

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WORLD SERVICE OFFICE, INC.,
a Charitable Corporation and
Trustee of the Copyrights,
Trademarks and Service Marks
for the Fellowship of
Narcotics Anonymous,

Plaintiff,

v.

DAVID MOORHEAD,

Defendant.

Civil Action No.

MEMORANDUM IN SUPPORT OF THE MOTION OF WORLD SERVICE OFFICE
FOR A PRELIMINARY INJUNCTION AND EXPEDITED DISCOVERY

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II. Factual Background

The Plaintiff, World Service Office, Inc. (hereinafter "WSO") is a California non-profit corporation. WSO is the service and support arm of the Fellowship of Narcotics Anonymous (hereinafter "the Fellowship" or "NA"), a charitable fellowship dedicated to assisting narcotics addicts (Tooredman Decl., ¶¶ 4, 5). Founded in 1953 in Southern California, the Fellowship is an organization comprising members situated throughout the United States and other parts of the world (Tooredman Decl., ¶ 2). The service structure of Narcotics Anonymous consists of the following. A group is any regularly held meeting of two or more members. Groups in a common geographic location make up an "Area." A significant number of Areas in a geographic location constitute a "Region." (Tooredman Decl., ¶ 3). The Fellowship's decision-making body is the World Service Conference.

WSO publishes Fellowship literature and serves as an information clearinghouse for new groups (Tooredman Decl., ¶ 5). In accordance with the direction of the World Service Conference, WSO holds the copyrights, trademarks and service marks to all Narcotics Anonymous literature as trustee in a charitable trust held on behalf of the entire Fellowship. The World Service Conference is the settlor of the charitable trust and WSO's actions are subject to the direction of the World Service Conference (Tooredman Decl., ¶ 6). To date, the World Service Conference has affirmed that WSO grant permission to four major Fellowship Service Offices in several parts of the world to reproduce certain Fellowship literature. World Service Conference has also specifically directed that WSO prosecute any party who infringes the Fellowship's copyrights, trademarks and service marks. (Tooredman Decl., ¶ 7).

WSO currently publishes and sells over twenty Fellowship works, including a 286-page basic text (hereinafter "Basic Text") entitled "Narcotics Anonymous". The Basic Text, which sells for approximately \$8.00, discusses the nature of drug addiction and sets forth the fundamental tenets of the Fellowship, including

Twelve Steps and Twelve Traditions. (Tooredman Decl., ¶ 6, 8).¹

The sale of the Fellowship's publications by the WSO, and in particular the Basic Text, provides the Fellowship with most of the resources required to fund its worldwide activities (Tooredman Decl., ¶ 9). These activities include the dissemination of starter kits for new groups, assistance for new Narcotics Anonymous communities around the world, salaries for WSO staff members, costs of WSO offices and overhead, translation of Fellowship literature into other languages, and the development of new Fellowship books and pamphlets (Tooredman Decl., ¶ 5).

Beginning in approximately June, 1990, WSO became aware that someone was producing an infringing version of the Basic Text. (Tooredman Decl., ¶ 11). The infringing books have been published with a light blue cover and contain the first ten chapters of the Narcotics Anonymous Basic Text (Third Edition, Revised) version, replacing the material on Traditions 4 and 9 with material from the

¹Other works published for the Fellowship by WSO include "Recovery and Relapse"; "Am I an Addict"; "The Triangle of Self-Obsession"; "Youth and Recovery",

Second Edition version (Tooredman Decl., ¶ 11, Hollahan Decl., ¶ 5, 6).

Defendant David Moorhead, who resides in this district, has identified himself as the key individual responsible for the creation of the infringing Texts. Moorhead, who uses the pseudonym "Grateful Dave", has produced and distributed 7,000 copies of the illicit text from this district. Based upon statements contained in a letter which Moorhead distributed to members of the Fellowship, Moorhead currently plans to produce 50,000 additional copies of the infringing Basic Texts and make them available to groups for \$.50 each. (Tooredman Decl., ¶ 12, Exhibit A). This threat was repeated to a WSO staff member. (Hollahan Decl., ¶ 3). Moorhead's letter has invited anyone wishing to purchase books to write to him at his address in Philadelphia or to call him at a phone number within this district. (Tooredman Decl., ¶ 12, Exhibit A). Hence, the act of copying has been admitted in this case by

the defendant. Moorhead has further threatened to begin distribution of counterfeit basic information pamphlets (Hollahan Decl., ¶ 3).

The illicit text being distributed and sold by defendant Moorhead includes unauthorized reproductions of the Fellowship's federally registered trademark and service mark "NARCOTICS ANONYMOUS" as well as a reference indicating that the illicit text is "Fellowship Approved" (Hollahan Decl., ¶¶ 5, 7). After the failure of repeated and good faith attempts to persuade Moorhead to voluntarily cease and desist from his infringing conduct, the present action was filed. (Tooredman Decl., ¶¶ 14-15, Hollahan Decl., ¶¶ 3, 4).

As will be shown below and as attested to in the appended Declarations of Stuart Tooredman and George Hollahan, the sale of the infringing texts threatens both the stability of the Fellowship and the cohesiveness of its message, as well as the financial basis of the WSO. In view of the clear damage and ongoing threat to the Fellowship of Narcotics Anonymous, WSO requests the entry of the preliminary injunction appended hereto and the grant of expedited discovery.

III. Argument

A. The Prerequisites for the Grant of A Preliminary Injunction

The conditions prerequisite to the grant of a preliminary injunction include:

- (1) a reasonable probability of eventual success in the litigation; and
- (2) that the movant will be irreparably injured pendent lite.

Moreover, while the burden rests upon the moving party to make these two requisite showings, the District Court should "take into account when they are relevant; the possibility of harm to other interested persons from the grant or denial of the injunction; and the public interest. In re Arthur Treacher's Franchise Litigation, 689 F.2d 1137, 1143 (3d Cir. 1982); Independence HMO Inc. v. Smith, 733 F. Supp. 983 (E.D. Pa. 1990). an additional 50,000 of the infringing Basic Text. (Tooredman Decl., ¶ 12).

2. WSO and the Fellowship Are Suffering and Will Continue to Suffer Irreparable Injury and Harm Resulting from Moorhead's Infringement of the Basic Text

A showing of a *prima facie* case of copyright infringement and a reasonable likelihood of success on the merits raises the presumption of irreparable harm. Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1254 (3d Cir. 1983) (and cases cited therein). A copyright plaintiff who makes out a *prima facie* case of infringement is entitled to a preliminary injunction without any detailed showing of irreparable harm. *Id.*; See, 3 Nimmer On Copyright, § 14.04 [A], 14-50, 14-51, and N.16 (Collecting Authorities).

Moorhead's acts of infringement are thus presumed to irreparably harm WSO. As stated in Unesda Doll Co., Inc. v. Regent Baby Products Corp., 355 F. Supp. 438, 455 (S.D.N.Y. 1972): "Irreparable damage . . . [in a copyright infringement action] is implicit in the nature of the wrong complained of." WSO has clearly demonstrated the threat and fact of immediate and irreparable harm. WSO has also clearly set forth a *prima facie* case of copyright infringement and is entitled to preliminary injunctive relief under Fed. R. Civ. Proc. 65(b).

3. The Denial of a Preliminary Injunction Would Harm Narcotics Anonymous and the Members of the Fellowship

Even putting aside the legal presumption of irreparable harm created by Moorhead's blatant and wanton acts of copyright infringement, the denial of a preliminary injunction would greatly harm the Fellowship as a whole. The Narcotics Anonymous Basic Text presents the fundamental message of the Fellowship (Torredman Decl., ¶ 8). The unauthorized printing of the Basic Text impairs the Fellowship's ability to maintain the integrity of both its identity and message (Torredman Decl., ¶¶ 6, 7, 8, 10, 14). Further, the acts of infringement undercut many years of work directed toward making the World Service Conference the single focal point where decisions significantly affecting the entire Narcotics Anonymous movement are implemented. Such decisions include those affecting the content of the Basic Text. (Torredman Decl. ¶¶ 8, 9). Finally, the unauthorized publication of the Basic Text undercuts the primary means for the Fellowship to support

Narcotics Anonymous World Services. (Tooreman Decl., ¶ 10). As noted above, the bulk of the Fellowship's worldwide services are funded through sales of its literature, and most notably the Basic Text. Moorhead is obviously planning to syphon off as much of those sales as he can. The potential of harm to WSO and the Fellowship is immense and any balancing of hardships tips decidedly toward the plaintiff.²

²Any showing of a detrimental effect on Moorhead should not be determinative. If that were a proper factor "then a knowing infringer [like Moorhead] would be permitted to construct his business around his infringement, a result this Court could not condone." *Apple Computer, supra*, 714 P.2d at 1255. Similarly, public interest considerations overwhelmingly support WSO and the Fellowship. Notwithstanding the fact that the Fellowship is a charitable organization dedicated to aiding narcotics addicts, "it is virtually axiomatic" that the public interest can only be served by upholding copyright protections and, correspondingly, preventing misappropriation of the skills, creative energies, and resources which are invested in the protected work. *Id.*

C. WSO is also Entitled to Preliminary Injunctive Relief for Moorhead's Acts of Federal and Common Law Trademark and Service Mark Infringement, Violations of 43(a) of the Lanham Act, Unfair Competition, and Trademark and Service Mark Dilution

As discussed above, in addition to the wholesale misappropriation of the Fellowship's copyrighted Basic Text, Moorhead has sold the infringing books with the "NARCOTICS ANONYMOUS" federal and common law trademark and service mark affixed prominently thereon. Moorhead's infringing text has also been distributed with a prominent mark which falsely indicates that the illicit text is "Fellowship Approved." (Hollahan Decl., ¶ 7, 8). WSO, acting in trust for the Fellowship, is clearly entitled to a preliminary injunction prohibiting further similar acts by defendant.

~~WSO is highly likely to prevail on the merits of its~~
WSO is highly likely to prevail on the merits of its counts for federal and common law trademark and service mark infringement, violation of §43(a) of the Lanham Act, dilution, and unfair competition. The threatened injury to the Fellowship's goodwill from Moorhead's wrongful acts is irreparable as a matter of law. The public interest clearly demands that Moorhead be restrained from deceiving members of the public into purchasing infringing books.

1. It Is Highly Likely That WSO Will Succeed on the Merits

The merits of WSO's trademark, service mark, §43(a), dilution and unfair competition claims are ultimately grounded on

two facts. First, that WSO holds exclusive legal rights in "NARCOTICS ANONYMOUS" as a trademark and service mark. Second, that Moorhead's current and threatened continued use and counterfeiting of the marks "NARCOTICS ANONYMOUS" clearly infringes those exclusive rights.

- a. WSO, as Trustee for the Fellowship, Holds Exclusive Rights in its Registered Trademark and Service Mark NARCOTICS ANONYMOUS

The federal trademark and service mark registrations for "NARCOTICS ANONYMOUS" for books, pamphlets, instructional manuals and drug counselling services held by WSO, are evidenced by the certificate of registration, appended to the Complaint submitted as Exhibit G (U.S. Reg. No. 2,476,774). The Fellowship has continuously used these marks in interstate commerce since 1953, and the certificate of registration serves as *prima facie* evidence of validity, ownership and use.

A certificate of registration of a mark upon the principal register provided by this chapter shall be *prima facie* evidence of the validity of the registration, registrant's ownership of the mark, and of registrant's exclusive right to use the mark in commerce in connection with goods or services specified in the certificate, subject to any conditions and limitations stated therein. 15 U.S.C. § 1057.

As provided by the Lanham Act, the registrations held by WSO are constructive notice to Moorhead that WSO holds the exclusive enforcement rights in the "NARCOTICS ANONYMOUS" trademark and service mark, as used in connection with the sale of books, instructional manuals, pamphlets and information sheets and drug treatment services.

Registration of a mark on the principal register...shall be constructive notice of the registrant's claim of ownership thereof. 15 U.S.C. §1113

- b. Moorhead's Current and Threatened Continued Use of "NARCOTICS ANONYMOUS" Infringes WSO's Exclusive Rights in the Trademark and Service Mark "NARCOTICS ANONYMOUS"

The federal trademark statute, 15 U.S.C. §1114, provides in pertinent part:

- (1) Any person who shall, without the consent of the registrant--
 - (A) Use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to deceive or mislead the public;

likely to cause confusion, or to cause mistake, or to deceive; or

- (B) Reproduce, counterfeit, copy, or colorably imitate a registered mark and apply such reproduction, counterfeit, copy, or colorable imitation to...advertisements intended to be used in commerce upon or in connection with the sale, distribution or advertising of goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake or deceive;

shall be liable in a civil action by the registrant for the remedies hereinafter provided.

Section 43(a) of the Lanham Act, 15 U.S.C. 1125(a), provides in pertinent part:

- (a) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which --

- (1) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or . . .

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

The standard of liability under 15 U.S.C. §1114, and 15 U.S.C. §1125(a), as under the common law³, is whether the defendant has used a trademark or service mark which would be likely to cause confusion as to the source or origin of the goods or services. Horizon Financial F.A. v. Horizon Bancorp, 2 U.S.P.Q.2d 1696, 1701 (E.D. Pa. 1987). To trigger liability under the Lanham Act, the infringer's mark and the owner's mark need only be confusingly similar. They need not be identical.

In the instant case, the marks of WSO and Moorhead are absolutely identical and the WSO marks have been intentionally counterfeited by the defendant. Moreover, the goods and services being sold and rendered by WSO and Moorhead are also virtually identical. Where, as here, the identity of the parties' services and goods is combined with identity of the mark at issue, liability is simply "open and shut," as a leading author on trademark law, Professor McCarthy, has observed:

Cases where a defendant uses an identical mark on competitive goods . . . are 'open and shut' and do not

involve protracted litigation to determine liability for trademark infringement. Most businesspeople know enough not to adopt a mark identical to that already in use in the same market. 2 J. McCarthy Trademarks and Unfair Competition § 23:3 at 56 (2d ed. 1984).

In view of the absolute identity of the marks and the products and services at issue, WSO respectfully submits that an extended analysis of the "likelihood of confusion" issue is

³The standard of liability for trademark and service mark infringement under Pennsylvania common law has been repeatedly held to be co-extensive with the standard of liability under Section 43(a). See, e.g., Mercury Foam Corp. v. L&M Sales & Marketing, 625 F.Supp. 87, 91 N.1 (E.D. Pa. 1985); Arma-Corp v. Nordic Co., 512 F.Supp. 1184, 1187 (W.D. Pa. 1981).

unnecessary in this case.⁴ "Where the marks are identical . . . the marks in themselves are evidence of likelihood of confusion." Interpaca Corp. v. Lapp, Inc., 721 F.2d 460, 463 (3d Cir. 1983) (quoting American Plan Corp. v. State Loan & Finance Corp., 365 F.2d 625, 639 (3d Cir. 1966), cert. denied, 385 U.S. 1011 (1967)).

⁴This court has long looked to the well established factors including the degree of mark similarity, the degree of product similarity, the intent of the defendant, and the degree of care likely to be exercised by consumers in assessing "likelihood of confusion". See American Express v. Pan American Express, 509 F.Supp. 348, 211 U.S.P.Q. 387 (E.D. Pa. 1981). Each factor strongly favors WSO. Moorhead's clear wrongful intent, however, is of particular note. Evidence of such intent justifies an inference that the infringer has been successful in enhancing the likelihood of successfully inducing consumer confusion:

If it can be shown that the selection of a name or symbol is part of a calculated or preconceived plan to play on the drawing power of a "congenial symbol" then this factor will assuredly enhance a plaintiff's position on the issue of likelihood of confusion. Baker v. Simmons Co., 307 F.2d 458, 465 (1st Cir. 1962).

2. The Harm to Defendant Does Not Outweigh WSO's and The Fellowship's Irreparable Injury

The issuance of a preliminary injunction prohibiting Moorhead's use of the trademark and service mark "NARCOTICS ANONYMOUS" will not substantially injure Moorhead. Any harm to Moorhead resulting from a preliminary injunction would be harm that Moorhead brought upon himself. Moorhead's counterfeiting and appropriation of the trademark and service mark "NARCOTICS ANONYMOUS" were clearly willful. Having adopted such a willful course of conduct, Moorhead cannot properly complain of preliminary restraint:

Defendant has brought these hardships on itself (himself). It is the duty of the newcomer to identify its product in a manner that will avoid a likelihood of confusion with the product of the first comer. Lasportsac, Inc. v. K-Mart Corp., 607 F.Supp. 183, 187 (E.D.N.Y. 1984), *aff'd*, 754 F.2d 71 (2d Cir. 1985). Accord Harold F. Ritchie, Inc. v. Chesabrough-Pond's, Inc., 281 F.2d 755, 758 (3d Cir. 1960); Blumenfeld Development Corp. v. Carnival Cruise Lines, Inc., 669 F.Supp. 1297, 1321 (E.D. Pa. 1987); Johnson & Johnson v. Quality Drug Manufacturing, Inc., 198 F.Supp. 222, 223 (E.D. Pa. 1961).

3. The Public Interest Favors the Issuance
of a Preliminary Injunction in This Case

Legal protection of trademarks and service marks rests, first and foremost, on protection of the public:

The trademark laws exist not to 'protect' trademarks, but . . . to protect the consuming public from confusion, concomitantly protecting the trademark owner's right to a non-confused public. Scott Paper Co. v. Scott's Liquid Gold, Inc., 539 F.2d 1225, 1228 (3d Cir. 1978) (quoting James Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266, 276 (7th Cir. 1976)).

In this case, the public interest clearly supports the preliminary injunction sought by WSO. Public confusion will inevitably arise from defendant's use of the mark "NARCOTICS ANONYMOUS" on infringing copies of the Basic Text.⁵ "Plaintiff, as well as the public, is entitled to protection from a situation, such as this, that is latent with possibilities of confusion, mistake or deception." Sweetarts v. Sunline, Inc., 380 F.2d 923, 927 (8th Cir. 1967). The individual who is deceived as to the identity of the services and goods he or she receives suffers an injury for which he or she will likely never receive compensation.⁶

D. WSO Requires Expedited Discovery

Fed. R. Civ. Proc. 30(a), 33(a), and 33(b) authorize a District Court to grant expedited discovery in appropriate circumstances. WSO has made a clear showing that defendant Moorhead, by his own admission, has sold 7,000 infringing copies of the Basic Text and has stated that he further intends to produce and distribute up to 50,000 additional copies of the infringing Basic Text. Moorhead is currently working through some group and possibly other intermediaries to distribute the infringing text. In order to determine the source and distribution in time to

⁵The Fellowship, a charitable organization, faces the loss of control over its reputation and goodwill, which have been established for nearly forty years. "These types of injury are notoriously difficult to prove." American Diabetes Association v. National Diabetes Association, 533 F. Supp. 16, 214 U.S.P.Q. 231 (E.D. Pa. 1981). The Fellowship's Traditions further require that it be "self-supporting", declining outside donations. Its "self-support" comes from literature sales. Moorhead's acts are diverting literature sales from the member's intended recipient, the WSO.

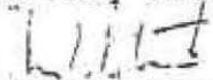
⁶This possibility is significant in the present case. New members to the Fellowship are typically chemically dependent and may be particularly vulnerable to deceptive conduct. Existing members have learned to trust the "Fellowship Approved" marking, and will be deceived into thinking that their literature purchase will in some way be benefitting the Fellowship and/or the Fellowship's World Service Office. Instead, the only beneficiary is David Moorhead.

prevent further irreparable harm, it is necessary that WSO be granted expedited discovery in this action. WSO therefore requests an Order granting leave to take full discovery prior to the hearing on the motion for preliminary injunction.

IV. Conclusion

Based upon the foregoing points and authorities, WSO, as trustee of the copyrights, trademarks, and service marks of the Fellowship of Narcotics Anonymous respectfully requests the entry of the attached Order granting preliminary injunctive relief and expedited discovery.

Respectfully submitted,



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DAVID MOORHEAD, :

Defendant. :

: Civil Action No. :

ORDER

Having come before me this ____ day of December, 1990,
upon the Motion of Plaintiff, World Service Office, Inc., it is

heresy ordered pursuant to Federal Rule of Civil Procedure 65(b) as follows:

Defendant David Moorhead, his agents, servants, employees, attorneys, and any and all other persons acting in active concert or in participation with him, who receive actual notice of this order, are hereby ordered to cease and desist from:

1. Using, selling, or trading in any manner utilizing the federally registered and common law trademark and service mark "NARCOTICS ANONYMOUS";

2. Reproducing, copying, distributing, or selling works identified in the following subsisting copyright registrations:

- (a) United States Copyright Registration TX2 837 638, entitled "Narcotics Anonymous" (5th Edition);

- (b) United States Copyright Registration TX2 254 607, entitled "Narcotics Anonymous" (4th Edition);

- (c) United States Copyright Registration TX2 250 588, entitled "Narcotics Anonymous" (3rd Edition Revised);

- (d) United States Copyright Registration TX2 342 402, entitled "Narcotics Anonymous" (3rd Edition);

- (e) United States Copyright Registration TX2 250 589, entitled "Narcotics Anonymous" (2nd Edition);

- (f) United States Copyright Registration TX2 112 598, entitled "Narcotics Anonymous" (1st Edition);

3. Reproducing, distributing, copying or selling works in violation of WSO's rights in any other proprietary or copyrighted subject matter;

4. Diluting or tarnishing in any way Plaintiff's reputation, goodwill and exclusive rights in and to the "NARCOTICS ANONYMOUS" service mark and trademark;

5. Using, authorizing, or causing the use of "Narcotics Anonymous" or any colorable imitation thereof, in or on any books, pamphlets, letterhead, business cards, signs, brochures, directories, advertisements, promotional items, or otherwise, as a name or mark purportedly identifying the Defendant Moorhead or any services or goods offered or proposed to be offered by Defendant Moorhead; and

6. Discarding, destroying, secreting, distributing, or otherwise divesting himself of possession, for any purpose, of any financial and/or business or personal records of reflecting or related to the purchase, sale, or other distribution of works reproduced, distributed, copied or sold in violation of WSO's copyrights, trademarks or service marks;

7. Encouraging, directing, or otherwise assisting, either directly or indirectly, any person, company or entity that may have possession of any financial and/or business or personal record of, reflecting or related to the purchase, sale, or other distribution of works reproduced, distributed, copied or sold in violation of WSO's copyrights, trademarks or service marks to discard, destroy, secret or otherwise divest themselves of possession of such records.

8. Discarding, destroying, secreting, distributing, or otherwise divesting himself of possession, for any purpose, of any means by which the creation of works violative of WSO's copyrights, trademarks or service marks have been created (including but not limited to printing plates);

9. Encouraging, directing, or otherwise assisting, either directly or indirectly, any person, company or entity that may have possession of any items used in the creation of copies violative of WSO's copyrights, trademarks or service marks (including but not limited to printing plates), to discard, destroy, secret or otherwise divest themselves of possession of such items.

10. Otherwise competing unfairly with Plaintiff.

Expedited discovery is hereby ordered in this matter.

Date: _____

U.S.D.J.