



Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
 S.D. New York.
 GMA ACCESSORIES, INC., Plaintiff,
 v.
 MEGATOYS, INC., et al., Defendants.
No. 01 Civ. 12743(LAK).

Jan. 14, 2003.

Owner of copyrights for "Maggie the Monkey," "Frankie the Frog," and "Dolly the Duck" dolls brought suit against defendant for copyright infringement. After entry of default judgment, the District Court, [Kaplan](#), J., adopted report and recommendation of [Pitman](#), United States Magistrate Judge, which held that statutory damages award of twice infringer's revenue from accused products was warranted.

Ordered accordingly.

West Headnotes

Copyrights and Intellectual Property  **87(4)**
[99k87\(4\) Most Cited Cases](#)

Owner of copyrights for "Maggie the Monkey," "Frankie the Frog," and "Dolly the Duck" dolls was entitled to statutory damages award of \$132,975, or twice infringer's revenue from accused products, even though infringement was intentional and entirely unjustified, and maximum statutory damages permissible was \$450,000, where volume of sales was relatively modest. [17 U.S.C.A. § 504\(a\)](#).

[John P. Bostany](#), The **Bostany** Law Firm, New York City, for GMA Accessories, Inc.

[Nancy J. Mertz](#), Brown, Raysman, Millstein Felder & Steiner, LLP, for Megatoys, Inc.

ORDER

[KAPLAN](#), J.

*1 The Court adopts the report and recommendation

of Magistrate Judge Pitman, dated December 23, 2002, to which no objections have been filed. Plaintiff shall have judgment against defendant Lovely Overseas Marketing, Ltd. in the amount of \$132,975.

As the entry of judgment in accordance with this order will dispose of the last remaining claim against the last remaining defendant, the Clerk thereupon shall close the case.

SO ORDERED.

REPORT AND RECOMMENDATION

[PITMAN](#), Magistrate J.

I. Introduction

On July 15, 2002, the Honorable Lewis A. Kaplan, United States District Judge for the Southern District of New York, referred this matter to me to conduct an inquest concerning plaintiff's damages against defendant Lovely Overseas Marketing, Ltd. [\[FN1\]](#) ("Lovely") and to report and recommend concerning those damages. The matter was referred to me after the entry of a default judgment against Lovely as a result of its failure to answer or move with respect to the complaint or otherwise appear in this action.

[FN1](#). A permanent consent injunction has been entered with respect to all other defendants (Docket Item 34) and all cross claims have been voluntarily dismissed (Docket Item 35).

Pursuant to the Order of Reference, I issued an Amended Scheduling Order on August 7, 2002 directing plaintiff to serve and file proposed findings of fact and conclusions of law by September 6, 2002 and directing Lovely to submit responsive materials by October 16, 2002. My August 7 Amended Scheduling Order further provided:

Unless Lovely Overseas Marketing, Ltd. answers or appears by October 15, 2002, Defendant shall submit its response to plaintiff's submissions, if any, no later than October 16, 2002. *IF DEFENDANT (1) FAILS TO RESPOND TO PLAINTIFF'S SUBMISSIONS, OR (2) FAILS TO CONTACT MY CHAMBERS BY OCTOBER 16, 2002 AND REQUEST AN IN-COURT HEARING. IT IS MY INTENTION TO ISSUE A REPORT AND*

RECOMMENDATION CONCERNING DAMAGES ON THE BASIS OF PLAINTIFF'S WRITTEN SUBMISSIONS ALONE WITHOUT AN IN-COURT HEARING. See [Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.](#), 109 F.3d 105, 111 (2d Cir.1997); [Fustok v. ContiCommodity Services Inc.](#), 873 F.2d 38, 40 (2d Cir.1989) ("[I]t [is] not necessary for the District Court to hold a hearing, as long as it ensured that there was a basis for the damages specified in the default judgment."). If Lovely Overseas Marketing does answer or appear by October 15, 2002, it need not take any action in response to this Order. [\[FN2\]](#)

[FN2](#). The default against Lovely was originally issued on the basis of e-mail service. In July, 2002, plaintiff's counsel realized that service may have been defective because Lovely had been served by e-mail without an Order permitting such service. See [Rio Properties, Inc. v. Rio International InterLink](#), 284 F.3d 1007, 1014-17 (9th Cir.2002). Plaintiff's counsel wrote to Judge Kaplan on July 29, 2002 advising him of the potential problem, and Judge Kaplan issued an endorsed Order directing that service on Lovely be made by e-mail no later than August 15, 2002 and providing that the default previously entered against Lovely would be automatically vacated if Lovely answered or appeared on or before October 15, 2002. Accordingly, I included language in my August 7 Amended Scheduling Order that would obviate the need for a submission from Lovely if it timely appeared to litigate this matter.

(Emphasis in original).

A copy of my August 7 Amended Scheduling Order was sent to Lovely in Taiwan; it has not been returned as undeliverable.

Plaintiff timely submitted proposed findings of fact and conclusions of law in response to my Amended Scheduling Order. Lovely has not made any submission to me, nor has it contacted my chambers in any way. Accordingly, on the basis of plaintiff's written submissions alone, I recommend that the Court make the following findings of fact and conclusions of law.

II. Findings of Fact

A. The Parties

1. Plaintiff, GMA Accessories, Inc. ("GMA") is a corporation duly organized and existing under the laws of the State of New York, with a place of business at 1 East 33rd Street, New York, New York (Amended Complaint ¶ 1 [\[FN3\]](#)).

[FN3](#). As a result of Lovely's default, all the allegations of the Complaint, except as to the amount of damages, must be taken as true. [Bambu Sales, Inc. v. Ozak Trading Inc.](#), 58 F.3d 849, 854 (2d Cir.1995); [Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp.](#), 973 F.2d 155, 158 (2d Cir.1992); [Trans World Airlines, Inc. v. Hughes](#), 449 F.2d 51, 69-70 (2d Cir.1971), *rev'd on other grounds*, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973); [Wing v. East River Chinese Rest.](#), 884 F.Supp. 663, 669 (E.D.N.Y.1995); [Deshmukh v. Cook](#), 630 F.Supp. 956, 959-60 (S.D.N.Y.1986).

*2 2. Defendant Lovely is a corporation duly organized and existing under the laws of the country of Taiwan, with its principal place of business at 18F1-8# 77 Hsin Tai Wu Rd. Sec 1 Hsichih Chen, Taipei Hsien, 221 Taiwan (Amended Complaint ¶ 5).

B. Plaintiff's Claims

3. GMA designed and created a design or work of art known as "Maggie the Monkey" and published "Maggie the Monkey" in the United States, all prior to 1998 (Amended Complaint ¶¶ 33-34).

4. GMA designed and created a design or work of art known as "Frankie the Frog" and published "Frankie the Frog" in the United States, all prior to 1998 (Amended Complaint ¶¶ 35-36).

5. GMA designed and created a design or work of art known as "Dolly the Duck" and published "Dolly the Duck" in the United States, all prior to 1998 (Amended Complaint ¶¶ 37-38).

6. Between 1996 and 1998, GMA complies in all respects with all the requirements of the Act of July 30, 1947, c. 391, 61 Stat. 652 and revised in its entirety by [Pub.L. No. 94-553, Title I, § 101](#), Oct. 19, 1976, 90 Stat. 2541, as amended (the "Copyright Act"), and all other laws governing copyright (Amended Complaint ¶ 39).

7. GMA was granted the exclusive right in and to

"Maggie the Monkey" and was issued certificate of registration number Vau 380-458 by the United States Copyright Office on February 6, 1997 (Amended Complaint ¶ 40).

8. GMA was granted the exclusive right in and to "Frankie the Frog" and was issued certificate of registration number Vau 380-483 by the United States Copyright Office on February 6, 1997 (Amended Complaint ¶ 41).

9. GMA was granted the exclusive right in and to "Dolly the Duck" and was issued certificate of registration number Vau 399-317 by the United States Copyright Office on April 7, 1997 (Amended Complaint ¶ 42).

10. Apart from infringements that have been the subject of litigation commenced by GMA, since 1997, to the best of GMA's knowledge, "Maggie the Monkey," "Frankie the Frog" and "Dolly the Duck" have been published only by GMA, and all copies of these figures have been printed, reproduced and published by GMA in strict conformity with the provisions of the Copyright Act, and all other laws governing copyright (Amended Complaint ¶ 44).

11. At all time since 1997, GMA has been and still is the sole proprietor of all rights, title and interest in and to the copyrights in the aforementioned works and GMA is now the sole proprietor thereof. See [17 U.S.C. § 106](#) (Amended Complaint ¶ 45).

12. Since 1997, GMA has been, and still is, the sole rightful designer and seller of soft plush dolls and/or bean bag animals or other items bearing the aforementioned copyrighted works of art and has had, and still has, the exclusive right to sell such designs. See [17 U.S.C. § 106](#) (Amended Complaint ¶ 46).

13. Pursuant to GMA's sole and exclusive rights, GMA has commenced before 1997, and did thereafter continue, either on its own or through its agents, employees, or contractors, to manufacture and sell the dolls bearing the copyrighted works of art described above, and has advertised, offered for sale and sold such dolls to retailers and wholesalers (Amended Complaint ¶ 47).

*3 14. Since at least April 5, 2001, Lovely has been marketing in the United States a doll identical to GMA's "Maggie the Monkey" doll that utilizes GMA's copyrighted "Maggie the Monkey" design (Amended Complaint ¶ 48).

15. Since at least April 5, 2001, Lovely has been marketing in the United States a doll identical to GMA's "Frankie the Frog" doll that utilizes GMA's copyrighted "Frankie the Frog" design (Amended Complaint ¶ 49).

16. Since at least April 5, 2001, Lovely has been marketing in the United States a doll identical to GMA's "Dolly the Duck" doll that utilizes GMA's copyrighted "Dolly the Duck" design (Amended Complaint ¶ 50).

17. By virtue of Lovely's failure to controvert GMA's allegations of intentional infringement, I find that Lovely's infringement was intentional. In addition, I have examined samples of GMA's dolls and the dolls sold by Lovely. The dolls sold by Lovely are identical to the dolls sold by GMA, and, therefore, it is apparent that Lovely copied GMA's designs.

C. Lovely's Sales

18. In August 2000, Lovely sold 9600 unauthorized copies of GMA's "Maggie the Monkey" in the United States at a price of \$1.10 each for a total sale of \$10,560.00 (Exhibit 1 to the Declaration of Charles Woo, dated January 3, 2002).

19. In August 2000, Lovely sold 9600 unauthorized copies of GMA's "Frankie the Frog" in the United States at a price of \$1.00 each for a total sale of \$9,600.00 (Exhibit 1 to the Declaration of Charles Woo, dated January 3, 2002).

20. In June 2001, Lovely sold 9600 unauthorized copies of GMA's "Dolly the Duck" in the United States at a price of \$1.00 each for a total sale of \$9,600.00 (Exhibit 1 to the Declaration of Charles Woo, dated January 3, 2002).

21. In June 2001, Lovely sold 9190 unauthorized copies of GMA's "Maggie the Monkey" in the United States at an average price of \$1.280468 each for a total sale of \$11,767.50 (Exhibit 21 to the Declaration of Charles Woo, dated January 3, 2002).

22. In June 2001, Lovely sold 9600 unauthorized copies of GMA's "Frankie the Frog" in the United States at a price of \$1.30 each for a total sale of \$12,480.00 (Exhibit 2 to the Declaration of Charles Woo, dated January 3, 2002).

23. In June 2001 2000, Lovely sold 9600

unauthorized copies of GMA's "Dolly the Duck" in the United States at a price of \$1.30 each for a total sale of \$12,480.00 (Exhibit 2 to the Declaration of Charles Woo, dated January 3, 2002).

24. Accordingly, Lovely's total sales in the United States of dolls that infringe GMA's copyrights are \$66,487.50.

D. *Lovely's Default*

25. Lovely has not answered or appeared in this matter. For all that appears in the record, it appears that Lovely has never contacted the Court in any way.

III. *Conclusions of Law*

26. This action arises under the Copyright Laws of the United States. Jurisdiction is conferred upon this Court by [28 U.S.C. §§ 1331, 1338](#).

27. Personal jurisdiction over lovely exists because it derives substantial revenue from New York State, solicits business in New York State, engages in a persistent course of conduct in New York State, and has committed tortious acts outside New York State resulting in injury within New York State and are doing business in New York State (Amended Complaint ¶ 31).

*4 28. Venue is proper in this District because Lovely is subject to jurisdiction in this District. [28 U.S.C. § 1391\(b\), \(c\)](#).

29. Because Lovely has marketed in the United States, without authorization from GMA, dolls that are at least substantially similar to GMA's copyrighted designs, Lovely has infringed GMA's copyrights in "Maggie the Monkey," Frankie the Frog" and "Dolly the Duck."

30. As the victim of copyright infringement, GMA is entitled to recover Lovely's profits from the sale of the accused merchandise or statutory damages. [17 U.S.C. § 504\(a\)](#). GMA has elected recover statutory damages.

31. Where, as here, a defendant has willfully infringed then plaintiff's copyright, "a statutory damages award should incorporate not only a compensatory, but also a punitive component to discourage further wrongdoing by the defendants and others." [Roxley Watch U.S.A., Inc. v. Jones, 99 Civ. 2359\(DLC\)\(FM\), 2002 WL 596354](#) at *5 (S.D.N.Y.

April 17, 2002) (citations omitted).

32. The Copyright Act permits recovery of statutory damages of up to \$150,000 for all infringements of any one work. Although GMA seeks an award of the maximum statutory damages permissible, or \$450,000, I conclude that an award in the amount of \$132,975.00, or twice Lovely's revenue from the accused products, is appropriate here. Although Lovely's infringement was intentional and entirely unjustified, the volume of sales was relatively modest. Indeed, an award of the maximum statutory damages permissible would result in a judgment approximately seven times larger than Lovely gross revenues from the accused product. Damages in the amount of twice Lovely's revenues is clearly sufficient to compensate GMA, punish Lovely and deter Lovely and other would-be infringers from any similar conduct in the future.

IV. *Conclusion*

Accordingly, for all the foregoing reasons, I respectfully recommend that GMA recover damages against Lovely in the amount of \$132,975.00.

V. *Objections*

Pursuant to [28 U.S.C. § 636\(b\)\(1\)\(C\)](#) and [Rule 72\(b\) of the Federal Rules of Civil Procedure](#), the parties shall have ten (10) days from the date of this Report and Recommendation to file written objections. *See also* [Fed.R.Civ.P. 6\(a\)](#) and [6\(e\)](#). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Lewis A. Kaplan, United States District Judge, 500 Pearl Street, Room 1310, New York, New York 10007, and to the chambers of the undersigned, 500 Pearl Street, Room 750, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Kaplan. FAILURE TO OBJECT WITHIN TEN (10) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. [Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 \(1985\)](#); [IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 \(2d Cir.1993\)](#); [Frank v. Johnson, 968 F.2d 298, 300 \(2d Cir.1992\)](#); [Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 \(2d Cir.1988\)](#); [McCarthy v. Manson, 714 F.2d 234, 237-38 \(2d Cir.1983\)](#).

Not Reported in F.Supp.2d, 2003 WL 193507 (S.D.N.Y.)

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