

For hearing before Mr. Justice Choi at 9:00am on 24 November, 2007

RE: HCA NO. 1001 OF 2007

PLAINTIFF SKELETON SUBMISSIONS

I. The Plaintiff's application for an interlocutory injunction

1. P is a sole proprietor trading under the name of Marvel Greeting Cards ("Marvel"). He is in the business of designing and selling holiday and greeting cards in Hong Kong and over the world. P is the sole designer and artist for the cards' designs.
2. D is a company also trading in cards of the same nature.
3. P seeks relief by virtue of an interlocutory prohibitory injunction pursuant to O.29 r.1 of the Rules of the High Court to prevent D from infringing P's copyright subsisting in the artistic drawings used on two holiday card products called "Marvel Christmas!" and "Marvel Valentine's Day!".

II. Chronology of events

1 Mar. 07 – 31 Jun. 07	P created a series of artistic works by exercising his independent and substantial labour and judgment. See Exhibit PP-5 at p.38.
10 Oct. 07 – 12 Oct. 07	P and D set up booths at a Hong Kong trade fair. See ¶14 of P's 1st Affirmation at p.11.
12 Oct. 07	P discovered that two of the cards being sold and promoted at D's booth looked substantially similar to the artistic works that he created earlier. See ¶15 of P's 1st Affirmation at p.11.
17 Oct. 07	P issues writ of summons against D.

III. The law

4. It is well established that the following must be proven by affidavit evidence in order for P to succeed in establishing a right to interlocutory injunction:
 - (a) That there is a serious issue to be tried;
 - (b) That there would be irreparable damage;
 - (c) That the balance of convenience would be in favour of P; and
 - (d) That P is willing to give an undertaking as to damages.

See American Cyanamid Company v Ethicon Limited [1975] AC 396 at 407.

IV. Cause of action (copyright infringement) – Serious issue to be tried

5. The Court need only satisfy itself that there is a serious issue to be tried, i.e. that the claim is not frivolous or vexatious. The court is not to evaluate the parties' cases in a substantial way or decide difficult questions of law.

See *American Cyanamid* at 407.

6. Copyrights are proprietary rights that exist solely by virtue of the Copyright Ordinance (the "Ordinance"). P must therefore establish:

- (a) That there is a work in which copyright can subsist;
- (b) That copyright does subsist in the work;
- (c) That he is the owner of that copyright; and
- (d) That the copyright was infringed.

See *San-X Co. Ltd. v Tai Pan Bread & Cakes Co. Ltd. [2002] HKEC 584* at ¶39, p.3.

7. The designs on the cards in question are drawings and are therefore artistic works in which copyrights can subsist (the "Artistic Works").

See s.2 of the Ordinance.

8. Since P used his independent skill, labour, judgment and ability to create those designs, those Artistic Works are original for the purpose of the Ordinance.

See ¶7 of P's 1st Affirmation at p.10.

9. P is the author and therefore owner of the Artistic Works printed on the cards.

See ¶7 of P's 1st Affirmation at p.10.

10. D has manufactured and sold cards incorporating a substantial part of the Artistic Works ("the Infringing Copies"), thereby infringing P's copyright contrary to s.22(2) of the Ordinance.

Compare D's cards in Exhibit PP-10 on p.[•] of P's 1st Affidavit with P's cards in Exhibit PP-7 on p.[•] of P's 1st Affidavit.

See ¶16 of D's Affidavit at p.55.

11. It is likely that the Infringing Copies are a substantial copy of P's Artistic Works for the following reasons:

- (a) D's contention that the Infringing Copies were results of designs drawn up by their own in-house artists is weak. There is no documentary evidence

that either of the 'in-house designers' were in D's employ during the material period.

- (b) Even if D initially possessed an original design, the final designs that were printed as the Infringing Copies is unlikely to be any adaptation or improvement upon them.

See Exhibits CK-2 and CK-3 of D's Affidavit at pp.60 and 62 respectively.

It is unlikely that the drawings in CK-3 were 'improved' versions of those in CK-2 as there is a significant difference between the two. CK-3 is much more likely to be a copy of P's Artistic Works due to their similarities.

- (c) The drawings on CK-3 are dated 15th and 31st September 2007. That is 1.5 months after P's cards were first sold to retailers and after P had sent samples of the Artistic Works to Ds.

See Exhibit PP-4 of P's 1st Affirmation at p.31; and PP-15 of P's 2nd Affirmation (the "Delivery Slip") at p.89.

The fact that D had access to the Artistic Works before they allegedly created something very similar afterwards makes it more likely that they had copied P's Artistic Works.

12. Where sufficient similarity has been established and it can be shown that the defendant had previous access to the copyright work, the burden passes to the defendant to satisfy the judge that, despite the similarities, they did not result from copying.

See *Designers Guild Ltd v. Russell Williams (Textiles) Ltd [2001] FSR 113 (HL)* at ¶41, p.125 per Lord Millett.

13. Even if D's case is arguable, there is still a serious issue of fact to be tried, viz. whether D had actually copied P's Artistic Works or had otherwise infringed the copyrights of P.

V. Irreparable damage

14. It is submitted that damages are not sufficient to compensate P if an interlocutory injunction is not granted forthwith.
15. Marvel is a card design and trading business and is therefore reliant on the copyrights in the artistic works it authors and exploits. Having only started

operations on 1 July 2007, it is a young business represented by P in his personal capacity and therefore highly vulnerable to any copyright infringement.

16. D is pricing the infringing copies at \$30, undercutting P's Cards by \$10. This undercutting adversely affects P's market share and reduces its ability to turn a profit. If P's customers come to know that cards of substantially the same design are being sold more cheaply, they may drop further orders and subject P's business to ruin.

See ¶22 of P's 1st Affirmation at p.12; and Exhibits PP-6 and PP-11 on p.40 and p.51 respectively.

17. Acts of copyright infringement will adversely affect the reputation of P because originality and creativity are highly valued in the card-design industry. Common belief that P is not creating or selling genuine, original products may adversely affect P's artistic career and thus his livelihood, which cannot be quantified.
18. P has very high growth potential as demonstrated by its sales record. Any damage to its market share and bottom line by infringing acts will be significant and difficult to quantify.

See Exhibit PP-4 of P's 1st Affirmation at pp.31-36.

19. As of October 2007, P has received orders mostly for the 2 cards in question, and not for any other product.

See Exhibit CK-4 of D's Affidavit at p.64; and Exhibit PP-4 of P's 1st Affirmation at pp.31-36.

Ability of Defendant to pay damages

20. P has never heard of D despite being aware of such card companies in Hong Kong so it is likely that D does not have material operational profits with which to compensate P even if damages were sufficient to recompense P.

See ¶4 of P's 2nd Affirmation at p.85.

21. D has not shown that it has sufficient assets to compensate P's loss.
22. D's balance sheet shows no profitable operations in 2006 and 2007. Up to the end of September 2007, it has had no accounts receivable from third parties such as customers. Nor do its current liabilities reflect those of an active business operation, showing only related transactions and a bank overdraft.

See Exhibit CK-5 of D's Affidavit at p.69.

23. The balance sheet 'for the year ended 31 September 2007' is highly suspicious. Adding to the above, there is no such day as the 31st of September 2007. Furthermore, the balance sheet is unaudited and the accounts it proposes to show do not balance.
24. Given that D's balance sheet is not reliable, the 'profits' and 'fixed assets' (which would include the alleged warehouse and manufacturing facilities in Guangdong) purportedly shown on it must also be viewed with circumspect.
25. Page 2 of D's Annual Return only shows the nominal value of D's shares to be '1'. The denominating currency is not given as is required by the notes to the Annual Return.

Exhibit PP-3 of P's 1st Affirmation at p.22.

26. Given that D's accounts and total share capital is unclear, it is submitted that D has not shown that it is capable of compensating P's loss if an injunction is not granted.

VI. Balance of convenience

27. The weighing of convenience only takes place if the Court finds that the damage caused to both P and D would be inadequate and finely balanced. Notwithstanding that damages would sufficiently compensate D in the event that an injunction ought not to have been granted, it is submitted that the balance of convenience lies in P's favour.
28. The infringing products in question are only extensions to D's product lines. D already has other cards for the same festivals. In contrast for P, however, the Artistic Works are shown on the only cards of their genre and amount to a significant portion of its profits.

See Exhibit PP-11 of P's 1st Affirmation at p.51.

29. Preventing Ds from selling and promoting their cards will at most cause pecuniary loss to their business, which can be compensated by damages. On the other hand, if D can sell those cards, it would potentially ruin P's business, reputation and livelihood.
30. Compared to D, which is a company, loss of reputation is highly material to P as an individual because his ability to earn a living through drawing and selling his artistic designs may be significantly and adversely affected by the infringing acts in question.

31. D contends that it will be injured because it had expended promotion costs and received orders for the cards in question from customers. The following reasons, however, cast doubt on that contention:

(a) The promotion costs allegedly incurred are not reflected in D's own balance sheet;

See Exhibit CK-5 of D's Affidavit at p.67.

(b) D's official receipt no. 58903 is dated 28 October 2007, one day before invoice no. 10023, which is dated 29 October 2007. It is submitted that this gives rise to an inference that either or both the receipts and/or the invoices are fictional; and

See Exhibits CK-8 and CK-10 respectively of D's Affidavit on pp.75-79 and p.83 respectively.

(c) As stated previously at ¶22, D's balance sheet does not show any account receivable or accounts payable as expected from a operational business.

See Exhibit CK-5 of D's Affidavit at p.69.

The above shows that D had only recently and suddenly expended promotion costs and made sales of cards – specifically, infringing copies of P's cards. It appears that D is trying to project an image that it is promoting and successfully selling the cards in question when it has not actually done so.

32. It is submitted that D's operations may not be on such a large scale as claimed by D. According to their balance sheet, they have not incurred any income or expense pertaining to any normal business operations. Further, one would expect a company having a substantial scale to have a registered office that is not also the residential address of one of its directors.

See ¶22 above; and
Exhibit PP-3 of P's 1st Affirmation at p.25.

33. Given that D's operations may be limited in scale, the losses that may be incurred as a result of an injunction must also be limited in scope. If an injunction is not granted, however, it may result to the loss of P's entire livelihood.

VII. Undertaking as to damages

34. As indicated in P's affirmations, he is willing to give an undertaking as to damages to compensate D for lost sales and wasted promotion costs related to the

cards in question. P has gone further to show that he has sufficient funds to give D in the event that the undertaking needs to be enforced.

See ¶10 of P's 2nd Affirmation at p.10; and Exhibit PP-16 thereof at p.91.

35. According to ¶31 above, the evidence relating to promotion costs and sales orders must be viewed with circumspect. With D's operations likely to be limited in scale, the undertaking as to damages must be valued accordingly.

VIII. Conclusion

36. Given the foregoing, P humbly asks this Honourable Court to exercise its discretion to grant an interlocutory injunction in terms.

Dated this 20th day of November, 2007

Cliff Lui

Counsel for the Plaintiff

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PLAINTIFF LIST OF AUTHORITIES

1. *American Cyanamid Company v Ethicon Limited* [1975] AC 396
2. *San-X Co. Ltd. v Tai Pan Bread & Cakes Co. Ltd.* [2002] HKEC 584
3. *Designers Guild Ltd v. Russell Williams (Textiles) Ltd* [2001] FSR 113
4. Copyright Ordinance, Cap.528. Sections 2 to 22.

Dated this 20th day of November, 2007

Cliff Lui

Counsel for the Plaintiff