

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS**

JOSEPH R. TOMELLERI,

Plaintiff,

v.

CAFEPRESS, INC.

Serve:

CafePress, Inc.

c/o Registered Agent

CSC Lawyers Incorporating Service Company

421 W Main Street

Frankfort, KY 40601

and

DAVID M. BOOTH

d/b/a FISHGOD

Serve:

David M. Booth

44755 Sterling Highway SPC 17

Soldotna, AK 99669-7943

and

JAMES A. EHLERS

d/b/a MOTHERTHUMPER

Serve:

James A. Ehlers

55 Buckeye Ridge East

Dahlonega, GA 30533-8257

and

ADMIN_CP

Serve:

Admin_CP

c/o Registered Agent

CSC Lawyers Incorporating Service Company

421 W Main Street

Frankfort, KY 40601

Defendants.

Case No.:

JURY TRIAL DEMANDED

COMPLAINT

COMES NOW Plaintiff Joseph R. Tomelleri and, for his complaint against Defendants CafePress, Inc., David M. Booth d/b/a Fishgod, James A. Ehlers d/b/a MotherThumper and Admin_CP, alleges and states as follows:

JURISDICTION AND VENUE

1. This claim is brought pursuant to 17 U.S.C. § 101, et seq. for copyright infringement.
2. This Court has subject matter jurisdiction over Joseph R. Tomelleri's claims pursuant to 28 U.S.C. § 1331 and 1338 (a) and (b) in that this case arises under the copyright laws of the United States of America (17 U.S.C. §§ 101, et. seq.)
3. Personal jurisdiction in this judicial district over CafePress, Inc., David M. Booth d/b/a Fishgod, James A. Ehlers d/b/a MotherThumper and Admin_CP is proper pursuant to 28 U.S.C. §§ 1331, 1338, Fed. R. Civ. P. 4 and K.S.A. § 60-308(b) because they have transacted business in the State of Kansas in this judicial district.
4. Venue in this judicial district is proper under 28 U.S.C. §§ 1391 (b),(c), 1400(a) and K.S.A. § 60-605 in that CafePress, Inc., David M. Booth d/b/a Fishgod, James A. Ehlers d/b/a MotherThumper and Admin_CP have regularly solicited and conducted business with the residents of this judicial district and purposefully marketed and directed its infringing products to residents of this judicial district and the counties therein.

PARTIES

5. Plaintiff Joseph R. Tomelleri (hereinafter "Plaintiff") is an adult individual and a resident of the State of Kansas.
6. Defendant CafePress, Inc. (hereinafter "CafePress") is a corporation organized and existing in good standing in the State of Delaware, and which operates a fully interactive website that provides tools for creating various products, and an online marketplace for distributing those goods. CafePress lists its business location as Louisville, Kentucky.
7. Defendant David M. Booth d/b/a Fishgod (hereinafter "Fishgod") is an online storefront company through CafePress.

8. Defendant James A. Ehlers d/b/a MotherThumper (hereinafter “MotherThumper”) is an online storefront company through CafePress.

9. Defendant Admin_CP (hereinafter “Admin_CP”) is an online storefront exclusively owned, operated and controlled by CafePress.

INTRODUCTORY FACTS

10. Plaintiff is a trained biologist and artist, and has spent most of his working life collecting, studying, and illustrating fish species within North America.

11. Plaintiff’s illustrations have been published in several scientific studies, journals, books, magazines and fish identification guides.

12. Plaintiff is the owner of the website www.americanfishes.com where his individual illustrations are available for purchase. Plaintiff has illustrated over one thousand (1,000) fish in his career from specimens caught in the wild.

13. Plaintiff’s illustrations are registered under Title 17 of the United States Code (Copyright Act of 1976), and all other United States laws governing copyrights, under the following copyrights:

TX0005813942	TX0005639631	X0005639632	VA0000998415
VA0001151489	TX0005597332	VA0001229832	VA0001291994
VA0001339459	VA0001392179	VA000164596	VA0001741737
VA0001786445	VA0001743819	VA0001799888	VA0001800740
VA0001799485	VA0001779644	VA0001787183	TX0007020033
TX0006998390	VA0001783041	VA0001787182	VA0001827025
VA0001787184	VA0001779955	VA0001814563	VA0001779953
VAU001089450	VAU000265291	VAU001066848	TX0005998741
TX0007384205	TX0003082428	TX0003082429	TX0007431958
TX0004478574	VA0001673790	VA0001799775	VA0001784738
VA0001163619			

Plaintiff illustrated and is the sole owner and proprietor of all right, title and interest in and to the copyrights in all of Plaintiff’s illustrations, including all those identified in the preceding paragraph and those at issue in this action (hereinafter the “Illustrations”).

14. CafePress owns and/or operates the website with the following URL address: www.cafepress.com, where it encourages and facilitates online storefronts to sell customizable novelty items including, but not limited to, clothing, coffee mugs and art.

15. Through this product customization and design process, the online storefronts of CafePress (including, but not limited to Fishgod, MotherThumper and Admin_CP) avail their customers with an array of digital images, or permit customers to upload their own images.

16. CafePress, Fishgod, MotherThumper, and Admin_CP have sold numerous items containing unauthorized copies of Plaintiff's copyrighted Illustrations.

17. Upon the customer's payment, CafePress prints these copied images upon "blank" novelty items supplied by CafePress.

18. Through this product customization and design process, CafePress and its online storefronts, including, but not limited to, Fishgod, MotherThumper and Admin_CP, digitally modify Plaintiff's copyrighted Illustrations before printing said images on "blank" novelty items, including, but not limited to, clothing, coffee mugs and art. See **EXHIBIT A** attached hereto.

19. Plaintiff has discovered CafePress' infringing use of at least thirty (30) of Plaintiff's Illustrations on CafePress products.

20. To support its online storefronts, CafePress has the exclusive right to provide and manage all material aspects of the transactions with its customers, including internet hosting, marketing, search engine optimization, production of merchandise, shipping, invoicing, billing, product returns and refunds.

21. CafePress keeps a large percentage of the revenue generated from the sale and pays only a small royalty to the persons selling items through CafePress.

22. CafePress packages and ships the purchased novelty items in a box with its CafePress ® trademark.

23. The images printed on the blank novelty items are digitally modified from their original form in Plaintiff's Illustrations.

24. Additionally, CafePress further digitally modifies and manipulates Plaintiff's Illustrations to include the CafePress ® trademark (registered with the United States Patent and Trademark Office under number 2935560), for display and advertising purposes on the CafePress website.

25. Moreover, CafePress digitally modifies and manipulates Plaintiff's copyrighted images through "remarketing" by displaying them in email advertisements sent to its customers and potential customers.

26. Upon information and belief, CafePress receives thousands of images that are uploaded daily, yet currently does not have a system in place to protect against copyright infringement.

27. Plaintiff's copyrights in and to the Illustrations are presently valid and subsisting, were valid and subsisting from the moment of their creation, and all conditions precedent to the filing of this suit have occurred.

28. Plaintiff has discovered that CafePress and at least three (3) of its online storefronts, Fishgod, MotherThumper and Admin_CP had, without Plaintiff's authorization, reproduced and copied several of Plaintiff's Illustrations and were displaying them in advertising on the CafePress website.

29. In addition to its direct sales through Admin_CP on the CafePress website, CafePress itself has online storefronts on other shopping websites such as Amazon.com where it sells infringing products under the online storefront name "CafePress".

30. In June 2012, Plaintiff demanded CafePress cease and desist its infringing activities, and to provide an accounting of profits from the sales of products using his copyrighted images.

31. Despite having actual knowledge of its infringing activity, CafePress failed to remove or disable access to all images infringing upon Plaintiff's copyrighted Illustrations, and continues to receive revenue from its and its storefronts' infringing activity, including images which CafePress knew from Plaintiff's June 2012 Cease and Desist letter to be infringing.

32. CafePress responded to Plaintiff's Cease and Desist letter that it had "taken down" the offending images, but that it was an internet service provider protected from copyright infringement under 17 U.S.C. § 512 of the Digital Millennium Protection Act.

33. The continuing infringements of CafePress, Fishgod, MotherThumper and Admin_CP to Plaintiff's copyrights in and to the Illustrations are therefore additionally willful.

CAUSES OF ACTION

COUNT I · DIRECT INFRINGEMENT
CAFEPRESS, INC.

34. Plaintiff restates and realleges the allegations contained in the preceding paragraphs as if fully set out herein.

35. CafePress has infringed Plaintiff's copyrights in and to his Illustrations by scanning, copying, reproducing, displaying, offering for sale, and selling unauthorized copies thereof within the United States of America in violation of 17 U.S.C. § 101, et. seq. Such infringements were either non-willful, or alternatively, they were committed willfully.

36. As a result of the above-described acts of CafePress, Plaintiff has sustained damages including lost licensing revenue in an amount not yet ascertained, and CafePress has earned profits that should be disgorged to Plaintiff, or alternatively, for statutory damages under 17 U.S.C. § 504, interest, attorneys' fees, and costs.

COUNT II · DIRECT INFRINGEMENT
CAFEPRESS, INC. AND DAVID M. BOOTH D/B/A FISHGOD

37. Plaintiff restates and realleges the allegations contained in the preceding paragraphs as if fully set out herein.

38. CafePress and Fishgod have infringed Plaintiff's copyrights in and to his Illustrations by scanning, copying, reproducing, displaying, offering for sale, and selling unauthorized copies thereof within the United States of America in violation of 17 U.S.C. § 101, et. seq. Such infringements were either non-willful, or alternatively, they were committed willfully.

39. As a result of the above-described acts of CafePress and Fishgod, Plaintiff has sustained damages including lost licensing revenue in an amount not yet ascertained, and CafePress and Fishgod have earned profits that should be disgorged to Plaintiff, or alternatively, for statutory damages under 17 U.S.C. § 504, interest, attorneys' fees, and costs.

COUNT III · DIRECT INFRINGEMENT
CAFEPRESS, INC. AND JAMES A. EHLERS D/B/A MOTHERTHUMPER

40. Plaintiff restates and realleges the allegations contained in the preceding paragraphs as if fully set out herein.

41. CafePress and MotherThumper have infringed Plaintiff's copyrights in and to his Illustrations by scanning, copying, reproducing, displaying, offering for sale, and selling unauthorized copies thereof within the United States of America in violation of 17 U.S.C. § 101, et. seq. Such infringements were either non-willful, or alternatively, they were committed willfully.

42. As a result of the above-described acts of CafePress and MotherThumper, Plaintiff has sustained damages including lost licensing revenue in an amount not yet ascertained, and CafePress and MotherThumper have earned profits that should be disgorged to Plaintiff, or alternatively, for statutory damages under 17 U.S.C. § 504, interest, attorneys fees', and costs.

COUNT IV · DIRECT INFRINGEMENT
CAFEPRESS, INC. A/K/A ADMIN_CP

43. Plaintiff restates and realleges the allegations contained in the preceding paragraphs as if fully set out herein.

44. CafePress and its online storefront Admin_CP have infringed Plaintiff's copyrights in and to his Illustrations by scanning, copying, reproducing, displaying, offering for sale, and selling unauthorized copies thereof within the United States of America in violation of 17 U.S.C. § 101, et. seq. Such infringements were either non-willful, or alternatively, they were committed willfully.

45. As a result of the above-described acts of CafePress and Admin_CP, Plaintiff has sustained damages including lost licensing revenue in an amount not yet ascertained, and CafePress and Admin_CP have earned profits that should be disgorged to Plaintiff, or alternatively, for statutory damages under 17 U.S.C. § 504, interest, attorneys' fees, and costs.

COUNT V · CONTRIBUTORY AND VICARIOUS INFRINGEMENT
CAFEPRESS, INC.

46. Plaintiff restates and realleges the allegations contained in the preceding paragraphs as if fully set out herein.

47. CafePress encouraged, permitted, participated in and/or otherwise allowed the infringements described above by its online storefront companies Fishgod and MotherThumper.

48. CafePress has the authority, right, power and ability to control the actions of its online storefront companies.

49. CafePress has continuously and materially contributed to the infringing and unauthorized use of the copyrighted material described herein, including, but not limited to, creating and maintaining the online marketplace which enabled the infringements.

50. CafePress directly profited from the infringements that occurred.

51. As a result of the above-described acts of CafePress, Fishgod, MotherThumper and Admin_CP, Plaintiff has sustained damages including lost licensing revenue in an amount not yet ascertained, and CafePress, Fishgod, MotherThumper and Admin_CP have earned profits that should be disgorged to Plaintiff, or alternatively, for statutory damages under 17 U.S.C. § 504, interest, attorneys' fees, and costs.

COUNT VI · INJUNCTIVE RELIEF
CAFEPRESS, INC.

52. Plaintiff restates and realleges the allegations contained in the preceding paragraphs as if fully set out herein.

53. The acts of CafePress described herein have caused, and unless enjoined by this Court will continue to cause, irreparable injury and other damage to Plaintiff's business, reputation, and goodwill. Plaintiff has no other adequate remedy at law.

54. By reason of the acts of CafePress described herein, Plaintiff is entitled to injunctive relief against CafePress restraining further acts of infringement and of violations of the Digital

Millennium Copyright Act; to attorneys' fees, and to profits attributable to the acts of CafePress described herein.

PRAYER FOR RELIEF

55. Plaintiff requests that CafePress, Fishgod, MotherThumper and Admin_CP be required to pay over to Plaintiff his actual damages sustained, plus all of their direct and indirect profits attributable to the infringements;

56. Alternatively, because the copyrighted images were registered prior to the infringements to them by CafePress, Fishgod, MotherThumper, and Admin_CP, Plaintiff seeks recovery of statutory damages up to Thirty Thousand Dollars (\$30,000.00) per non-willful infringement and One Hundred Fifty Thousand Dollars (\$150,000.00) per willful infringement;

57. Plaintiff seeks recovery from CafePress, Fishgod, MotherThumper and Admin_CP of his attorneys' fees and Court costs;

58. Plaintiff also seeks to recover the professional fees and expenses of all expert witnesses he retains for the prosecution of this action;

59. Plaintiff requests that CafePress, Fishgod, MotherThumper and Admin_CP, and all their agents, employees, and/or servants, be enjoined pendent lite and permanently from infringing Plaintiff's copyrights in any manner whatsoever, and from publishing through any visual media, and from selling, marketing or otherwise distributing Plaintiff's Illustrations and further engaging in any form of copyright infringement.

60. Plaintiff requests that CafePress, Fishgod, MotherThumper and Admin_CP be required to immediately search the CafePress website and sales archives for infringing copies of Plaintiff's Illustrations, and deliver them up, under oath, for impounding during the pendency of this action, and for destruction thereafter, all images which infringe Plaintiff's copyrights in and to the Illustrations, including photographs, digitally scanned images, and all other articles by means of which such infringing copies may be produced, which are in the possession of, or under the direct or indirect control of CafePress, Fishgod, MotherThumper and Admin_CP;

61. Plaintiff requests that CafePress be required to prospectively police its website and images subsequently uploaded by customers, and remove all infringing copies of Plaintiff's Illustrations on an ongoing basis;

62. Plaintiff requests there be an accounting of all gains, profits, and advantages derived by CafePress, Fishgod, MotherThumper, and Admin_CP as a result of the copyright infringements herein described;

63. Plaintiff requests all such other and further relief as this Court shall deem just and proper.

PLAINTIFF JOSEPH R. TOMELLERI RESPECTFULLY DEMANDS TRIAL BY JURY.

Respectfully submitted,

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