IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SHILONG CAI, *Plaintiff,* v. **LIN QIUGUI d/b/a ESTMY STORE,** *Defendant.*	Civil Action No. 1:22-cv-04530 Judge Robert W. Gettleman **JURY TRIAL DEMANDED**

PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSTION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Shilong Cai ("Plaintiff") files this Reply to Defendant's Opposition (Dkt. No.) to Plaintiff's Motion for Preliminary Injunction (Dkt. No.).

I. INTRODUCTION

Plaintiff has demonstrated a better than negligible chance on at least one of the claims, irreparable injury, and that the balance of hardships and public interest favor a preliminary injunction. In an attempt to deflect attention from Defendant's uncredible date of creation, Defendant responds by making red herring and contradictory arguments about first-to-register, originality, and copying. Regarding irreparable injury, Plaintiff's losses are not speculative and cannot reasonably be remedied by monetary damages given their uncertain and unquantifiable nature. Further, the public interest is best served by upholding copyrights.

III. ARGUMENT

A. Plaintiff Has Demonstrated a Likelihood of Success on the Merits

Defendant responds by arguing that Plaintiff has failed to demonstrate a likelihood on the merits for both the copyright and state law claims. However, Defendant glosses over the caselaw

that sets out the applicable standard: Plaintiff need only demonstrate "a better than negligible chance" on at least one of the claims which is "an admittedly low requirement." *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S.A.*, 549 F.3d 1079, 1096 (7th Cir. 2008).

Plaintiff has more than met this low requirement regarding the copyright claim. Defendant even admits that Plaintiff has submitted the Certificate of Registration which constitutes *prima facie* evidence of validity. Defendant's attempt to undermine the validity of Plaintiff's Copyright with their own Certificate of Registration is unpersuasive because Defendant's claimed date of creation and publication is simply not credible. Defendant offers no evidence of publication and a likely back-dated, hand-drawn work as evidence of creation. In contrast, Plaintiff has offered a reputable Amazon listing as evidence of publication and a credible Adobe Photoshop file as evidence of creation. To mask such shortcoming, Defendant's response is largely filled with red herring and contradictory arguments about first-to-register, originality, and copying. What is controlling here is the credibility to be afforded the respective dates of creation. Plaintiff urges the Court to give little to no evidentiary weight to Defendant's lackluster evidence of creation. If so, then Defendant has not overcome the presumption of validity afforded Plaintiff's Copyright. As such, Plaintiff has demonstrated at least a negligible chance of success on the copyright infringement claim.

Similarly, Plaintiff has more than met this low requirement regarding the UDTPA claim. Defendant again puts forth red herring arguments in their response. For example, Defendant argues that Plaintiff has no protective right in the Pumpkin Work. While it is true that the Pumpkin Work has not been federally registered, Plaintiff's deceptive trade practice claim is not to be confused with a copyright infringement claim where creation and ownership are crucial. Neither creation nor ownership are elements under the UDTPA. Next, Defendant cites *Egnell, Inc. v. Weniger*, 94

Ill. App. 3d 325, 330 (1981) for the proposition that "there must be more than the mere allegation that confusion occurred to the injury of the plaintiff." Such caselaw is plainly at odds with the language of the UDTPA, as made effective on June 28, 2001, which states: "In order to prevail in an action under this Act, a plaintiff need not prove competition between the parties or actual confusion or misunderstanding." 815 ILCS 510/2(b). Plaintiff has met the requirement of a likelihood of confusion. Finally, Defendant argues that the UDTPA claim is preempted by the Copyright Act. However, Plaintiff's UDTPA claim is not based on Defendant's reproduction and distribution of the Pumpkin Work itself as a work of authorship. Instead, Plaintiff's claims are based on Defendant's use and misappropriation of Plaintiff's development, goodwill, skills, labor, reputation, and necessary expenditures to create the Pumpkin Work. Defendant unfairly trades upon these things in their Amazon listings so as to deceive consumers for profit. Such use and misappropriation are not activities violating legal or equitable rights equivalent to the exclusive rights within the general scope of copyright. 17 U.S.C. § 301(b); *see Chi. Bd. Options Exch., Inc. v. Int'l Sec. Exch., LLC, No. 06 C 6852, 2007 U.S. Dist. LEXIS 13007 (N.D. Ill. Feb. 23, 2007); see also* H.R. Rep. No. 94-1476, at 132 (1976) ("Section 301 is not intended to preempt common law protection in cases involving activities such as false labeling, fraudulent representation, and passing off even where the subject matter involved comes within the scope of the copyright statute."); *see also* H. Rep. No. 101-514, at 21 (June 1, 1990) ("[s]tate law causes of action such as those for misappropriation [and] unfair competition… are not currently preempted under § 301, and they will not be preempted under the proposed [amendments to the Copyright Act]."). As such, Plaintiff has demonstrated at least a negligible chance of success on the UDTPA claim.

C. Plaintiff Has Demonstrated Irreparable Harm

Defendant responds by arguing that Plaintiff's claimed irreparable harms are too speculative and can be remedied by monetary damages. However, "[I]rreparable harm may not be presumed[, but] [i]n run-of-the-mill copyright litigation, such proof should not be difficult to establish…" 6 William F. Patry, Patry on Copyrights, § 22:74. Moreover, "[t]he threat of irreparable injury is related to proof of a protectable interest, and once such an interest is established, there is a presumption that injury to the party seeking the injunction will follow if the interest is not protected." *Mohanty v. St. John Heart Clinic, S.C.*, 358 Ill. App. 3d 902, 832 N.E.2d 940, 943, 295 Ill. Dec. 490 (Ill. App. Ct. 2005). Plaintiff's strongest argument for irreparable harm is the deprivation of the ability to control the creative content protected by the Copyright, *i.e.*, loss of exclusivity. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) ("[l]ike a patent owner, a copyright holder possesses 'the right to exclude others from using his property.'") (citation omitted); *see also MGM Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966 (C.D. Cal. 2006) at 997 ("The right to exclude is inherent in the grant of a copyright."). The infringing products sold by Defendant are in direct competition with Plaintiff on the Amazon marketplace, and in the absence of an injunction, Plaintiff will continue to suffer loss of brand goodwill, recognition, market share, and exclusivity. Such losses are not speculative and cannot reasonably be remedied by monetary damages given their uncertain and unquantifiable nature.

IV. CONCLUSION

In view of the foregoing, Plaintiff respectfully requests that this Court enter a Preliminary Injunction enjoining Defendant from further infringement and misappropriation.

DATED: November 14, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2022, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Illinois, Eastern Division, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Hao Ni
Hao Ni