UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| PITBULL PRODUCTIONS, INC., Plaintiff, | : | 07 Civ. 1784 (RMB) (GWG) |
| -v.- | : | REPORT AND RECOMMENDATION |
| UNIVERSAL NETMEDIA, INC., et al., Defendants. | : | |

**GABRIEL W. GORENSTEIN, UNITED STATES MAGISTRATE JUDGE**

## I. BACKGROUND

On March 1, 2007, plaintiff Pitbull Productions, Inc. ("Pitbull") filed a complaint against Alpha Red, Inc., Universal Netmedia, Inc., and John Does 1-10. See Complaint, filed Mar. 1, 2007 (Docket #1) ("Compl."). Shortly thereafter, Pitbull filed an amended complaint dropping Alpha Red, Inc. as a defendant but adding Nadine Lewers, Jonathan Lewers, Larry Lewers, and Jonathan Lewers a/k/a Craig Ennis. See Amended Complaint, filed Apr. 6, 2007 (Docket #8) ("Am. Compl."). The amended complaint seeks damages and injunctive relief for trademark and trade dress infringement and false designation of origin under Section 43(a) of the Lanham Act; trademark infringement and unfair competition under New York common law; copyright infringement; invasion of privacy; and slander and libel. See Am. Compl. ¶¶ 32-49. The defendants – other than the "John Doe" defendants – were served on March 28 and April 28, 2007, see Certificates of Service, filed June 27, 2007 (Docket ##21-25), but did not answer. The district court thereafter ordered the defendants to show cause why a default judgment should not be issued against them. See Order to Show Cause, filed June 28, 2007 (Docket #26). On July 3, 2007, the district court issued an Order stating that a default judgment would be entered against the defendants, issuing a permanent injunction against continuing the conduct alleged in the amended complaint, and referring the case to the undersigned for an inquest regarding damages and injunctive relief pertaining to the defendants' domain name. See Order, filed July 3, 2007 (Docket #29) ("Default Judgment Order").

By Order dated July 9, 2007, this Court directed Pitbull to make submissions supporting its request for damages against the defendants. See Scheduling Order for Inquest, filed July 10, 2007 (Docket #30) ("Scheduling Order"), at 1. A copy of the order was mailed to the defendants. In response, Pitbull submitted a declaration and Proposed Findings of Fact and Conclusions of Law seeking statutory damages in the amount of $2,000,000; attorney's fees and costs in the amount of $13,000.14; injunctive relief relating to the defendants' domain name; and a fine for future violations of the permanent injunction. See Plaintiff's Proposed Findings of Fact and Conclusions of Law, filed Aug. 21, 2007 (Docket #31) ("Proposed Findings"), at 6-7; Declaration of Jennifer Meredith (attached as Ex. E to Proposed Findings) ("Meredith Decl."), ¶¶ 4, 9-10. The Court gave the defendants until September 19, 2007, to submit any response, see Scheduling Order at 2, but the defendants did not avail themselves of this opportunity.

Neither party requested a hearing on the issue of damages. The Second Circuit has held that an inquest into damages may be held on the basis of documentary evidence "as long as [the Court has] ensured that there was a basis for the damages specified in [the] default judgment." Fustok v. ContiCommodity Servs., Inc., 873 F.2d 38, 40 (2d Cir. 1989); accord Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., Div. of Ace Young Inc., 109 F.3d 105, 111 (2d Cir. 1997); Action S.A. v. Marc Rich & Co. Inc., 951 F.2d 504, 508 (2d Cir. 1991), cert. denied, 503 U.S. 1006 (1992). Because Pitbull's submissions provide such a basis, no hearing is required. The following findings of fact and conclusions of law are based on those submissions. In addition, in light of the defendants' default, Pitbull's properly-pleaded allegations, except those relating to damages, are accepted as true. See, e.g., Cotton v. Slone, 4 F.3d 176, 181 (2d Cir. 1993) ("factual allegations are taken as true in light of the general default judgment"); Greyhound Exhibitgroup, Inc. v. E.L.U.L. Realty Corp., 973 F.2d 155, 158 (2d Cir. 1992), cert. denied, 506 U.S. 1080 (1993); Time Warner Cable of N.Y.C., a Div. of Time Warner Entm't Co., L.P. v. Barnes, 13 F. Supp. 2d 543, 547 (S.D.N.Y. 1998).

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Facts Relating to Liability

The following findings of fact relating to liability are taken from the plaintiff's amended complaint.

Pitbull is a company in the business of adult entertainment movies and websites. Am. Compl. ¶ 15. It has applied for and registered various copyrights and trademarks and has acquired common law trademark rights and trade dress rights for pre-recorded CD's, video tapes, laser disks and DVD's featuring adult entertainment. See id. ¶¶ 16-19; Ex. B to Compl. (listing registrations for six trademarks); Ex. C to Compl. (listing titles that are either protected as trademarks or include protected marks).

The defendants "have created and control and [sic] extensive and integrated network that uses the Internet to connect people throughout the world and encourages and enables them to pool various types of infringing files." Am. Compl. ¶ 23. Specifically, the defendants provide their users with the means to infringe on Pitbull's trademarks. See id. Pitbull's images and content are uploaded through the defendants' network without its permission. See id. ¶¶ 24-25.

In addition, the defendants willfully use counterfeit and confusingly similar trademarks and trade dress to attract consumers and compete with Pitbull. See id. ¶¶ 26-28. Defendants have posted "entire videos" on their website "www.whatsea.com." See id. ¶ 20. As a result, Pitbull has suffered damage to its reputation and lost potential goodwill and money spent accumulating that goodwill for its intellectual property. See id. ¶ 29. Also, in retaliation for attempting to enforce its intellectual property rights, the defendants maliciously "posted libelous and slanderous statements on their website accusing [Pitbull's] employees of having sexually transmitted diseases." Id. ¶ 30.

B. Statutory Damages

1. Applicable Law

Pitbull seeks monetary damages only for trademark infringement. It seeks $2,000,000 in statutory damages pursuant to 15 U.S.C. § 1117(c) based on the infringement of two marks. See Proposed Findings at 4; Meredith Decl. ¶ 4. Section 1117(c) provides:

> In a case involving the use of a counterfeit mark (as defined in section 1116(d) of this title) in connection with the sale, offering for sale, or distribution of goods or services, the plaintiff may elect, at any time before final judgment is rendered by the trial court, to recover, instead of actual damages and profits under subsection (a) of this section, an award of statutory damages for any such use in connection with the sale, offering for sale, or distribution of goods or services in the amount of–
> (1) not less than $500 or more than $100,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just; or
> (2) if the court finds that the use of the counterfeit mark was willful, not more than $1,000,000 per counterfeit mark per type of goods or services sold, offered for sale, or distributed, as the court considers just.

Section 1117(c) was enacted to address the difficulty of calculating actual damages caused by counterfeiters. See, e.g., Rodgers v. Anderson, 2005 WL 950021, at *2 (S.D.N.Y. Apr. 26,

2005) ("The rationale for this section is the practical inability to determine profits or sales made by counterfeiters."); Gucci Am., Inc. v. Duty Free Apparel, Ltd., 315 F. Supp. 2d 511, 520 (S.D.N.Y.) ("Congress added the statutory damages provision of the Lanham Act in 1995 because 'counterfeiters' records are frequently nonexistent, inadequate, or deceptively kept . . . , making proving actual damages in these cases extremely difficult if not impossible.'") (quoting S. Rep. No. 104-177, at 10 (1995)), amended in part, 328 F. Supp. 2d 439 (2004); Tiffany (NJ) Inc. v. Luban, 282 F. Supp. 2d 123, 124 (S.D.N.Y. 2003) (same).

Section 1117(c), however, "does not provide guidelines for courts to use in determining an appropriate award as it is only limited by what the court considers just." Gucci Am., Inc., 315 F. Supp. 2d at 520 (internal citation and quotation marks omitted). Many courts have looked to an analogous provision in the Copyright Act for guidance, see 17 U.S.C. § 504(c), and have considered the following factors in setting statutory damage awards under the Lanham Act: (1) "the expenses saved and the profits reaped;" (2) "the revenues lost by the plaintiff;" (3) "the value of the copyright;" (4) "the deterrent effect on others besides the defendant;" (5) "whether the defendant's conduct was innocent or willful;" (6) "whether a defendant has cooperated in providing particular records from which to assess the value of the infringing material produced;" and (7) "the potential for discouraging the defendant." Malletier v. WhenU.Com, Inc., 2007 WL 257717, at *4 (S.D.N.Y. Jan. 26, 2007) (quoting Fitzgerald Publ'g Co., Inc. v. Baylor Publ'g Co., 807 F.2d 1110, 1117 (2d Cir. 1986)); accord Kenneth Jay Lane, Inc. v. Heavenly Apparel, Inc., 2006 WL 728407, at *6 (S.D.N.Y. Mar. 21, 2006); Phillip Morris USA Inc. v. Marlboro Express, 2005 WL 2076921, at *6 (E.D.N.Y. Aug. 26, 2005); Silhouette Int'l Schmied AG v. Vachik Chakhbazian, 2004 WL 2211660, at *2 (S.D.N.Y. Oct. 4, 2004) (Report and

Recommendation), adopted by, Order, filed Oct. 26, 2004 (Docket #29 in 04 civ. 3613); Sara Lee Corp. v. Bags of New York, Inc., 36 F. Supp. 2d 161, 166 (S.D.N.Y. 1999).

2. Analysis

The defendants' willfulness in violating the trademark law is established by virtue of its failure to controvert the allegations of willfulness in the amended complaint. Thus, an award of up to $1,000,000 per counterfeit mark per type of goods or services sold is permissible. 15 U.S.C. § 1117(c)(2). In addition, the defendants' failure to respond to the papers seeking a default judgment has left the Court with no information as to any of the factors relating to the defendants' circumstances. Thus, the Court draws every inference on these points against the defendants.

Nonetheless, Pitbull has not provided any rationale for awarding the maximum of $1,000,000 per mark. See Proposed Findings at 4. In the cases cited by plaintiff awarding the maximum, see id. at 3, the record included documentation addressing the volume or potential value of infringing goods. See Nike, Inc. v. Top Brand Co., 2006 WL 2946472, at *2 (S.D.N.Y. Feb. 27, 2006) (Report and Recommendation) ("millions" of infringing goods produced), adopted by, 2006 WL 2884437 (S.D.N.Y. Oct. 6, 2006); Gucci Am., Inc., 315 F. Supp. 2d at 521 (estimating profits derived from infringing goods); Phillip Morris USA Inc., 2005 WL 2076921, at *6 (estimating value of infringing goods using number of units sold and a retail price). Here there is no record whatsoever regarding the nature of the defendants' infringement, estimates of the defendants' earnings, or possible losses to Pitbull arising from the defendants' conduct.

While Pitbull has alleged the infringement of six marks, see Am. Compl. ¶¶ 25-28, 32-

37; Ex. B to Compl., its Proposed Findings seek damages for infringement of two marks. Proposed Findings at 4.

Taking into account the defendants' failure to submit to this Court any documentation from which to determine damages, the willfulness of the their conduct, and the deterrent effect a damages award would have on both the defendants and others, the Court believes that $250,000 per mark is sufficient to compensate Pitbull for losses it suffered and to deter both the defendants and others from infringing on those marks in the future. Courts have awarded similar damages in other cases in which there was little information as to the defendants' infringement. See Rodgers, 2005 WL 950021, at *4 (awarding $250,000); see also Malletier, 2007 WL 257717, at *6 nn.1-2 (citing cases with damage awards from $100,000 to $1,000,000 per infringed mark). Therefore, the Court concludes that a $500,000 judgment is appropriate to accomplish the goals of the statute.

C. Attorneys' Fees

Under the copyright and trademark law, a court may in its discretion award costs and reasonable attorneys' fees. See 15 U.S.C. § 1117 (trademark); 17 U.S.C. § 505 (copyright). Pitbull has submitted an affirmation by its attorney asserting that it has incurred attorneys' fees of $11,490. Meredith Decl. ¶ 4. Pitbull's papers, however, do not include any contemporaneous time records, let alone any affidavit authenticating such records. In New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136 (2d Cir. 1983), the Second Circuit held that a party seeking an award of attorneys' fees must support the request with contemporaneous time records that show "for each attorney, the date, the hours expended, and the nature of the work done." Id. at 1148. While in Cruz v. Local Union No. 3, IBEW, 34 F.3d 1148 (2d Cir. 1994), the Second Circuit accepted a "typed listing of [attorneys'] hours from their computer records" in lieu of contemporaneous records, it did so where the record showed that the attorneys "made contemporaneous entries as the work was completed, and that their billing was based on these contemporaneous records." Id. at 1160; see also Johnson v. Kay, 742 F. Supp. 822, 837 (S.D.N.Y. 1990) ("Where the attorneys have provided the court with affidavits that have been reconstructed from contemporaneous records and that set forth all charges with specificity, fees have not been denied."); Lenihan v. City of New York, 640 F. Supp. 822, 824 (S.D.N.Y. 1986) (noting that "[t]he Court routinely receives computerized transcriptions of contemporaneous time records from firms whose billing records are maintained in computers" as "a form convenient for the Court.").

Here, the application contains no statement that the summary of hours provided to the Court was produced based on a compilation of contemporaneous time records. Accordingly, no compensation can be awarded for attorneys' fees.

D. Costs

Pitbull's papers at one point seek $1,510.14 in costs, see Proposed Findings at 4, and at another point $1,553.64 in costs, see Meredith Decl. ¶ 4. In light of the fact that the receipts submitted for costs total $1,496.04, see Ex. C to Proposed Findings, costs should be awarded in the amount of $1,496.04.

E. Injunctive Relief

Pitbull seeks an order that two non-parties, identified as "Godaddy" and "Domains by Proxy, Inc.," be required "to reveal the 'private registration' for whatstea.com and any other domain names owned by the same owner of whatstea.com that are held as 'private registrations,'" Proposed Findings at 6; that the domain name "www.whatstea.com" be delivered to it; that the Registrar for this domain name "freeze the registration;" and "that the name servers be deleted and left blank so that the domain (website) cannot point to any Internet Service Provider (ISP)." Proposed Findings at 7.

"A court may issue an injunction on a motion for default judgment provided that the moving party shows that (1) it is entitled to injunctive relief under the applicable statute and (2) it meets the prerequisites for the issuance of an injunction." Kingvision Pay-Per-View Ltd. v. Lalaleo, 429 F. Supp. 2d 506, 516 (E.D.N.Y. 2006) (internal citation and quotation marks omitted). To satisfy the second condition, "a party seeking a[n] . . . injunction must demonstrate irreparable harm and the absence of an adequate remedy at law." Id. (citing Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 57 (1975)); see Gucci Am., Inc. v. Duty Free Apparel, Ltd., 286 F. Supp. 2d 284, 290 (S.D.N.Y. 2003) ("To obtain a permanent injunction, [the requesting party] must demonstrate (1) actual success on the merits and (2) irreparable harm.").

1. Entitlement to Injunctive Relief

Pitbull cites two statutes for its entitlement to the injunctive relief. First, Pitbull cites 15 U.S.C. § 1125(d)(1)(A) for the proposition that "'[a] trademark owner is entitled to relief, including an order requiring a domain name registrant to transfer, forfeit, or cancel its domain names.'" Proposed Findings at 6. However, this statute is not applicable here. Rather, it prevents a person from "register[ing], traffic[king] in, or us[ing] a domain name that" infringes on another's mark. 15 U.S.C. § 1125(d)(1)(A)(ii). Here, there is no allegation in the amended complaint that any domain name infringes on Pitbull's marks. Rather, the only claim is that the defendants' website has been used as a vehicle for otherwise infringing on Pitbull's marks. See

Am. Compl. ¶¶ 21-27. Thus, Pitbull has not established that it is entitled to injunctive relief under 15 U.S.C. § 1125(d)(1)(A).

Pitbull also cites 15 U.S.C. § 1116(a), see Proposed Findings at 6, which provides that "[t]he several courts vested with jurisdiction of civil actions arising under this chapter shall have power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable . . . ." 15 U.S.C. § 1116(a). Pitbull has established trademark infringement under the Lanham Act, see Am. Compl. ¶¶ 32-37, and thus the Court may grant injunctive relief pursuant to this provision.

2. Prerequisites to Injunctive Relief

Because the defendants' default constitutes an admission of liability, Pitbull has established success on the merits. See Dunkin' Donuts, Inc. v. Peter Romanofsky, Inc., 2006 WL 2433127, at *6 (E.D.N.Y. Aug. 8, 2006). Furthermore, "[i]n a trademark case, irreparable injury is established where there is any likelihood that an appreciable number of ordinarily prudent purchasers are likely to be misled, or indeed simply confused, as to the source of the goods in question." Lobo Enters., Inc. v. Tunnel, Inc., 822 F.2d 331, 333 (2d Cir. 1987) (internal citation and quotation marks omitted); see also Malletier v. Burlington Coat Factory Warehouse Corp., 426 F.3d 532, 537 (2d Cir. 2005) ("In trademark disputes, a showing of likelihood of confusion establishes . . . irreparable harm.") (internal citation and quotation marks omitted). Accepting its allegations as true, Pitbull has alleged likelihood of confusion and thus also established irreparable injury. See Am. Compl. ¶ 26 ("Defendants' use of Plaintiff's trademarks and trade dress is confusingly similar to Plaintiff's trademarks."); id. ¶ 27 ("Defendants' use of counterfeits [sic] Plaintiff's trademarks in connection with images and adult entertainment content are in direct competition with Plaintiff's goods and are likely to cause confusion, mistake or deception among the relevant trade and public.").

The remaining inquiry is whether there is an adequate remedy at law. Pitbull does not discuss the law governing permanent injunctions in its submission. However, the plaintiff appears to argue that there is no adequate remedy at law with respect to its request that the Court order that the domain name "www.whatstea.com" be turned over to its possession inasmuch as it argues that the defendants "will continue to infringe unless restrained." Proposed Findings at 5. Pitbull further argues that such relief is the only way to make it whole because "[e]ach download of [its] content may not be reclaimed and may lead to additional third party infringements." Id.

Pitbull annexed documents to its Proposed Findings that appear to be printouts of defendants' website. See Exs. A, B to Proposed Findings. While Pitbull's Proposed Findings, at 2, refer the reader to "Exhibit C" for an affidavit authenticating some of these documents, Exhibit C in fact contains no such affidavit. Accordingly, the Court has disregarded Exhibits A and B. Nevertheless, the plaintiff alleges in the amended complaint that the "www.whatstea.com" website is being used to infringe, see Complaint, ¶ 20, see also id. ¶¶ 1, 23, and that the defendants are infringing "willfully and with full knowledge and awareness of the superior trademark rights of Plaintiff, and with the purpose and intent of confusing the relevant trade and public into mistakenly believing that Defendants' services are associated with, affiliated with, or licensed by Plaintiff." Am. Compl. ¶ 28.

Accepting these allegations as true, an injunction requiring the defendants to transfer the domain name registration for "www.whatstea.com" to Pitbull should be granted. Other courts have similarly required infringers to transfer particular domain names to the aggrieved party.

See, e.g., Ford Motor Co. v. Cross, 441 F. Supp. 2d 837, 853 (E.D. Mich. 2006) (defendants ordered to disclose all other domain registrations held by them and to transfer registration of a particular domain name to plaintiff in part under authority of 15 U.S.C. § 1116(a)); Philip Morris USA, Inc. v. Otamedia Ltd., 331 F. Supp. 2d 228, 234, 247 (S.D.N.Y. 2004) (modifying injunction to require that defendant transfer two domain names to plaintiff after defendant "persistently and overtly flouted" terms of default judgment). Given the defendants' default in this action and willful infringement, such injunctive relief is necessary to protect the plaintiff's rights.

3. Injunctive Relief Against Non-Parties

Pitbull also seeks injunctive relief against Godaddy and Domains by Proxy, Inc., see Proposed Findings at 6, non-parties to this action. Specifically, the plaintiff asks the Court to order that the domain name registrar "freeze the registration" for the domain name and order "that the name servers be deleted and left blank," id. at 7, on the ground that the defendants will continue to violate the Court's orders unless they no longer have access to the domain name. See id. at 5. The plaintiff also requests that the Court order Godaddy and Domains by Proxy, Inc. to "reveal the 'private registration' for whatstea.com and any other domain names owned by the same owner of whatstea.com that are held as 'private registrations' . . . to ensure compliance with the permanent injunction." Id. at 6.

No such injunctions should issue, however, because Pitbull has failed to provide any facts in admissible form with respect to the conduct of these non-parties. In addition, Pitbull has not briefed the legal standards for issuing injunctions against non-parties, see, e.g., United States v. Regan, 858 F.2d 115, 120 (2d Cir. 1988), or discussed how those standards would support the injunction requested here.[1]

F. Additional Relief Requested

Finally, Pitbull requests that the Court impose a provision that fixes damages at $500,000 for each future violation of the permanent injunction previously issued by Judge Berman. Proposed Findings at 7. The plaintiff has not cited any authority for this sort of request. While the Court is aware that courts sometimes fix penalties for future violations of their orders, the lack of admissible evidence with respect to the specifics of the defendants' previous violations of the court's injunction or infringements in this case counsels against fixing a precise dollar amount here. Obviously, the Court is free in the future to institute an appropriate remedy for the violation of its order – remedies that may include a fine or imprisonment. In addition, Pitbull is free to seek modification of the Court's injunction if "a better appreciation of the facts in light of experience indicates that the decree is not properly adapted to accomplishing its purposes." King-Seeley Thermos Co. v. Aladdin Indus., Inc., 418 F.2d 31, 35 (2d Cir. 1969).

Conclusion

For the foregoing reasons, Pitbull should be awarded judgment against the defendants in the amount of $501,496.04. In addition, an injunction should be issued requiring the defendants to transfer, or to take all steps necessary to transfer, the registration of the website "www.whatstea.com" to Pitbull.

Pitbull's requests for injunctive relief against non-parties and a fine for future violations of the permanent injunction should be denied.

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[1] To the extent plaintiff is seeking information from these third parties in order to enforce the judgment, it presumably would be able to take post-judgment discovery pursuant to Fed. R. Civ. P. 69 or other appropriate rule.

**PROCEDURE FOR FILING OBJECTIONS TO THIS REPORT AND RECOMMENDATION**

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have ten (10) days from service of this Report and Recommendation to file any objections. See also Fed. R. Civ. P. 6(a), (e). Such objections (and any responses to objections) shall be filed with the Clerk of the Court, with copies sent to the Hon. Richard M. Berman, 500 Pearl Street, New York, New York 10007. Any request for an extension of time to file objections must be directed to Judge Berman. If a party fails to file timely objections, that party will not be permitted to raise any objections to this Report and Recommendation on appeal. See Thomas v. Arn, 474 U.S. 140 (1985).

Dated: November 7, 2007
New York, New York

GABRIEL W. GORENSTEIN
United States Magistrate Judge

Copies sent to:

Jennifer Meredith
Dariush Keyhani
Meredith & Keyhani, PLLC
330 Madison Avenue
6th Floor
New York, NY 10017

Universal Netmedia, Inc.
P.O. Box 7489
Coral Spring, FL 33071

Larry Lewers
5919 NW Batchelor Terrace
Port St. Lucie, FL 34986

Jonathan Lewers aka Craig Ennis
5919 NW Batchelor Terrace
Port St. Lucie, FL 34986

Nadine Lewers
5919 NW Batchelor Terrace
Port St. Lucie, FL 34986

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Dated: November 7, 2007
New York, New York

GABRIEL W. GORENSTEIN
United States Magistrate Judge