

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

03-71960

MONSTERPATTERNS.COM, LLC,)
)
Plaintiff,)
)
v.)
)
THE MCCALL PATTERN COMPANY,)
MP HOLDINGS, INC., BUTTERICK)
COMPANY, INC., CONSO INTERNATIONAL)
CORPORATION (d/b/a CONSO PRODUCTS)
COMPANY and d/b/a CONSO)
INTERNATIONAL, INC.), SIMPLICITY)
PATTERN CO. INC. (d/b/a SIMPLICITY)
PATTERN CO. and d/b/a SIMPLICITY)
PATTERN COMPANY, INC.), and DIGITAL)
RIVER, INC.)
)
Defendants.)

ANNA DIGGS TAYLOR
COMPLAINT FOR
DECLARATORY, LEGAL,
AND EQUITABLE RELIEF

MAGISTRATE JUDGE MORGAN
DEMAND FOR JURY TRIAL

No.

FILED
2003 MAY 21 P 8:27
U.S. DIST. COURT CLERK
EAST DIST. MICHIGAN
DETROIT

COMPLAINT

NOW COMES the Plaintiff, MONSTERPATTERNS.COM, LLC, a Michigan company, by and through its attorney, Charles Lee Mudd Jr., and complains of the defendants, THE MCCALL PATTERN COMPANY, a Delaware Company, MP HOLDINGS, INC., a Delaware Company, BUTTERICK COMPANY, INC., a Delaware Company, CONSO INTERNATIONAL CORPORATION (d/b/a CONSO PRODUCTS COMPANY and d/b/a CONSO INTERNATIONAL, INC.), a South Carolina Company, SIMPLICITY PATTERN CO. INC. (d/b/a SIMPLICITY PATTERN CO. and d/b/a SIMPLICITY PATTERN COMPANY,

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COMPANY, INC., CONSO INTERNATIONAL)	DEMAND FOR JURY TRIAL
CORPORATION (d/b/a CONSO PRODUCTS)	
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INTERNATIONAL, INC.), SIMPLICITY)	
PATTERN CO. INC. (d/b/a SIMPLICITY)	
PATTERN CO. and d/b/a SIMPLICITY)	No.
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COMPLAINT

NOW COMES the Plaintiff, MONSTERPATTERNS.COM, LLC, a Michigan company, by and through its attorney, Charles Lee Mudd Jr., and complains of the defendants, THE MCCALL PATTERN COMPANY, a Delaware Company, MP HOLDINGS, INC., a Delaware Company, BUTTERICK COMPANY, INC., a Delaware Company, CONSO INTERNATIONAL CORPORATION (d/b/a CONSO PRODUCTS COMPANY and d/b/a CONSO INTERNATIONAL, INC.), a South Carolina Company, SIMPLICITY PATTERN CO. INC. (d/b/a SIMPLICITY PATTERN CO. and d/b/a SIMPLICITY PATTERN COMPANY,

INC.), a Delaware Company, and DIGITAL RIVER, INC., a Minnesota Company, and states as follows:

NATURE OF ACTION

1. This action seeking declaratory, legal, and equitable relief involves the ability of a small Internet company to market and sell abandoned and discarded products of the Defendants, in essence two companies that dominate the sewing pattern market with a combined market share of more than seventy-five percent (75%) of the domestic, United States market, without violating federal copyright (United States Copyright Act, 17 U.S.C. § 101, et. seq.), trademark, and unfair competitions laws.

PARTIES

2. MONSTERPATTERNS.COM, LLC (“Monsterpatterns”) is a Michigan company with an office located in Livonia, Michigan and with additional operations out of the home and garage of Derek and Lynn Gendron (the “Gendrons”) in Canton, Michigan. Prior to incorporation, Monsterpatterns consisted of the Gendrons doing business as Monsterpatterns.com.

3. THE MCCALL PATTERN COMPANY (“Defendant McCall”) is a Delaware Company with its principal place of business in New York, New York.

4. MP HOLDINGS, INC. (“Defendant MP”) is a Delaware Company with its principal place of business in New York, New York. Defendant MP owns Defendant McCall.

5. BUTTERICK COMPANY, INC. (“Defendant Butterick”) is a Delaware Company with its principal place of business in New York, New York. Defendant Butterick is now a subsidiary of Defendant McCall.

6. SIMPLICITY PATTERN CO. INC. (“Defendant Simplicity”) is a Delaware Company with its principal place of business in New York, New York. SIMPLICITY PATTERN CO. INC. also does business as SIMPLICITY PATTERN COMPANY, INC. with offices in Niles, Michigan. SIMPLICITY PATTERN CO. INC. also does business as SIMPLICITY PATTERN CO.

7. CONSO INTERNATIONAL CORPORATION (“Defendant Conso”) is a South Carolina Company with its principal place of business in Union, South Carolina. Defendant Conso also does business as CONSO PRODUCTS COMPANY and CONSO INTERNATIONAL, INC. In June 1998, Defendant Conso acquired all the outstanding common stock of Simplicity Capital Corporation, the parent company of Defendant Simplicity.

8. DIGITAL RIVER, INC. (“Defendant Digital River”) is a Minnesota Company with its principal place of business in Eden Prairie, Minnesota.

9. Where appropriate and unless otherwise noted explicitly or by context, Defendant McCall shall include by reference Defendants MP and Butterick. Where appropriate and unless otherwise noted explicitly or by context, Defendant Simplicity shall include by reference Defendant Conso.

10. Where appropriate and unless otherwise noted explicitly or by context, “Pattern Defendants” shall include by reference all defendants except Defendant Digital River.

JURISDICTION AND VENUE^[CLMJ1]

11. Jurisdiction of this court arises under 28 U.S.C. §§ 1331 (federal question), 1337 (regulating commerce), 1338 (copyright and trademark), ^[CLMJ2]and 28 U.S.C. § 2201 (declaratory judgment).

12. This Court has jurisdiction over each Defendant because each Defendant has substantial contacts with Michigan. Moreover, Defendant Simplicity operates a business location in Niles, Michigan.

13. Venue is proper pursuant to 28 U.S.C. § 1391 because (a) a substantial part of the events or omissions giving rise to this action occurred in this judicial district; (b) a substantial part of the property that is the subject of the action is situated in this judicial district; and (c) for purposes of venue, Simplicity resides in this judicial district.

14. An actual case or controversy has arisen between the parties. Defendants have threatened Monsterpatterns with litigation. In doing so, they have asserted that the sale of the products at issue by Monsterpatterns constitutes unfair competition and violates copyright and trademark law. The Defendants' statements have caused actual and/or threatened injury to Monsterpatterns.com.

FACTUAL BACKGROUND

15. This action involves issues relating to a young company's entrance into the venerable clothing pattern industry dominated by two corporate giants.

A. Background on Patterns

16. Sewing patterns typically are printed on tissue paper. An individual using a

sewing pattern will normally lay the sewing pattern on fabric. From this, the individual would use the sewing pattern's guided lines to facilitate the proper cutting of the fabric in the production of homemade clothing and crafts.

17. Defendant Butterick has been operating since 1863.

18. Defendant McCall has been operating since 1870.

19. Defendant Butterick manufactures patterns under its own brands and also holds the license to manufacture patterns under the Vogue name. Vogue patterns have existed since 1899.

20. Defendant Simplicity has been operating since 1927.

21. As of August 2000, Defendant McCall and Defendant Simplicity controlled collectively more than three-quarters of the sales in the United States of domestic home sewing patterns.

22. Defendant Butterick controlled about 22 percent of the sales in the United States of domestic home sewing patterns.

23. Of the approximate remaining three percent, Kwik-Sew Pattern Co. Inc., the next largest domestic manufacturer of home sewing patterns, enjoyed a share of only about two to three percent of the United States market.

24. Upon information and belief, Defendants McCall and Simplicity also represent major printers of pattern paper for the smaller pattern companies such as Kwik-sew.

25. Pursuant to a Letter of Intent dated February 25, 2000, Defendant Conso through Citicorp Venture Capital Ltd. proposed to acquire all of the stock of Defendant McCall for approximately \$22 million (plus assumption of up to \$7.5 million in debt), and to merge with

Defendant McCall.

26. In August 2000, the Federal Trade Commission filed suit against Defendants Conso, MP, and McCall to block the intended purchase of McCall by Defendant Conso.

27. Defendant Conso failed to purchase Defendant McCall.

28. In February 2001, Defendant MP, parent company of Defendant McCall, and Butterick Holdings, the parent of Defendant Butterick, announced their agreement to merge their companies. Although the companies merged, they have maintained separate corporate identities with Defendant Butterick operating under the Butterick name as a subsidiary of Defendant McCall.

29. Consequently, where previously three major pattern manufacturers existed in 2000, there now exist two dominate pattern manufacturers with more than approximately ninety-five percent (95%) of the domestic United States pattern market.

Defendant McCall and Defendant Butterick

30. As Defendants McCall and Butterick are interrelated, the following discussion of Defendant McCall will also apply to Defendant Butterick.

31. Defendant McCall designs clothing. For each of its clothing designs (“Design”), Defendant McCall produces a sewing pattern that will allow a consumer, costumer, seamstress, etc. to reproduce the clothing design in the form of actual clothing (“Pattern”).

32. Defendant McCall reproduces the Patterns in mass quantities to market and sell nationwide, including on the Internet.

33. Defendant McCall markets its Designs and Patterns under several brands,

including McCall's, Butterick, Vogue, See and Sew, and Green Pepper. Defendant McCall also designs and produces wallpaper cutouts under the brand Wallies.

34. Defendant McCall sells its Patterns online at web sites related to the particular brand being sold. These include "www.mccallspatterns.com," "www.voguepatterns.com," and "www.butterick.com." In addition, Defendant McCall markets its Patterns through magazines and/or catalogs such as "Butterick" and "Vogue Patterns."

35. Defendant McCall also makes its Patterns available through a multitude of retailers throughout the United States, including the State of Michigan.

36. Numerous third-party retailers sell Defendant McCall's patterns throughout the United States, including Michigan. For example, consumers can purchase Defendant McCall's patterns from Jo-Ann Fabrics and Hancock's Fabrics (formerly Minnesota Fabrics) stores in Livonia, Michigan.

37. Defendant McCall also makes its Patterns available through online retailers such as www.sewingpatterns.com.

38. In addition to the distinct brands used by Defendant McCall, each Design can be identified through a unique number identifier ("Design Number" or "Pattern Number"). For example, a Design by Defendant McCall under its Vogue brand may be referred to as "Vogue 2116" or "Vogue No. 2116."

39. When a consumer purchases the Pattern, the consumer obtains a package envelope ("Pattern Envelope") with the pattern inside. The Pattern Envelope will reflect the Pattern Number.

40. The front of the Pattern Envelope represents the Design through photographs or

drawings of models wearing the finished clothing product created from the Design. These representations allow the consumer to see the finished product created from the Pattern prior to purchasing the Pattern Envelope. The front of the Pattern Envelope also contains the trademarks of Defendant McCall and additional information identifying the specific Design and Pattern contained within the Pattern Envelope.

41. The back of the Pattern Envelope provides a written description of the clothing produced from the Design and Pattern. In addition, the back of the Pattern Envelope may include information necessary to successfully create the clothing from the Design and Pattern, including supplies and fabric needed.

42. A consumer will find the actual Pattern inside the Pattern Envelope. The Pattern will consist of thin sheets of paper, usually brown, that reflect the Pattern for reproducing the Design. In addition, the Pattern Envelope will typically include additional instruction materials.

43. Online retailers, such as www.sewingpatterns.com, display the Pattern Envelopes along with the Defendant McCall's trademarks on their web sites.

Defendant Simplicity

44. Defendant Simplicity also designs clothing. Further, Defendant Simplicity also produces a Pattern for its Designs.

45. Defendant Simplicity reproduces the Patterns in mass quantities to market and sell nationwide.

46. Defendant Simplicity markets its Designs and Patterns under several brands, including Simplicity, New Look, Style, and Elegance.

47. Defendant Simplicity sells its pattern catalogs and books online at the web site “store.yahoo.com/simplicitypattern”, directed from Simplicity’s own web site “www.simplicity.com.” These catalogs include Simplicity's Complete Pattern Catalog, New Look, the Children's Pattern Catalog, Home Decorating and Craft Catalog, and Costume Catalog.

48. Defendant Simplicity also makes its Patterns available through a multitude of retailers throughout the United States, including Michigan.

49. Defendant Simplicity also makes its Patterns available through online retailers such as www.sewingpatterns.com.

50. Numerous third-party retailers sell Defendant Simplicity’s Patterns throughout the United States, including the State of Michigan.

51. In addition to the distinct brands used by Defendant Simplicity, each Design can be identified through a Design Number or Pattern Number. In fact, Defendant Simplicity allows one to search by Design Number on its web site.

52. When a consumer purchases the Pattern, the consumer obtains a Pattern Envelope with the pattern inside. The Pattern Envelope will reflect the Pattern Number.

53. The front of the Pattern Envelope represents the Design through photographs or drawings of models wearing the finished clothing product created from the Design. These representations allow the consumer to see the finished product created from the Pattern prior to purchasing the Pattern Envelope. The front of the Pattern Envelope also contains the trademarks of Defendant Simplicity and additional information identifying the specific Design and Pattern contained within the Pattern Envelope.

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56. Online retailers, such as www.sewingpatterns.com, display the Pattern Envelopes along with the Defendant Simplicity's trademarks on their web sites.

B. Gendrons' Discovery of Discarded and Abandoned Patterns

57. In late August 1999, Mr. Gendron investigated a number of refuse containers.

58. Among the refuse containers Mr. Gendron investigated, he came across the refuse discarded by a Jo-Ann Fabrics store in Novi, Michigan during a late afternoon. In doing so, he noticed that about 400 Pattern Envelopes had been discarded and abandoned in the store's refuse container. These Pattern Envelopes remained in the boxes as apparently shipped from Defendants McCall and Simplicity.

59. Mr. Gendron has no business relationship with Jo-Ann Fabrics.

60. Mr. Gendron's discovery in Novi piqued his interest and caused him to investigate discarded and abandoned refuse in refuse containers and dumpsters at other Jo-Ann Fabrics stores.

61. In January 2000, Mr. Gendron continued to explore refuse containers for abandoned and discarded items. Among the many containers explored, Mr. Gendron

investigated the refuse discarded by a Jo-Ann Fabrics store in Westland, Michigan. In doing so, Mr. Gendron discovered a multitude of discarded and abandoned Pattern Envelopes in the store's refuse container.

62. In early 2000, the Gendrons had established a store from which they sold many items, including the abandoned and discarded Pattern Envelopes.

63. By June 2000, the Gendrons had begun to sell the Pattern Envelopes on Ebay, including Issey Miyake patterns.

64. Through the incredible response he obtained to the Issey Miyake patterns, Mr. Gendron later learned that some of the Patterns contained in the Pattern Envelopes he discovered had been discontinued by the Defendants.

65. The Gendrons' sale of the patterns continued on Ebay into 2001.

66. In about mid-2001, the Gendrons began to investigate obtaining additional Pattern Envelopes from fabric stores that closed or would soon be closing.

C. Monsterpatterns.com

67. On December 25th, 2000, Mr. Gendron registered the domain www.monsterpatterns.com.

68. Soon thereafter, Monsterpatterns began selling the abandoned, discarded Pattern Envelopes on the web site www.monsterpatterns.com.

69. To facilitate online sales of the Pattern Envelopes, Mr. Gendron used Freermerchant.com (originally owned by Network Commerce Inc.) to establish a store front sales web site located at patterns.safeshopper.com as early as March 2001. On or about January 4,

2002, Digital River acquired the Freemerchant.com service.

70. On May 16, 2001, Mr. Gendron filed a “Doing Business As” application in Lapeer County, Michigan stating his intent to operate as Monsterpatterns.com.

71. On the product pages, Monsterpatterns would display the front of the Pattern Envelope. When a customer clicked on the picture of the Pattern Envelope, the customer would see a partial “blow-up” of the product description from the back of the Pattern Envelope. However, the pictures or images displayed were not of reproduction quality. Indeed, Monsterpatterns engaged in the affirmative, preventative measure of making low-quality scans of the Pattern Envelopes.

72. Monsterpatterns never copied in any manner any of the Defendants’ actual Patterns.

73. Monsterpatterns never displayed the actual Patterns online. Rather, Monsterpatterns only provided images of the Pattern Envelope as virtual “store-front” displays to further the sale of the Pattern Envelopes directly to consumers.

74. When Monsterpatterns did not display the back of particular Pattern Envelopes, it would receive emails from customers requesting to see the supplies needed for the pattern so that, upon ordering the pattern, the customers could purchase the fabric and notions needed to complete patterns.

75. Throughout, Monsterpatterns employed disclaimer language of the following form: “DISCLAIMER: Monsterpatterns.com strive to offer an easy-to-use site with accurate content, product information, policies, pricing, and displays. Policies, pricing, and item availability are subject to change without notice and we reserve the right to limit quantities.

TRADEMARKS: All product names and company logos mentioned herein remain the trademarks of their respective owners. Copyright 2001 Monsterpatterns.com. All rights reserved. Published by Monsterpatterns.com. All product names throughout this site are trademarks or registered trademarks of their respective holders.”

76. On January 16, 2003, as a normal course of action for a growing business, Mr. Gendron formed Monsterpatterns.com LLC. He subsequently filed a dissolution of the DBA.

D. Defendants Initial Interaction with Monsterpatterns

77. If not before, Defendant McCall had learned of Monsterpatterns by June of 2001.

78. On numerous occasions in 2001 and 2002, Defendant McCall and Defendant Simplicity referred customers seeking discontinued Patterns to Monsterpatterns.

79. In fact, Defendant McCall would respond to emails it received by providing a referral to www.monsterpatterns.com as a source for discontinued patterns. In fact, on information and belief, Defendant McCall incorporated a referral to www.monsterpatterns.com into an autoresponder message sent in response to emails received at particular email addresses. Anyone sending any email to these particular addresses would receive a referral to www.monsterpatterns.com.

80. Also, representatives of both Defendant McCall and Defendant Simplicity referred www.monsterpatterns.com to individuals who telephoned the Pattern Defendants seeking information on discontinued patterns.

E. Defendants Dispute with Monsterpatterns

81. On November 21, 2002, Defendant Digital River, Inc. and FreeMerchant received a copyright and trademark infringement notice from attorneys representing Defendant McCall.

82. On or about January 10, 2003, Mr. Gendron first received a telephone call from Mr. Robert Herman, Chief Executive Officer of Defendant McCall. Mr. Frank Rizzo, Chief Executive Officer of Defendant Simplicity, contacted Mr. Gendron subsequently. Both Mr. Herman and Mr. Rizzo threatened to sue Mr. Gendron and Monsterpatterns unless it entered into a distributorship agreement.

83. On or about this time, representatives of the Pattern Defendants began to telephone individuals from whom emails were received in attempts to dissuade them from doing business with Monsterpatterns.

84. Mr. Gendron had several conversations with representatives of the Pattern Defendants.

85. On February 3, 2003, Monsterpatterns received a letter from attorneys representing Defendant McCall.

86. On February 4, 2003, Monsterpatterns received an email from Defendant Digital River and FreeMerchant stating that it had disabled Monsterpatterns' FreeMerchant account based upon the letter it received from Defendant McCall in November 2002.

87. In response, Monsterpatterns sent Defendant Digital River and Freemerchant a counter notification pursuant to the provisions of 17 U.S.C. § 512(g)(3).

88. Despite receiving the counter-notification, Defendant Digital River and Freemerchant failed to restore Monsterpatterns' FreeMerchant account and the associated web site content.

89. On February 28, 2003, attorneys representing Defendant Simplicity sent a cease and desist letter to Network Commerce, the company Defendant Simplicity believed to be hosting Monsterpatterns' Internet web site (in actuality, Defendant Digital River had obtained the Freemerchant service by this time, including Monsterpatterns' Internet web site, as discussed above). In the letter, Defendant Simplicity's attorneys warned Network Commerce [sic] that unless it chose to "immediately terminate, remove, and disable access to monsterpatterns.com," Simplicity would be advised to consider litigation against Network Commerce [sic].

90. On March 4, 2003, Monsterpatterns received a confirming email from attorneys representing Defendant Digital River and FreeMerchant informing it that operation of the site "patterns.safeshopper.com" had been terminated.

F. Current Status

91. Defendant Digital River and FreeMerchant shut down Monsterpatterns' online store site "patterns.safeshopper.com". The site remains shut down.

92. Although Monsterpatterns retains the domain name www.monsterpatterns.com, the Monsterpatterns web site content hosted at Monsterpatterns' domain name "www.monsterpatterns.com" had been shut down.

93. Numerous individuals continue to sell the Defendants patterns through online auction sites such as Ebay displaying images of Pattern Envelopes and using the Pattern Defendants' trademarks to facilitate the sales of the patterns.

94. Individuals continue to sell the Pattern Defendants' patterns, both current and discontinued patterns, through their own online web sites such as, for example,

www.oldpatterns.com. In doing so, the web sites display images of Pattern Envelopes and use the Pattern Defendants' trademarks to facilitate the sales of the patterns without, upon information and belief, a license agreement with the Pattern Defendants.

95. Monsterpatterns has expended great amounts of time and money porting its entire site to a new server and hosting company.

CLAIMS FOR RELIEF

Count One

Declaratory Relief of No Copyright Violation

United States Copyright Law, 17 U.S.C. § 101 et seq.

96. That Monsterpatterns hereby incorporates by reference paragraphs 1 through 95 above as though fully set forth herein.

97. The Pattern Defendants, individually and collectively, have claimed that Monsterpatterns' sale of abandoned, discarded, and discontinued patterns on the Internet and the online display of packaging material to facilitate such sales constitutes copyright infringement.

98. The Pattern Defendants' assertions and claims to Monsterpatterns and third parties threaten to and have adversely affected Monsterpatterns' ability to pursue and expand its legitimate business of selling on the Internet, in a manner consistent with United States copyright law, patterns that have been abandoned, discarded, and discontinued by the Pattern Defendants. Further, the Pattern Defendants' actions have had a chilling effect on Monsterpatterns' rights to free speech under the state and federal constitutions.

99. An actual, present, and justiciable controversy has arisen between Monsterpatterns and the Defendants concerning Monsterpatterns' right to sell abandoned, discarded, and discontinued patterns on the Internet and its right to display online the patterns' packaging material to facilitate such sales.

100. Monsterpatterns seeks a declaratory judgment from this Court holding that its activities in selling the Pattern Defendants' abandoned, discarded, and discontinued patterns on the Internet do not violate the provisions of the United States Copyright Act on the grounds that (a) the Defendants abandoned the property and/or (b) the First Sale Doctrine, codified at 17

U.S.C. § 109(a), permits Monsterpatterns to sell or otherwise dispose of the possession of the particular copies of the copyrighted works in its possession.

101. Monsterpatterns further seeks a declaratory judgment from this Court holding that its activities in displaying online the packaging material containing the patterns for purposes of facilitating the sale of the Pattern Defendants abandoned, discarded, and discontinued patterns on the Internet do not violate the provisions of the United States Copyright Act on the grounds that (a) the Defendants abandoned the property and/or (b) the First Sale Doctrine, codified at 17 U.S.C. § 109(a), permits Monsterpatterns to display the product for purposes of selling or otherwise disposing of its possession of the product.

102. A judicial determination regarding Monsterpatterns' and the Defendants' respective rights is necessary and appropriate so that the Parties can ascertain their respective rights and properly engage in their businesses now and in the future.

103. WHEREFORE, Monsterpatterns seeks declaratory relief in the form of a judicial determination holding that Monsterpatterns' sale of abandoned, discarded, and discontinued patterns on the Internet and the online display of packaging material to facilitate such sales has not and does not constitute copyright infringement.

Count Two

Declaratory Relief of No Trademark Infringement

Lanham Act, 15 U.S.C. § 1114

104. That Monsterpatterns hereby incorporates by reference paragraphs 1 through 103 above as though fully set forth herein.

105. The Pattern Defendants, individually and collectively, have claimed that Monsterpatterns has violated the § 1114 of the Lanham Act, 15 U.S.C. § 1114.

106. The Pattern Defendants' assertions and claims to Monsterpatterns and third parties threaten to and have adversely affected Monsterpatterns' ability to pursue and expand its legitimate business of selling on the Internet, in a manner consistent with United States trademark law, patterns that have been abandoned and discarded by the Pattern Defendants and/or third party retailers. Further, the Defendants' actions have had a chilling effect on Monsterpatterns' rights to free speech under the state and federal constitutions.

107. Based on the Pattern Defendants' claims, a justiciable and actual controversy exists before this Court with respect to whether (1) Monsterpatterns' use of the Pattern Defendants' trademarks on its web pages to identify the Pattern Defendants' products; (2) Monsterpatterns' use of the Pattern Defendants' trademarks in its web pages' metatags; and (3) Monsterpatterns' use of the Pattern Defendants' trademarks as purchased keywords from pay-for-performance search engines will infringe the Pattern Defendants' trademark rights under 15 U.S.C. § 1114.

108. Monsterpatterns' use of the Pattern Defendants' trademarks is unlikely to cause confusion with respect to any of the Pattern Defendants' trademark registrations.

109. Thus, Monsterpatterns' use of the Pattern Defendants trademarks does not

infringe any of Pattern Defendants' rights under 15 U.S.C. § 1114.

110. Monsterpatterns seeks a declaratory judgment from this Court holding that its use of the Pattern Defendants' trademarks on its web pages to identify the Pattern Defendants' products does not violate 15 U.S.C. § 1114 on grounds that include, but are not limited to: (1) Monsterpatterns may use the Pattern Defendants' trademarks to truthfully identify the Pattern Defendants' products and (2) Monsterpatterns may stock, display, and resell the Pattern Defendants' product under the Pattern Defendants' trademarks pursuant to the First Sale Doctrine.

111. Monsterpatterns further seeks a declaratory judgment from this Court holding that its use of the Pattern Defendants' trademarks in its web pages' metatags does not violate 15 U.S.C. § 1114 on the grounds that include, but are not limited to: (1) Monsterpatterns may use the Pattern Defendants' trademarks to truthfully identify the Pattern Defendants' products and (2) Monsterpatterns may stock, display, and resell the Pattern Defendants' product under the Pattern Defendants' trademarks pursuant to the First Sale Doctrine.

112. Monsterpatterns further seeks a declaratory judgment from this Court holding that its use of the Pattern Defendants' trademarks as purchased keywords from pay-for-performance search engines does not violate 15 U.S.C. § 1114 on the grounds that include, but are not limited to: (1) Monsterpatterns may use the Pattern Defendants' trademarks to truthfully identify the Pattern Defendants' products; (2) Monsterpatterns may stock, display, and resell the Pattern Defendants' product under the Pattern Defendants' trademarks pursuant to the First Sale Doctrine; and (3) Monsterpatterns use of the words comprising the Pattern Defendants' trademarks as search terms constitutes free speech under the state and federal constitutions.

113. A judicial determination regarding Monsterpatterns' and the Defendants' respective rights is necessary and appropriate so that the Parties can ascertain their respective rights and properly engage in their businesses now and in the future.

114. WHEREFORE, Monsterpatterns seeks declaratory relief in the form of a judicial determination holding that Monsterpatterns' conduct has not and does not violate § 1114 of the Lanham Act, 15 U.S.C. § 1114.

Count Three
Declaratory Relief of No Trademark Dilution
Lanham Act, 15 U.S.C. § 1125

115. That Monsterpatterns hereby incorporates by reference paragraphs 1 through 114 above as though fully set forth herein.

116. The Pattern Defendants, individually and collectively, have claimed that Monsterpatterns has violated the Lanham Act, 15 U.S.C. § 1125.

117. The Pattern Defendants' assertions and claims to Monsterpatterns and third parties threaten to and have adversely affected Monsterpatterns' ability to pursue and expand its legitimate business of selling on the Internet, in a manner consistent with United States trademark law, patterns that have been abandoned and discarded by the Pattern Defendants and/or third party retailers. Further, Defendants' actions have had a chilling effect on Monsterpatterns' rights to free speech under the state and federal constitutions.

118. Based on the Pattern Defendants' claims, a justiciable and actual controversy exists before this Court with respect to whether (1) Monsterpatterns' use of the Pattern Defendants' trademarks on its web pages to identify Pattern Defendants' products; (2)

Monsterpatterns' use of the Pattern Defendants' trademarks in its web pages' metatags; and (3) Monsterpatterns' use of the Pattern Defendants' trademarks as purchased keywords from pay-for-performance search engines will dilute the Pattern Defendants' trademark rights under 15 U.S.C. § 1125(c).

119. Monsterpatterns' use of the Pattern Defendants' trademarks is unlikely to dilute the distinctive quality of any trademark owned by Defendants.

120. Thus, Monsterpatterns' use of the Pattern Defendants trademarks does not constitute dilution under 15 U.S.C. § 1125(c).

121. Monsterpatterns seeks a declaratory judgment from this Court holding that its use of the Pattern Defendants' trademarks on its web pages to identify the Pattern Defendants' products does not violate 15 U.S.C. § 1125(c) on grounds that include, but are not limited to: (1) Monsterpatterns may use the Pattern Defendants' trademarks to truthfully identify the Pattern Defendants' products and (2) Monsterpatterns may stock, display, and resell the Pattern Defendants' product under the Pattern Defendants' trademarks pursuant to the First Sale Doctrine.

122. Monsterpatterns further seeks a declaratory judgment from this Court holding that its use of the Pattern Defendants' trademarks in its web pages' metatags does not violate 15 U.S.C. § 1125(c) on the grounds that include, but are not limited to: (1) Monsterpatterns may use the Pattern Defendants' trademarks to truthfully identify the Pattern Defendants' products and (2) Monsterpatterns may stock, display, and resell the Pattern Defendants' product under the Pattern Defendants' trademarks pursuant to the First Sale Doctrine.

123. Monsterpatterns further seeks a declaratory judgment from this Court holding that

its use of the Pattern Defendants' trademarks as purchased keywords from pay-for-performance search engines does not violate 15 U.S.C. § 1125(c) on the grounds that include, but are not limited to: (1) Monsterpatterns may use the Pattern Defendants' trademarks to truthfully identify the Pattern Defendants' products; (2) Monsterpatterns may stock, display, and resell the Pattern Defendants' product under the Pattern Defendants' trademarks pursuant to the First Sale Doctrine; and (3) Monsterpatterns use of the words comprising the Pattern Defendants' trademarks as search terms constitutes free speech under the state and federal constitutions.

124. A judicial determination regarding Monsterpatterns' and the Defendants' respective rights is necessary and appropriate so that the Parties can ascertain their respective rights and properly engage in their businesses now and in the future.

125. WHEREFORE, Monsterpatterns seeks declaratory relief in the form of a judicial determination holding that Monsterpatterns' conduct has not and does not violate § 1125 of the Lanham Act, 15 U.S.C. § 1114.

Count Four

Declaratory Relief of No Violation of State Trademark Law

State Trademark Law

126. That Monsterpatterns hereby incorporates by reference paragraphs 1 through 125 above as though fully set forth herein.

127. The Pattern Defendants, individually and collectively, have claimed that Monsterpatterns has violated state trademark laws.

128. The Pattern Defendants' assertions and claims to Monsterpatterns and third parties threaten to and have adversely affected Monsterpatterns' ability to pursue and expand its

legitimate business of selling on the Internet, in a manner consistent with state trademark law, patterns that have been abandoned and discarded by the Pattern Defendants and/or third party retailers. Further, the Defendants' actions have had a chilling effect on Monsterpatterns' rights to free speech under the state and federal constitutions.

129. Based on the Pattern Defendants' claims, a justiciable and actual controversy exists before this Court with respect to whether (1) Monsterpatterns' use of the Pattern Defendants' trademarks on its web pages to identify the Pattern Defendants' products; (2) Monsterpatterns' use of the Pattern Defendants' trademarks in its web pages' metatags; and (3) Monsterpatterns' use of the Pattern Defendants' trademarks as purchased keywords from pay-for-performance search engines will dilute and/or infringe the Pattern Defendants' trademark rights under state law.

130. Monsterpatterns' use of the Pattern Defendants' trademarks is unlikely to dilute the distinctive quality of any trademark owned by the Pattern Defendants.

131. Monsterpatterns' use of the Pattern Defendants' trademarks is unlikely to cause confusion with respect to any of the Pattern Defendants' trademark registrations.

132. Thus, Monsterpatterns' use of the Pattern Defendants' trademarks does not constitute dilution nor does it infringe any of Pattern Defendants' trademark rights.

133. Monsterpatterns seeks a declaratory judgment from this Court holding that its use of the Pattern Defendants' trademarks on its web pages to identify the Pattern Defendants' products does not violate state trademark laws on grounds that include, but are not limited to: (1) Monsterpatterns may use the Pattern Defendants' trademarks to truthfully identify the Pattern Defendants' products and (2) Monsterpatterns may stock, display, and resell the Pattern

Defendants' product under the Pattern Defendants' trademarks pursuant to the First Sale Doctrine.

134. Monsterpatterns further seeks a declaratory judgment from this Court holding that its use of the Pattern Defendants' trademarks in its web pages' metatags does not violate state trademark laws on the grounds that include, but are not limited to: (1) Monsterpatterns may use the Pattern Defendants' trademarks to truthfully identify the Pattern Defendants' products and (2) Monsterpatterns may stock, display, and resell the Pattern Defendants' product under the Pattern Defendants' trademarks pursuant to the First Sale Doctrine.

135. Monsterpatterns further seeks a declaratory judgment from this Court holding that its use of the Pattern Defendants' trademarks as purchased keywords from pay-for-performance search engines does not violate state trademark laws on the grounds that include, but are not limited to: (1) Monsterpatterns may use the Pattern Defendants' trademarks to truthfully identify the Pattern Defendants' products; (2) Monsterpatterns may stock, display, and resell the Pattern Defendants' product under the Pattern Defendants' trademarks pursuant to the First Sale Doctrine; and (3) Monsterpatterns use of the words comprising the Pattern Defendants' trademarks as search terms constitutes free speech under the state and federal constitutions.

136. Monsterpatterns seeks such a holding under Michigan law, and the law of any other applicable jurisdictions.

137. A judicial determination regarding Monsterpatterns' and the Defendants' respective rights is necessary and appropriate so that the Parties can ascertain their respective rights and properly engage in their businesses now and in the future.

138. WHEREFORE, Monsterpatterns seeks declaratory relief in the form of a judicial

determination holding that Monsterpatterns' conduct has not and does not violate state trademark laws.

Count Five
Declaratory Relief of No Violation of Unfair Competition Laws
Unfair Competition

139. That Monsterpatterns hereby incorporates by reference paragraphs 1 through 138 above as though fully set forth herein.

140. The Pattern Defendants, individually and collectively, have claimed that Monsterpatterns has violated unfair competition laws.

141. The Pattern Defendants' assertions and claims to Monsterpatterns and third parties threaten to and have adversely affected Monsterpatterns' ability to pursue and expand its legitimate business of selling on the Internet, in a manner consistent with protections instituted through unfair competition laws, patterns that have been abandoned, discarded, and discontinued by the Pattern Defendants. Further, the Pattern Defendants' actions have had a chilling effect on Monsterpatterns' rights to free speech under the state and federal constitutions.

142. Based on the Pattern Defendants' claims, a justiciable and actual controversy exists before this Court with respect to whether (1) Monsterpatterns' discovery and retrieval of abandoned and discarded Pattern Envelopes constitutes misappropriation; (2) Monsterpatterns' sale of the abandoned and discarded Pattern Envelopes constitutes unfair competition; (3) Monsterpatterns' use of the Pattern Defendants' trademarks constitutes unfair competition; and (4) Monsterpatterns' use of the front and back of the Pattern Defendants' Pattern Envelopes for purposes of selling the Pattern Envelopes constitutes unfair competition.

143. Monsterpatterns' discovery and retrieval of abandoned and discarded Pattern Envelopes does not constitute misappropriation.

144. Monsterpatterns' sale of the abandoned and discarded Pattern Envelopes does not constitute unfair competition.

145. Monsterpatterns' use of the Pattern Defendants' trademarks does not constitute unfair competition.

146. Monsterpatterns' use of the front and back of the Pattern Defendants' Pattern Envelopes for purposes of selling the Pattern Envelopes does not constitute unfair competition.

147. Monsterpatterns seeks a declaratory judgment from this Court holding that (a) its discovery and retrieval of abandoned and discarded Pattern Envelopes does not constitute misappropriation; (b) its sale of the abandoned and discarded Pattern Envelopes does not constitute unfair competition; (c) its use of the Pattern Defendants' trademarks does not constitute unfair competition; and (d) its use of the front and back of the Pattern Defendants' Pattern Envelopes for purposes of selling the Pattern Envelopes does not constitute unfair competition.

148. Monsterpatterns seeks such a holding under Michigan law, and the law of any other applicable jurisdictions.

149. A judicial determination regarding Monsterpatterns' and the Defendants' respective rights is necessary and appropriate so that the Parties can ascertain their respective rights and properly engage in their businesses now and in the future.

150. WHEREFORE, Monsterpatterns seeks declaratory relief in the form of a judicial determination holding that Monsterpatterns' conduct has not and does not violate any unfair

competition laws.

Count Six

**Declaratory Relief of No Tortious Interference With Contractual Relations
Tortious Interference**

151. That Monsterpatterns hereby incorporates by reference paragraphs 1 through 150 above as though fully set forth herein.

152. The Pattern Defendants, individually and collectively, have claimed that Monsterpatterns has tortiously interfered with contractual relations between the Pattern Defendants and third party retailers.

153. The Pattern Defendants' assertions and claims to Monsterpatterns and third parties threaten to and have adversely affected Monsterpatterns' ability to pursue and expand its legitimate business of selling on the Internet, in a manner consistent with protections instituted through unfair competition laws, patterns that have been abandoned, discarded, and discontinued by the Pattern Defendants. Further, the Pattern Defendants' actions have had a chilling effect on Monsterpatterns' rights to free speech under the state and federal constitutions.

154. Based on the Pattern Defendants' claims, a justiciable and actual controversy exists before this Court with respect to whether (1) Monsterpatterns' discovery and retrieval of abandoned and discarded Pattern Envelopes constitutes tortious interference with contractual relations; (2) Monsterpatterns' sale of the abandoned and discarded Pattern Envelopes constitutes tortious interference with contractual relations ; (3) Monsterpatterns' use of the Pattern Defendants' trademarks constitutes tortious interference with contractual relations; and (4) Monsterpatterns' use of the front and back of the Pattern Defendants' Pattern Envelopes for

purposes of selling the Pattern Envelopes constitutes tortious interference with contractual relations.

155. At no time did Monsterpatterns know the terms of any contracts between the Pattern Defendants and any third parties.

156. Monsterpatterns has not sought to cause or instigate any breach of any contractual relations between the Pattern Defendants and third parties.

157. On information and belief, there has been no breach of any contractual relations between the Pattern Defendants and any third parties.

158. Monsterpatterns does not have contractual relations with the Pattern Defendants or the third parties with whom they claim Monsterpatterns has tortiously interfered.

159. Monsterpatterns continues to not know the terms of any contracts between the Pattern Defendants and any third parties.

160. Monsterpatterns' discovery and retrieval of abandoned and discarded Pattern Envelopes does not constitute tortious interference with contractual relations.

161. Monsterpatterns' sale of the abandoned and discarded Pattern Envelopes does not constitute tortious interference with contractual relations.

162. Monsterpatterns' use of the Pattern Defendants' trademarks does not constitute tortious interference with contractual relations.

163. Monsterpatterns' use of the front and back of the Pattern Defendants' Pattern Envelopes for purposes of selling the Pattern Envelopes does not constitute tortious interference with contractual relations.

164. Monsterpatterns seeks a declaratory judgment from this Court holding that (a) its

discovery and retrieval of abandoned and discarded Pattern Envelopes does not constitute tortious interference with contractual relations; (b) its sale of the abandoned and discarded Pattern Envelopes does not constitute tortious interference with contractual relations; (c) its use of the Pattern Defendants' trademarks does not constitute tortious interference with contractual relations; and (d) its use of the front and back of the Pattern Defendants' Pattern Envelopes for purposes of selling the Pattern Envelopes does not constitute tortious interference with contractual relations.

165. Monsterpatterns seeks such a holding under Michigan law, and the law of any other applicable jurisdictions.

166. A judicial determination regarding Monsterpatterns' and the Defendants' respective rights is necessary and appropriate so that the Parties can ascertain their respective rights and properly engage in their businesses now and in the future.

167. WHEREFORE, Monsterpatterns seeks declaratory relief in the form of a judicial determination holding that Monsterpatterns' conduct has not and does not constitute tortious interference with contractual relations.

Count Seven

Declaration of Acquiescence^[CM3]

168. That Monsterpatterns hereby incorporates by reference paragraphs 1 through 167 above as though fully set forth herein.

169. A justiciable and actual controversy exists before this Court with respect to whether, on account of the conduct of the Pattern Defendants described herein, the Pattern Defendants are barred by the equitable doctrine of acquiescence from challenging (1)

Monsterpatterns use of the Pattern Defendants' trademarks as described above; (2) Monsterpatterns use of the front and back of the Pattern Envelopes for purposes of online product display as described above; (3) Monsterpatterns acquisition of the Pattern Envelopes; and (4) Monsterpatterns sale of the Pattern Envelopes (collectively, "Monsterpatterns' Business").

170. On information and belief, the Pattern Defendants had actual knowledge of Monsterpatterns' Business for at least the last two years. At no time did the Pattern Defendants ever object to Monsterpatterns' Business. In fact, the Pattern Defendants referred their own customers on numerous occasions over a period of two years to Monsterpatterns for discontinued patterns. The Pattern Defendants provided these referrals to individuals contacting them by telephone and email.

171. The Pattern Defendants had actual knowledge of Monsterpatterns' Business and deliberately chose not to oppose it.

172. The Pattern Defendants have delayed unreasonably in asserting their challenge to Monsterpatterns' Business.

173. Monsterpatterns relied on the referrals obtained from the Pattern Defendants as condonement and approval of its sale of their patterns and other aspects of the business operations related thereto.

174. Monsterpatterns relied to its detriment on the Pattern Defendants' unreasonable delay in asserting its challenge to Monsterpatterns' Business.

175. The Pattern Defendants' delay in asserting their claims is not justified or excused in law or in equity. The Pattern Defendants' belated infringement charges have been and are

malicious and directly aimed at decreasing competition in the lucrative market for discontinued Pattern Envelopes by attempting to stop Monsterpatterns from continued online sale of Pattern Envelopes.

176. Indeed, Defendant McCall now lists another entity as a source for discontinued Pattern Envelopes.

177. By their conduct complained of herein, the Pattern Defendants have relinquished any and all rights they might ever have had to object to Monsterpatterns' Business.

178. WHEREFORE, Monsterpatterns seeks declaratory relief in the form of a judicial determination holding that the Pattern Defendants are barred by the equitable doctrine of acquiescence from challenging Monsterpatterns' Business.

Count Eight

Tortious Interference With Contractual Relations

Against Pattern Defendants

179. That Monsterpatterns hereby incorporates by reference paragraphs 1 through 178 above as though fully set forth herein.

180. A contract existed between Monsterpatterns and Defendant Digital River (the "Contract").

181. The Pattern Defendants knew of the Contract.

182. The Pattern Defendants unjustifiably interfered with the contractual relations between Monsterpatterns and Defendant Digital River under the guise of the DMCA.

183. Defendant Digital River terminated and breached the Contract between itself and Monsterpatterns.

184. The Pattern Defendants unjustifiably instigated the termination and breach of the Contract.

185. The Pattern Defendants' conduct proximately caused Monsterpatterns to suffer damages including, but not limited to, redeveloping the web site and contents, porting the web site and contents to a distinct and new server, lost placement in search engines and Internet ratings, increased costs of maintaining web site and contents, and lost revenues and sales, attorney's fees, and costs.

186. WHEREFORE, Monsterpatterns seeks recovery of compensatory and punitive damages against the Pattern Defendants for their tortuous interference with contractual relations between Monsterpatterns and Defendant Digital River.

Count Nine

Tortious Interference With Business Relations

Against Pattern Defendants

187. That Monsterpatterns hereby incorporates by reference paragraphs 1 through 186 above as though fully set forth herein.

188. Monsterpatterns had a valid business relationship with Defendant Digital River and many existing and potential Internet customers.

189. The Pattern Defendants knew of the business relationship with Defendant Digital River and Monsterpatterns' many existing and potential Internet customers.

190. The Pattern Defendants intentionally interfered with the business relationships between (1) Monsterpatterns and Defendant Digital River and (2) Monsterpatterns and its many existing and potential Internet customers.

191. The Pattern Defendants' intentional interference induced and/or caused the breach and/or termination of the business relationships between (1) Monsterpatterns and Defendant Digital River and (2) Monsterpatterns and its many existing and potential Internet customers.

192. The Pattern Defendants intentional interference proximately caused Monsterpatterns to suffer damages including, but not limited to, redeveloping the web site and contents, porting the web site and contents to a distinct and new server, lost placement in search engines and Internet ratings, increased costs of maintaining web site and contents, and lost revenues and sales, attorney's fees, and costs.

193. WHEREFORE, Monsterpatterns seeks recovery of compensatory and punitive damages against the Pattern Defendants for their tortious interference with business relations between (1) Monsterpatterns and Defendant Digital River and (2) Monsterpatterns and its many existing and potential Internet customers.

Count Ten
Violation of Digital Millenium Copyright Act
Against Digital River

194. That Monsterpatterns hereby incorporates by reference paragraphs 1 through 193 above as though fully set forth herein.

195. Digital River removed and permanently disabled Monsterpatterns' Digital River web site and all related content.

196. Monsterpatterns provided Digital River with a counter-notice pursuant to the applicable provisions of the DMCA, 12 U.S.C. § 512.

197. Digital River failed to replace the removed material of Monsterpatterns' Digital

River web site and failed to cease disabling access to the Monsterpatterns' Digital River web site and all related content in contravention of the DMCA, specifically 12 U.S.C. § 512(g).

198. Digital River's failure to comply with the DMCA, 12 U.S.C. § 512(g), proximately caused Monsterpatterns to suffer damages including, but not limited to, redeveloping the web site and contents, porting the web site and contents to a distinct and new server, lost placement in search engines and Internet ratings, increased costs of maintaining web site and contents, and lost revenues and sales, attorney's fees, and costs.

199. WHEREFORE, Monsterpatterns seeks to recovery of compensatory damages and punitive damages for Defendant Digital River's violation of the DMCA. Monsterpatterns further seeks attorney's fees for Defendant Digital River's violation of the DMCA.

GENERAL

200. Where conditions precedent are alleged, Monsterpatterns avers that all conditions precedent have been performed or have occurred.

201. Monsterpatterns demands a jury trial.

PRAYER FOR RELIEF

WHEREFORE, MONSTERPATTERNS accordingly and respectfully prays for judgment against the DEFENDANTS as follows:

1. That the Court enter judgment according to the declaratory relief sought;
2. That MONSTERPATTERNS be awarded compensatory damages in an amount to be determined at trial;
3. That MONSTERPATTERNS be awarded punitive damages;
4. That MONSTERPATTERNS be awarded its attorney's fees and costs in this action; and
5. That MONSTERPATTERNS be awarded any such other and further relief as this Court may deem just and proper or which Monsterpatterns may be entitled as a matter of law or equity.

Dated: Chicago, IL
May 19, 2003

PLAINTIFF,
MONSTERPATTERNS.COM LLC

By: Plaintiff's Attorney

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