

**UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE**

REED ELSEVIER INC., through its REED
BUSINESS INFORMATION Division, and
REED ELSEVIER PROPERTIES INC.

Plaintiffs,

Civil No. _____

v.

JOSEPH P. ESCALANTE; JOSEPH P.
ESCALANTE, JOSH FREESE, WARREN
FITZGERALD, DAVID QUACKENBUSH,
JOSH FREESE, D/B/A THE VANDALS;
KUNG FU RECORDS, INC.

Defendants.

COMPLAINT

Plaintiffs, Reed Elsevier Inc., through its division Reed Business Information, and Reed Elsevier Properties Inc. (collectively "Reed Elsevier"), appearing through undersigned counsel, allege as follows based on first-hand knowledge and on information and belief:

1. This action stems from Defendants' (except for Defendant Josh Freese) past and ongoing violations of the Judgment (defined below) entered by the United States District Court for the Central District of California, and all the Defendants' past and ongoing breaches of the Settlement Agreements (defined below) regarding the Defendants' unauthorized use of the uniquely stylized graphics of the Plaintiffs' VARIETY, DAILY VARIETY and Flying V logo marks (defined below).

2. On September 3, 2004, Plaintiffs discovered that Defendants were infringing several of their protected VARIETY marks in marketing their recorded music. Defendants responded quickly, sending a cease and desist letter to Defendants on September 10, 2004, and shortly thereafter filing a lawsuit in the Central District of California alleging trademark infringement, and other violations. In order to settle and

resolve the lawsuit. Defendants committed to cease use of certain graphics and/or materials containing Plaintiffs VARIETY marks in connection with the sale of certain albums/CDs. Defendants' commitments were memorialized by (i) Defendants' execution of negotiated Settlement Agreements with Reed Elsevier, (ii) Defendants' (except Josh Freese) consent to Judgment entered by the Central District of California, and (iii) Defendants' sworn affidavits testifying to compliance with these commitments.

3. Notwithstanding the memorialization of these commitments, in December 2009 Reed Elsevier discovered multiple uses by Defendants of enjoined graphics and/or images on Defendants' own websites and other web sites under their control. When notified of these breaches and asked to remove the graphics, Defendants removed only the representative uses specifically identified by Reed Elsevier, leaving other uses known to Reed Elsevier -- indicating that Defendants (i) did not take Reed Elsevier's concerns with violations of the Judgment and breaches of the Settlement Agreements seriously and (ii) failed to engage in any substantive review of their 2009 and 2010 uses of the enjoined images. The continuing investigation efforts that Reed Elsevier has been forced to conduct, at significant expense, as a result of Defendants refusal to conduct a substantive review of their activities for compliance with their obligations under the Settlement Agreement and Judgment have identified yet further uses of the enjoined graphics/images leading to the initiation of this second lawsuit.

PARTIES

4. Reed Elsevier Inc. is a Massachusetts corporation having a principal place of business at 125 Park Avenue, New York, NY 10017. Reed Business Information is a division of Reed Elsevier Inc.

5. Reed Elsevier Properties Inc. is a Delaware corporation having a principal place of business at 1105 N. Market Street, Wilmington, Delaware 19801. Reed Business Information is a trademark licensee of Reed Elsevier Properties Inc.

6. On information and belief, Joseph P. Escalante (“Escalante”) is an individual residing in the Hollywood, California area and having a business address at 1405 Electric Ave, Seal Beach, California, 90740-6523.

7. On information and belief, Joseph P. Escalante, Josh Freese, Warren Fitzgerald and David Quackenbush, doing business as “The Vandals” are residents of the Los Angeles, California area and have a business address at 920 N. Citrus Avenue, Hollywood, California 90038.

8. On information and belief, Kung Fu Records, Inc. (“KFR”) is an active Nevada corporation having a last known principal place of business at 920 N. Citrus Avenue, Hollywood, California 90038 and a listed registered agent as Anita Rivas, Law Offices of Walner Rivas, 4064 La Salle Ave, Ste 1, Culver City California 90232

9. For reference purposes, Joseph P. Escalante individually and Joseph P. Escalante, Josh Freese, Warren Fitzgerald and David Quackenbush doing business as “The Vandals” shall collectively be referred to as “Vandals.”

JURISDICTION

10. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§1332(a) and 2201 *et seq.* Plaintiffs Reed Elsevier Inc. and Reed Business Information are residents of New York. Plaintiff Reed Elsevier Inc. is a citizen of Massachusetts by incorporation. Plaintiff Reed Elsevier Properties Inc. is a resident and citizen (by incorporation) of the State of Delaware. Defendants are all residents and citizens of California. The amount in controversy exceeds \$75,000, exclusive of interest and costs.

11. To aid in resolving disputes based on or arising from the Settlement Agreement, the Defendants agreed in Section 4.14 of the KFR/Vandals Settlement Agreement and Section 4.11 of the Freese Settlement Agreement:

- To consent to personal jurisdiction in the United States District Court for the District of Delaware;

- To permit Reed Elsevier to bring any action based on or arising out of the Settlement Agreement in the United States District Court for the District of Delaware;

12. Defendants are, therefore, subject to personal jurisdiction in this District, and have contractually waived any objections to venue in this District.

BACKGROUND

13. Plaintiff Reed Elsevier Inc., through its Reed Business Information division, offers publications and on-line information in the field of news and information in the entertainment industry, including for the music industry, in interstate commerce, under the marks VARIETY and DAILY VARIETY, and under a Flying V logo.

14. Plaintiff Reed Elsevier Properties Inc. is the owner of the trademarks and service marks VARIETY, DAILY VARIETY and the Flying V logo (the “VARIETY Marks”) used in connection with publications and on-line information in the field of news and information in the entertainment industry, including for the music industry. Plaintiff Reed Elsevier Inc., through its Reed Business Information division, is the licensee of Plaintiff Reed Elsevier Properties Inc. for use of the VARIETY Marks.

15. The Plaintiffs’ VARIETY Marks as generally used, appear as follows:

The word "VARIETY" in a stylized, bold, italicized serif font with a decorative flourish above the letters.The word "DAILY VARIETY" in a stylized, bold, italicized serif font. "DAILY" is in a smaller, blocky font to the left of "VARIETY", which has a decorative flourish above it.A stylized, bold, italicized letter "V" with a decorative flourish extending from the top right of the letter.

16. On or around June 29, 2004, Defendants KFR and Vandals adopted graphics for their band name “The Vandals” incorporated graphics from Reed Elsevier’s VARIETY Marks, and in particular in connection with their album/CDs entitled

“Hollywood Potato Chip.” The graphical presentation of “The Vandals” on album covers was:



17. KFR and Vandals also created and sold an album entitled “Gone With The Wind” of Punk Rock Samplers which incorporated substantially all of Plaintiffs’ Stylized VARIETY mark in what purports to be a mockup of a Daily Variety cover featuring a favorable review of the album:



18. On September 13, 2004, Reed Elsevier filed Civil Action No. CV04-7584 PA (“the Action”) against KFR and Vandals in the United States District Court for the Central District of California, alleging trademark infringement, trademark dilution, use of a false designation of origin, unfair competition, unjust enrichment and trademark counterfeiting under the Lanham Act and California law, based on KFR’s and Vandals’ activities relating to the offer and sale of products and services in commerce under marks incorporating the uniquely stylized graphics of the VARIETY Marks of Reed Elsevier.

19. Effective December 10, 2004, a confidential Settlement Agreement (the “KFR/Vandals Settlement Agreement”) was entered into between Reed Elsevier and Defendants Kung Fu Records, Inc., Joseph P. Escalante individually, and Joseph P.

Escalante, Warren Fitzgerald and David Quackenbush doing business as "The Vandals." A copy of the KFR/Vandals Settlement Agreement is attached as Exhibit A.

20. Effective December 10, 2004, a confidential Settlement Agreement was also entered into between Reed Elsevier and Defendant Josh Freese (the "Freese Settlement Agreement") and a copy of the Freese Settlement Agreement is attached as Exhibit B. The KFR/Vandals Settlement Agreement and the Freese Settlement Agreement shall collectively be referred to as "the Settlement Agreements."

21. On December 17, 2004, a Consent Judgment and Permanent Injunction ("Judgment") was entered in the U.S. District Court for the Central District of California against Joseph P. Escalante individually, and Joseph P. Escalante, Warren Fitzgerald and David Quackenbush doing business as "The Vandals," and Kung Fu Records, Inc. A copy of the Consent Judgment is attached as Exhibit C.

22. In accordance with the Judgment and Settlement Agreement, the revised graphic for "the Vandals" which appeared in the "Hollywood Potato Chip" album/CD was to appear as follows:



23. Reed Elsevier received Declarations of Compliance with the Consent Judgment and Permanent Injunction signed by Defendants, Josh Freese, Warren Fitzgerald and David Quackenbush, and dated December 13, 2004, in their individual capacities and signed by Defendant Joseph Escalante and dated January 10, 2004 (sic)/2005 on behalf of KFR, Joseph P. Escalante individually, and "The Vandals." These documents are hereafter referred to as the "Escalante/Vandals Affidavits." Copies of the Escalante/Vandals Affidavits are attached as Exhibit D.