

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION (DAYTON)

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|-------------------------------|---|-------------------------------|
| DEAN ROLL, |) | Case No. 3:12-CV-262 |
| |) | |
| Plaintiff, |) | (Judge _____) |
| |) | |
| vs. |) | |
| |) | |
| PEARSON EDUCATION, INC., |) | |
| |) | |
| and |) | |
| |) | |
| F.A.O. SCHWARZ, L.L.C., |) | |
| |) | |
| and |) | |
| |) | |
| AMAZON.COM, INC., |) | COMPLAINT FOR TRADEMARK |
| |) | INFRINGEMENT, UNFAIR |
| and |) | COMPETITION, DILUTION, |
| |) | INJUNCTIVE RELIEF AND OTHER |
| TOYS "R" US-DELAWARE, INC., |) | <u>RELIEF</u> |
| |) | |
| and |) | (Jury Demand Endorsed Hereon) |
| |) | |
| GSI COMMERCE SOLUTIONS, INC., |) | |
| |) | |
| and |) | |
| |) | |
| KABOODLE, INC., |) | |
| |) | |
| and |) | |
| |) | |
| JOHN DOE(S) 1-999, |) | |
| |) | |
| Defendants. |) | |
| |) | |

Plaintiff, Dean Roll, for his Complaint for Trademark Infringement, Unfair
Competition, Dilution, Injunctive Relief and Other Relief, against Defendants, Pearson
Education, L.L.C., F.A.O. Schwarz, L.L.C., Amazon.com, Inc., Toys "R" Us-Delaware, Inc.,

GSI Commerce Solutions, Inc., Kaboodle, Inc., and John Doe(s) 1-999, states and alleges as follows.

I. PARTIES, JURISDICTION AND VENUE

1. Plaintiff is a citizen and resident of Centerville, Montgomery County, Ohio.
2. Defendant, Pearson Education, Inc. (“Pearson Education”) is a Delaware corporation whose principal place of business is in Saddle River, New Jersey.
3. Defendant, F.A.O. Schwarz, L.L.C. (“FAO Schwarz”) is a Delaware corporation whose principal place of business is in New York, New York.
4. Defendant, Amazon.com, Inc. (“Amazon.com”) is a Delaware corporation whose principal place of business is in Seattle, Washington.
5. Defendant, Toys “R” Us-Delaware, Inc. (“Toys “R” Us-Delaware”) is a Delaware corporation whose principal place of business is in Wayne, New Jersey.
6. Defendant, GSI Commerce Solutions, Inc. (“GSI”) is a Pennsylvania corporation whose principal place of business is in King of Prussia, Pennsylvania.
7. Kaboodle, Inc. (“Kaboodle”), is a Delaware corporation whose principal place of business is in Los Angeles, California.
8. Upon information and belief, Defendant(s), John Doe(s) 1-999, are persons or entities, whose identities and citizenship are currently unknown to the plaintiff, who are liable to the plaintiff for trademark infringement, unfair competition and other related civil wrongs.
9. This action arises under the federal trademark, unfair competition, and dilution laws for trademark infringement, as a result of Defendants’ willful infringement of valid

rights in “SHARK BOY[®]” as hereinafter defined, and other unlawful activities conducted by Defendants in connection with such infringement.

9. Jurisdiction is proper in this court pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1332 and 1338, and the doctrine of supplemental jurisdiction. The amount in controversy exceeds the sum of \$75,000, exclusive of interest and costs.

10. Venue is proper in this court pursuant to 28 U.S.C. § 1391(b) and (c).

II. ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

11. Plaintiff has been and now is extensively engaged in the sport of professional wrestling under the service mark “SHARK BOY[®]” (hereinafter, the “Mark”). Plaintiff is the owner of the Mark, and has been using it continuously in interstate commerce since 1997.

12. The Mark is used extensively in connection with live and televised professional wrestling matches in the United States, Canada, the United Kingdom, Ireland, Finland, Switzerland, Mexico, India, the Middle East and elsewhere, and in connection with related goods and services, including without limitation brochures and promotional materials; packaging; advertisements; videos; DVDs; t-shirts; costumes; action figures; games; toys; trading cards; literature; comics; temporary tattoos; posters; caricatures and otherwise (hereinafter, the “Goods and Services”).

13. Plaintiff’s Goods and Services have been promoted and marketed extensively in the United States and abroad through various media, including without limitation cable television, radio, the internet and print media. Due to these promotional and marketing efforts, and the quality of Plaintiff’s Goods and Services, the Mark has become widely and favorably known, and has acquired distinctiveness and secondary meaning. Further, the Mark has become a valuable asset of Plaintiff and a symbol of his goodwill.

14. The Mark is registered with the United States Patent and Trademark Office, Nos. 2357366, 3274231, and 3769297. Copies of these registrations are attached hereto and incorporated herein by reference as Exhibits 1, 2 and 3, respectively.

15. The Mark is in full force and effect and has not been cancelled. The registration constitutes conclusive evidence of the Mark's validity, Plaintiff's ownership thereof, and his exclusive right to its use throughout the United States.

17. Pearson Education is the owner of POPTROPICA, an on-line, animated, role-playing game. The POPTROPICA game world is populated by avatars that players use to represent their "Poptropican" selves. Among those avatars are stock characters created and controlled by POPTROPICA'S editors. One POPTROPICA stock character appearing on "Shark Tooth Island" is "Shark Boy," a boy wearing a full-body shark costume (hereinafter, the "Poptropica Character").

18. Defendants are persons and entities that manufacture, distribute, sell or use toys bearing the mark "Shark Boy," which is confusingly similar to Plaintiff's mark SHARK BOY®.

19. Notwithstanding Plaintiff's continuous and exclusive use of and well-known prior rights in his Mark, Defendants have sought and are seeking to compete unfairly with Plaintiff by appropriating the Mark on or in connection with the Poptropica Character, and related goods and services, which is identical or substantially similar to Plaintiff's Mark as applied to his Goods and Services. In addition to the Mark, Defendants may have appropriated other marks and copyrights of Plaintiff as a result of which this complaint may have to be amended.

FIRST CLAIM FOR RELIEF

(Violation of 15 U.S.C. § 1114 – Federal Trademark Infringement)

20. Plaintiff incorporates by reference the allegations in Paragraphs 1 through 19 above as if fully rewritten herein.

21. Defendants' unauthorized uses of Plaintiff's Mark are likely to cause confusion, mistake, or deception and thus infringe Plaintiff's rights in his federally registered trademarks under 15 U.S.C. § 1114.

22. Defendants' past and present use of the Mark has been with actual knowledge of Plaintiff's ownership in the Mark, or with reckless disregard as to such ownership.

23. Defendants have and are now using Plaintiff's Mark without his consent in willful disregard of his rights in violation of 15 U.S.C. § 1114.

SECOND CLAIM FOR RELIEF

(Violation of 15 U.S.C. § 1125(a) – Federal Unfair Competition)

24. Plaintiff incorporates by reference the allegations in Paragraphs 1 through 23 above as if fully rewritten herein.

25. Defendants' unauthorized uses of Plaintiff's Mark on goods and services identical or substantially similar to Plaintiff's are likely to cause the public to believe mistakenly that Defendants' business activities and goods and services originate from, are sponsored by, or are in some way associated with, Plaintiff.

26. Defendants' unauthorized uses of Plaintiff's Mark on goods and services identical or substantially similar to Plaintiff's constitute false designations of origin, or false descriptions or representations, and is likely to cause the Mark to lose its significance as an indication of origin.

27. Defendants' past and present use of the Mark has been with actual knowledge of Plaintiff's ownership in the Mark, or with reckless disregard as to such ownership.

28. Defendants have and are now using Plaintiff's Mark without his consent in willful disregard of his rights in violation of 15 U.S.C. § 1125(a).

29. Thus, Defendants have willfully infringed, and are infringing, Plaintiff's rights in the Mark, in violation of 15 U.S.C. § 1125(a).

THIRD CLAIM FOR RELIEF
(Violation of 15 U.S.C. § 1125(c) – Federal Dilution)

30. Plaintiff incorporates by reference the allegations in Paragraphs 1 through 29 above as if fully rewritten herein.

31. Plaintiff's Mark is distinctive and famous by its unique characteristics, the duration and extent of the Mark's use in connection with Plaintiff's Goods and Services, the Mark's wide recognition in the industries and trade channels wherein Plaintiff and Defendants do business, and by the qualities that distinguish it from the marks of others in the sports and entertainment industries.

32. Defendants' use of Plaintiff's Mark in interstate commerce after such Mark has become famous has caused, and will cause, dilution of the Mark's distinctive quality, and infringes Plaintiff's rights in his famous Mark in violation of 15 U.S.C. § 1125(c)(1).

33. Defendants have adopted and are displaying the Mark with full knowledge of Plaintiff's rights to his famous Mark and with the willful intention to trade on Plaintiff's reputation and goodwill as embodied in his Mark, or to cause dilution of such Mark. Defendants have thus willfully violated Plaintiff's right under 15 U.S.C. § 1125(c)(2).

WHEREFORE, Plaintiff, Dean Roll, respectfully requests that this court make the determinations of fact and conclusions of law set forth below, and enter judgment in his favor against Defendants, jointly and severally, as follows.

A. That Plaintiff owns the entire right, title and interest in and to the Mark.

B. That Plaintiff's rights in his Mark are valid, enforceable, and have been infringed by Defendants, and that Defendants have violated other relevant federal and state laws and regulations.

C. That Defendants, their officers, consultants, employees, agents, representatives, counsel, their past and present subsidiaries, affiliates and corporate parents, and all persons and entities acting or purporting to act under their control or on their behalf, be preliminarily and permanently enjoined and restrained from:

(1) Using Plaintiff's Mark and other designations, designs, and indicia, which are likely to cause confusion, mistake or deception with respect to Plaintiff's rights;

(2) Causing internet searchers to use a mark or slogan of Plaintiff to be misdirected to any website of the Defendants; and

(3) Otherwise infringing rights in the Mark, and competing unfairly with Plaintiff.

D. That Defendants willfully infringed Plaintiff's rights.

E. That Defendants be required to pay Plaintiff such damages statutory or otherwise, together with prejudgment interest, as Plaintiff has sustained as a consequence of Defendants' wrongful acts.

F. That Defendants be required to account for and return to Plaintiff any money, profits, and advantages wrongfully gained by Defendants.

G. That all damages sustained by Plaintiffs be trebled.

H. That Defendants be required to pay to Plaintiff attorneys' fees, expenses, and costs incurred in this action.

I. That Defendants deliver up for impoundment during the pendency of this action, and for destruction upon entry of judgment, all products, fixtures, writings, signage, artwork, and other material, which infringe Plaintiff's rights, falsely designate source or origin, or otherwise facilitate Defendants' unfair competition with Plaintiff.

J. That Defendants notify all third-party search engine operators of this order and request that such operators assure there is no association between any of Plaintiff's marks or slogans with any website operated by Defendants.

K. That Defendants be directed to file with this court and serve on Plaintiff within thirty (30) days after the service of any injunction, a written report under oath setting forth in detail the manner and form in which Defendants have complied with this injunction.

L. That Plaintiff be granted such other and further relief, at law or in equity, as this court deems appropriate.

Respectfully submitted,



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JURY DEMAND

Plaintiff demands a trial by jury as to all issues so triable.



Thomas J. Intili, Trial Attorney