

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

FASCINATIONS, INC.,

Plaintiff,

v.

AMAZON.COM INC.,

Defendants.

15-cv-6068

COMPLAINT

Jury Trial Demanded

The Parties

1. Plaintiff is a Washington State corporation with a place of business at 19224 Des Moines Memorial Drive # 100, Seatac, WA 98148.

2. Upon information and belief, Defendant is a Delaware corporation with places of business at 7 West 34th Street, New York, NY 10001 and 1350 Avenue of the Americas, New York, NY 10019.

Nature Of Action

3. This is an action for copyright infringement under 17 U.S.C. § 101 et seq.
4. This is further an action for tortious interference with business relations.

Jurisdiction And Venue

5. Subject matter jurisdiction over the claim of copyright infringement is proper pursuant to 28 U.S.C. §§ 1331 and 1338.

6. Subject matter jurisdiction over the tortious interference with business relations claim is proper pursuant to 28 U.S.C. § 1367.

7. Personal jurisdiction is proper under CPLR § 301, as Defendant resides within New York State.

8. Venue is proper pursuant to 28 U.S.C. § 1391(b)(1).

Facts

9. Plaintiff is the designer and manufacturer, via contracted fabricators, of several lines of three dimensional model kits. Plaintiff sells the model kits under the brands Metal Earth and Iconx.

10. The Metal Earth and Iconx models constitute copyrightable original sculptural works. Plaintiff has applied for and received registrations for substantially all of its Metal Earth and Iconx models, in both assembled and unassembled forms.

11. Plaintiff sells its Metal Earth and Iconx models at wholesale to authorized retailers, who in turn sell the models to consumers. The authorized retailers include both online and conventional “brick and mortar” retailers.

12. Defendant provides an online marketplace for goods.

13. Several of Plaintiff’s authorized retailers offer for sale and sell Plaintiff’s models via Defendant’s online marketplace.

14. Defendant aggregates sellers of like products into combined listings; that is, Defendant includes all sellers of a particular make and model of a product into a common “listing” for that product. Defendant represents to both buyers and sellers that all listings aggregated into a single listing are for the same goods, that is, that all sellers included in a particular listing are selling the same make and model of goods.

15. Upon investigation of the listings for Plaintiff's models, Plaintiff determined that numerous listings for Plaintiff's models included sellers of literal, unauthorized copies of Plaintiff's copyrighted models; that is, certain sellers that Defendant had included in certain listings were not in fact selling the same make and model of goods as the other listings. Instead, these certain sellers were selling literal, unauthorized copies of Plaintiff's copyrighted models.

16. The literal, unauthorized copies of Plaintiff's copyrighted models offered for sale in Defendant's online marketplace included, among others, models branded as "Nan Yuan" and "Zoyo". To date, Defendant has refused to take any meaningful action to prevent repeated infringement by sellers and/or to block infringing Zoyo and Nan Yuan products from its online marketplace, despite notice from Plaintiff regarding this ongoing, repeat infringement.

17. Additionally, the literal, unauthorized copies of Plaintiff's models offered for sale in Defendant's online marketplace included, among others, models shipped from China. Plaintiff does not sell its products to retailers in China, and so Plaintiff determined that the sellers purportedly offering authorized copies of Plaintiff's models on Defendant's online marketplace were in fact selling literal, unauthorized copies.

18. Defendant provides two means for contacting it to report infringement of intellectual property rights occurring in its online marketplace. The first means is via email or postal mail to a listed copyright agent. The second means is via an online reporting tool, that is, a web-based form implemented for purposes of reporting intellectual property violations.

19. Defendant actively discourages reporting of intellectual property infringement to its copyright agent via email and postal mail and actively encourages use of its online reporting tool.

20. Upon information and belief, Defendant's online reporting tool is largely automated. Upon information and belief, Defendant's online reporting tool automatically generates initial responses to submitted notices, such responses having no consideration of the actual content of the notice. Upon information and belief, a substantial number of notices submitted via Defendant's online reporting tool never receive human review or interaction.

21. Defendant's online reporting tool requires submission of information beyond that required by the safe harbor provisions of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512.

22. Plaintiff reported each and every infringing listing to Defendant using one or both of Defendant's online reporting tool and email and postal mail to Defendant's copyright agent.

23. Despite Defendant's requirement of information beyond that required by the DMCA, Plaintiff provided all of the information requested by Defendant in each instance of reporting. In addition, each and every notice by Plaintiff to Defendant satisfied fully the notice requirement of the DMCA.

24. In each instance of reporting, Defendant responded to the valid notice by demanding additional information, namely, responses to the following questions:

- Do you believe the offers in your complaint do not match the product detail pages?
- Do you believe that your trademark appears on products that you do not manufacture?
- Do you believe that your trademark is used inappropriately on the product detail pages?
- Have you placed test orders? If yes, be sure to provide the Amazon order numbers?

25. Plaintiff responded to each of Defendant's request for additional information with a detailed, substantive response. Because Defendant invariably responded to Plaintiff's notices with the same rote request for additional information, Plaintiff began to proactively provide the information with each notice it submitted.

26. Despite providing this information proactively, Defendant nonetheless responded to Plaintiff's notices by demanding the very same information already provided.

27. In all instances, Defendant refused to remove the infringing listings upon Plaintiff's initial, valid, DMCA compliant demand to do so.

28. Certain sellers have repeatedly and consistently offered for sale and sold models which infringing Plaintiff's copyrights. On at least July 13, 2015, Plaintiff notified Defendant of these repeat infringers. To date, Defendant has taken no action to prohibit or stop the repeat infringers from infringing Plaintiff's copyrights. The repeat infringers include at least the following sellers: Icanshop, Misun, Jonsonth Fashion, Blusky, Dafeng Trade Co., Ltd, Label Tape, Red Fire, Goodtrack, and Smartlovely.

29. On or about April 16, 2015, Plaintiff sent a valid, DMCA compliant notice concerning several infringing listings. Defendant responded on April 17, 2015, stating:

Based on the information you provided in your complaint, we are unable to remove the items listed at the end of this message.

When a detail page is created, it becomes a permanent catalog page on Amazon.com that will remain even if the creator's inventory sells out. Other sellers can list their items for sale against the page if their items exactly match the page.

If you believe sellers are listing against detail pages that do not exactly match their items, we ask that you submit your complaint using this form:

<http://www.amazon.com/gp/help/reports/contact-us>

Please include this information in your report, as applicable:

- Amazon.com Order ID of a test buy that confirms the violation (required)
- A concise description of the differences between the item ordered and the item received (required)
- The ASIN/ISBN of the item's detail page and the product title
- The store or business name of the seller you are reporting
- Any other evidence that supports your complaint

We thoroughly investigate all reports. For privacy reasons, we cannot disclose the results of our investigations, but we will take any disciplinary actions we find appropriate.

30. On April 20, 2015, Plaintiff responded to Defendant's April 17 correspondence as follows:

Thank you for the explanation of Amazon's "detail listing" framework. The issue my client has faced is as follows.

Fascinations, Inc. is the designer/manufacturer/producer of original hobbyist models (i.e., models that hobbyist can purchase and assemble). Fascinations holds a registered copyright in the artwork of each of these models, which number in the low 100's. Several third parties, including Zoyo and Nanyuan, have literally and directly copied these works. These third parties have listed the infringing works on Amazon, often using the same UPC code as the genuine Fascinations product.

When we have located such infringing listings, we have sent take down notices using Amazon's online notification system. Unfortunately, in doing so, we have ensnared many legitimate sellers of genuine, authorized Fascinations products. From our discussions with several of these aggrieved sellers, we have learned that the legitimate sellers had added themselves to the infringing listings based on either (a) the illicitly used UPC code, or (b) a description of the product that appeared genuine but

which in fact listed an infringing product.

We have repeatedly asked Amazon to permanently remove all Zoyo and Nanyuan model listings. To date Amazon has not done so.

I would welcome the opportunity to discuss this issue directly with Amazon. I can be reached at the telephone number below.

31. In response to this communication, Defendant took no action concerning the ongoing sale of infringing Nan Yuan and Zoyo products on Defendant's online marketplace.

32. In addition to the foregoing, in several instances, Defendant responded to Plaintiff's valid, DMCA compliant notices with a request that Plaintiff identify "the exact copyright protected material" about which Plaintiff claimed infringement. For example, on July 1, 2015, Plaintiff provided Defendant with a valid, DMCA compliant notice concerning eight infringing listings by seller "Icanshop" (i.e., offers by seller "Icanshop" that were among the aggregated, non-infringing sellers for eight different listings). Defendant did not remove the complained-of listings in response to Plaintiff's valid request. Instead, Defendant responded to this request on July 7, 2015 as follows:

Thank you for your message. When submitting notices of copyright infringement, please identify the exact copyright protected material you claim is being used by third parties on Amazon.com, such as the specific image or text in question. This will allow us to more quickly resolve these concerns.

Thank you for your understanding.

33. Plaintiff responded to Defendant's July 7 correspondence as follows:

The "exact copyright protected material" that is "being used by third parties on Amazon.com" is the very product being offered for sale on Amazon. To be clear, the complained-of listings are offering for sale products which are unauthorized copies of the copyrighted works.

I trust this satisfies your inquiry and look forward to swift compliance by Amazon to our previously stated demands.

34. Subsequent to the foregoing events, Plaintiff submitted another valid, DMCA compliant notice to Defendant on or about July 13, 2015. On July 14, 2015, Defendant responded via its “Copyright/Trademark Agent” Chad Bundy. This was the first and only time Defendant’s response identified a human correspondent.

35. In the July 14 response, Mr. Bundy stated:

It appears that the reported ASINs are listed as brand name Fascinations, which is the copyright owner which you appear to represent. As the items are purported to be the products of your client it is unclear how they can infringe upon your client’s copyrighted designs. Any additional explanation would be welcomed.

As you are likely aware, Amazon respects a manufacturer’s right to institute policies and rules to manage and control the distribution of its products. However, Amazon considers the enforcement of these policies and rules to be a matter between the manufacturer and the retailers. As a result, it would not be appropriate for Amazon to assist in such enforcement activities. You may contact any seller directly through Amazon.com’s website by selecting their storefront name and then clicking on the ‘contact this seller’ link in the lower right-hand corner.

Please note that we do not consider the use of a product’s name to sell that product to in any way constitute copyright or trademark infringement.

If you believe these sellers are offering items different than advertised, the Copyright department at Amazon.com will be unable to assist you. Any reports of a possible violation of the Amazon.com Community Rules and/or Participation Agreement are handled by our Seller Performance team. If you have questions about our policies, please search for “Selling Policies” in our Seller Help pages.

Please file a report with this team and provide an Order ID Number

of a test buy that confirms your claim that these sellers are not offering the item(s) advertised. You may contact the Seller Performance team through the following form:

<http://www.amazon.com/gp/help/reports/contact-us>

To facilitate an investigation, be sure you include the following information in your complaint, as applicable:

- The ASIN/ISBN of the item's detail page and the product title
- The store or business name of the seller you are reporting
- Your order ID (required)
- A brief explanation of the violation (required)

Please do not use the terms "trademark" or "copyright" in reports regarding items that are different from the detail page as this may cause a delay in the resolution of your report.

36. Plaintiff responded to Mr. Bundy's correspondence as follows:

Thank you for your response. It is nice to be corresponding now with an actual person.

Regarding the issue you raised concerning the "brand name" of the ASINs in question, my prior communications with Amazon explained in detail the situation Fascinations presently faces. Somewhere between my July 1 and July 8, 2015 emails to Amazon and your recent email, the details of the complaint have been lost.

As my July 1 and July 8 emails (attached hereto) explain, the goods offered for sale *by seller ICANSHOP and the other expressly identified sellers* in the enumerated listings are unauthorized, literal copies of Fascinations' copyrighted works. For all listings I have identified, it is not the master listing that is problematic, only certain sellers attached to those listings. The complained-of sellers are selling unauthorized copies of the copyrighted works described in the master listing. Thus, the master listing is correct when it identifies Fascinations as the "brand name", however, the complained-of sellers are not selling Fascinations branded products. Instead, they are selling infringing copies of Fascinations products.

I trust that this explains fully Fascinations concerns, and that in the future Amazon will act expeditiously and properly, and without repeated requests for “further explanation” in response to Fascinations’ take down notices.

If anything in the foregoing is unclear, I urge you to get in touch with directly at the phone number below.

37. Mr. Bundy did not contact Plaintiff’s counsel further, and subsequently, no other identified person from Defendant’s legal team contacted Plaintiff or Plaintiff’s counsel concerning the ongoing infringing listings.

38. In response to the foregoing correspondence in other instances, when Defendant did take action, it failed to take proper action. Instead of correctly removing the infringing materials, i.e., the infringing listings for the seller “Icanshop” and other expressly identified infringing sellers, Defendant instead removed all listings for all sellers of the corresponding legitimate, non-infringing, authentic product.

39. Despite Plaintiff’s repeated pleas to Defendant to contact Plaintiff’s counsel directly to discuss the ongoing and repeated infringement and Defendant’s improper response to Plaintiff’s notices, Defendant has refused to do so.

40. Defendant provides no direct contact information for any person in its legal department. Instead, Defendant provides only a general voice mail phone number for the its legal department. Defendant has refused to return repeated, detailed messages left by Plaintiff’s counsel on this voice mail.

41. Defendant has consistently responded to Plaintiff’s email communications by email, such emails having invalid return email addresses. Emails sent in reply to Defendant’s

emails “bounce” as being undeliverable. Defendant has thus rendered it impossible for Plaintiff to directly reply to Defendant’s email.

42. The net result of Defendant’s aforementioned conduct is that Defendant has stonewalled Plaintiff in its legitimate attempt to enforce its valid copyrights. Defendant has refused to adhere to the safe harbor provisions of the DMCA, instead requiring Plaintiff to repeatedly provide and provide again the same irrelevant information.

43. Plaintiff has complied with Defendant’s unwarranted demands to little or no avail. Plaintiff’s compliance has led not to the timely removal of infringing listings from Defendant’s online marketplace. It has, instead, led to no action in some instances and to the removal of all listings, including legitimate listings, in other instances.

44. The infringing listings previously described include, among others, the following ASIN’s (Plaintiff’s unique listing ID) and related copyright registrations:

ASIN	Copyright Registration(s)
B00GY9133O	VA 1-853-128, VA 1-852-986
B008G0TPY8	VA 1-937-439
B00J3X9QAA	VA 1-893-205, VA 1-917-968
B00QOWL5T8	VA 1-823-324, VA 1-823-794
B0063MFNYM	VA 1-848-187, VA 1-823-791
B00AH00AD0	VA 1-840-451, VA 1-850-227
B00GY9A2N6	VA 1-853-126, VA 1-852-982
B007P1N2IO	VA 1-823-329, VA 1-823-792
B00K2OJG68	VA 1-848-179, VA 1-823-304
B00GY89KBC	VA 1-853-026, VA 1-852-885, VA 1-852-985
B008ROUC4K	VA 1-823-639, VA 1-823-730
B00BEL2G4C	VA 1-857-251, VA 1-857-248
B00K2OE1RC	VA 1-823-329, VA 1-823-792

ASIN	Copyright Registration(s)
B00J3XEZY2	VA 1-848-187, VA 1-823-791
B00CWRCUHU	VA 1-869-657, VA 1-850-229
B00MIKLS24	VA 1-937-265
B00RCAQPW8	VA 1-831-251
B00TAEQRIQ	VA 1-848-177, VA 1-823-789
B00TAEOKCQ	VA 1-831-773, VA 1-831-256
B00SX1R2F4	VA 1-869-650, VA 1-857-257
B00SX1RB82	VA 1-937-459
B00SX1SMM6	VA 1-937-460
B00SX1Q444	VA 1-937-456

45. Defendant removed all listings, including legitimate listings, for at least the following ASIN's:

ASIN	Copyright Registration(s)
B005Y22FY8	VA 1-848-201, VA 1-848-201
B0063MFNYM	VA 1-848-187, VA 1-823-791
B008G0TPY8	VA 1-937-439
B00AH00AD0	VA 1-840-451, VA 1-850-227
B00GY9A2N6	VA 1-853-126, VA 1-852-982
B00J3X9QAA	VA 1-893-205, VA 1-917-968
B00QOWL5T8	VA 1-823-324, VA 1-823-794

46. Defendant has failed to timely remove at least the following listings despite receiving from Plaintiff valid, DMCA compliant notices:

ASIN	Copyright Registration(s)
B005Y22FY8	VA 1-848-201, VA 1-848-201
B007P1N09K	VA 1-823-327, VA 1-823-307
B009UZCRLG	VA 1-831-251
B00BEL2G4C	VA 1-857-251, VA 1-857-248

ASIN	Copyright Registration(s)
B00J3XEZY2	VA 1-848-187, VA 1-823-791
B00YMUPUUE	VA 1-848-201, VA 1-848-201
B00YMY418C	VA 1-848-197, VA 1-823-788
B00YOBJ6LU	VA 1-823-783, VA 1-848-181
B00YR5SQGE	VA 1-848-187, VA 1-823-791
B00YR7IPMW	VA 1-831-773, VA 1-831-256
B00YR808GM	VA 1-823-327, VA 1-823-307
B00YR808GM	VA 1-831-773, VA 1-831-256
B00YRCF2UK	VA 1-831-251

47. In addition to the foregoing described marketplace activities, Defendant also acts for certain sellers as the fulfillment agent for orders placed in its marketplace. In such instances, Defendant takes possession of the goods being offered for sale and maintains such inventory in one or more of Defendant's warehouses. Upon receiving orders for such goods, Defendant processes the order and ships the good.

48. Defendant was and is the fulfillment agent for sellers "Herndee" and "Casatii Toys", among certain others. The products offered for sale by seller Herndee, Casatii Toys and certain (but not all) others fulfilled by Amazon are unauthorized, infringing copies of Plaintiff's copyrighted models.

49. On March 18, 2015, Plaintiff notified Defendant concerning the copyright infringement of the Casatii Toys products. In response to this notice, Defendant refused to take action. Instead, Defendant again demanded answers to the following questions:

- Are you the manufacturer?
- Do you believe the offers in your complaint do not match the product detail pages?

- Do you believe that your trademark appears on products that you do not manufacture?

- Do you believe that your trademark is used inappropriately on the product detail pages?

- Have you placed test orders? If yes, be sure to provide the Amazon order numbers.

50. On July 22, 2015, Plaintiff contacted Defendant concerning the copyright infringement of the Herngee products and to request information from Defendant concerning the disposition of the infringing goods in its possession. In response to the correspondence from Plaintiff, Defendant indicated that Defendant would return infringing products to the seller for disposition by the seller as the seller saw fit.

51. The foregoing activities for which Defendant acts a fulfillment agent include, among others, the following ASIN's and related copyright registrations:

ASIN	Copyright Registration(s)
B00RYHEK4O	VA 1-823-327, VA 1-823-307
B00RXYFOTI	VA 1-831-251
B00SSQHMVS	VA 1-831-251, VA 1-823-329, VA 1-823-792, VA 1-848-187, VA 1-823-791, VA 1-823-327, VA 1-823-307
B00RYH9F7Q	VA 1-823-329, VA 1-823-792
B00RYHI4BY	VA 1-848-187, VA 1-823-791
B005Y22FY8	VA 1-848-201, VA 1-848-201
B00GY8S8MO	VA 1-852-883, VA 1-852-988
B00HVUYWM4	VA 1-853-026, VA 1-852-885, VA 1-852-985, VA 1-853-126, VA 1-852-982, VA 1-853-128, VA 1-852-986, VA 1-852-883, VA 1-852-988
B007P1N09K	VA 1-823-327, VA 1-823-307
B00979AHC6	VA 1-831-773, VA 1-831-256
B00AH00A76	VA 1-857-253, VA 1-857-262

ASIN	Copyright Registration(s)
B00D0XPVYY	VA 1-869-647, VA 1-857-259
B00H00XD6G	VA 1-890-755, VA 1-890-354
B00J8NNJXX	VA 1-823-327, VA 1-823-307, VA 1-848-187, VA 1-823-791
B00K0PQF5E	VA 1-848-179, VA 1-823-304, VA 1-823-336, VA 1-823-790

**First Count
Copyright Infringement**

52. Plaintiff realleges the allegations contained in the above paragraphs as if stated fully herein.

53. By virtue of Defendant's actions as detailed herein, Defendant infringes each of the copyrights listed herein in violation of 17 U.S.C. § 501.

54. By virtue of Defendant's actions described herein, Defendant is precluded from application of the safe harbor provision of the DMCA, 17 U.S.C. § 512.

55. Defendant, having been put on actual and constructive notice of Plaintiff's copyrights and further continuing to infringe such rights, has willfully and intentionally infringed Plaintiff's copyrights.

56. Plaintiff has been and continues to be harmed by such infringement.

**Second Count
Tortious Interference With Business Relations**

57. Plaintiff realleges the allegations contained in the above paragraphs as if stated fully herein.

58. Through the foregoing acts, including Defendant's repeated removal of valid listings, Defendant has interfered with Plaintiff's relations with its retail sellers by unfair and improper means, thereby injuring Plaintiff.

59. The aforementioned improper means include at least Defendant's refusal to deal in good faith with Plaintiff and further by using Defendant's market power and position as *de facto* primary online marketplace to hamper Plaintiff's retailers from selling Plaintiff's goods at retail, thus interfering with Plaintiff's business relations with its retailers.

60. Plaintiff has been and continues to be harmed by such interference.

Prayer For Relief

WHEREFORE, Plaintiff respectfully requests that the Court enter judgment in favor Plaintiff:

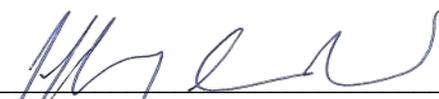
- a. awarding actual damages and/or statutory damages to Plaintiff for each Defendant's copyright infringement under 17 U.S.C. § 504 in an amount to be determined;
- b. awarding exemplary damages to Plaintiff in an amount equal to three times the actual damages and profits awarded;
- c. awarding Plaintiff its costs and attorneys' fees pursuant to 17 U.S.C. § 505;
- d. permanently enjoining Defendant pursuant to 17 U.S.C. § 502 from further infringement of Plaintiff's copyrights;
- e. ordering the destruction of all infringing goods pursuant to 17 U.S.C. § 503;
- f. awarding actual damages to Plaintiff for Defendant's tortious interference with Plaintiff's business relations in an amount to be determined;

g. permanently enjoining further tortious interference with Plaintiff's business relations
by Defendant; and

h. providing all other equitable relief that the Court deems just and proper.

Dated: August 3, 2015

Plaintiff Fascinations, Inc.
by its attorney,



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