanent injunction has been ordered, “the rights of the plaintiff are adequately protected and an order requiring the destruction of infringing articles, though permitted, may be unnecessary,” *Kelley Blue Book v. Car-Smarts, Inc.*, 802 F.Supp. 278, 293 (C.D.Cal. 1992), an injunction, by itself, would not adequately protect the Plaintiff against certain harms. The failure also to order the destruction of these infringing

articles would enable the defendant to sell, transfer, or otherwise dispose of the hard drives in a manner that would permit another party to infringe the Plaintiff's marks in exactly the same way as these Defendants have done.

As such, to remove any significant possibility that these Defendants can violate the injunction noted above by using the same mechanism as the past infringement, the Court should order the Defendants to deliver up their hard drives for destruction.

CONCLUSION

Based upon all of the foregoing, the Plaintiff respectfully urges the Court to grant their motion and to enter judgment by default against Jada, Big Bob's, and Paynter, in the amounts and on the terms requested.

COMPLIANCE WITH SERVICEMEMBERS CIVIL RELIEF ACT

Pursuant to the Servicemembers Civil Relief Act, formerly known as the Soldiers and Sailors Civil Relief Act of 1940, 50 App. U.S.C. § 501 *et seq.* (the "Act"), the Plaintiff is required to submit a declaration "if the plaintiff is unable to determine whether or not the defendant is in military service, stating that the plaintiff is unable to determine whether or not the defendant is in military service" 50 App. U.S.C. § 520(1)(B).

Since the Act is applicable only to natural persons, only Paynter is potentially subject to its provisions. Because of the lack of discovery in this case, the Plaintiff has not been able to obtain sufficient information about Paynter to enable it to conduct a search of military records maintained by the Department of Defense. *See* Exh. E, ¶¶ 2-3. The Plaintiff does not have any information in its possession that indicates that Paynter is or has ever been in active military service, and as such, the Plaintiff does not believe that the portion of the Act concerning default judgments applies to him. *See id.*

Respectfully submitted this the 29th day of September, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document is being filed on the date indicated using the Clerk's CM/ECF System, which will send a Notice of Electronic Filing to the following counsel of record:

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Service is being made upon the following ECF non-participants by U.S. Mail, postage prepaid, addressed to:

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Date: September 28, 2011

s/ James M. Harrington