

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. _____ Civ—Judge _____

CELLRDERM, LLC,

Plaintiff,

v.

MICROSOFT CORPORATION and
CRISPIN PORTER & BOGUSKY, LLC,

Defendants.

**PLAINTIFF CELLRDERM, LLC'S
ORIGINAL COMPLAINT AND JURY DEMAND**

Plaintiff Cellrderm, LLC files this Original Complaint and Jury Demand against Defendants Microsoft Corporation and Crispin Porter & Bogusky, LLC and respectfully states as follows:

I. INTRODUCTION

1. Plaintiff Cellrderm, LLC (“Cellrderm”) brings this action to enforce its copyrights in two original commercials that it created and owns. Defendant Microsoft Corporation (“Microsoft”) launched its Windows Phone 7 using commercials that incorporated substantial creative content from Cellrderm’s commercials. Defendant Crispin Porter & Bogusky, LLC (“CPB”) is the advertising agency that created these commercials. Microsoft and CPB’s (collectively “Defendants”) conduct constitutes copyright infringement in violation of the laws of the United States.

II. PARTIES

2. Plaintiff Cellrderm is a Florida limited liability company with its principal place of business at 755 Alamanda Street, Boca Raton, Florida 33486.

3. On information and belief, Defendant Microsoft Corporation is a Washington corporation with its principal place of business at One Microsoft Way, Redmond, Washington 98052-6399. Microsoft may be served through its registered agent, Chief Financial Officer, P.O. Box 6200 32314-6200, 200 E. Gaines Street, Tallahassee, Florida 32301.

4. On information and belief, Defendant CPB is a Delaware limited liability company with its principal place of business at 3390 Mary Street, Suite 300, Coconut Grove, Florida 33133. CPB may be served through its registered agent CT Corporation System, 1200 South Pine Island Road, Plantation, Florida 33324.

III. JURISDICTION AND VENUE

5. Counts One and Two of this action arise out of the Copyright Laws of the United States. Accordingly, this Court has subject matter jurisdiction over Counts One and Two under 28 U.S.C. §§ 1331 and 1338(a).

6. On information and belief, CPB resides and does business in Florida and in this District, and Microsoft does business in Florida and in this District. Defendants therefore have continuous and systematic contacts with Florida and this District sufficient for this Court to establish personal jurisdiction over them.

7. CPB resides and may be found within this District. Based on Microsoft's continuous and systematic contacts with Florida and this District, Microsoft is deemed to reside in this District under 28 U.S.C. § 1391(c). Venue is, therefore, proper in this Court under 28 U.S.C. § 1400(a). Additionally, a substantial part of the events or omissions giving rise to the claims alleged against CPB occurred in this District, because this suit concerns CPB's infringement of Cellrderm's copyrights while CPB resided in this District, and the infringing commercials were repeatedly broadcast in this District. Accordingly, venue is also proper under

28 U.S.C. § 1391(b).

IV. FACTUAL BACKGROUND

Background of Cellrderm and Cellrderm's Commercials

8. Cellrderm created and sells a novelty cellular abuse aid called Cell-R-Derm (the "Cell-R-Derm Product"). The Cell-R-Derm Product contains wearable Cell-R-Derm "patches" and a detailed users guide to help cell phone "addicts" overcome their addiction and improve their cell phone etiquette. While the Cell-R-Derm Product is a novelty, or gag, gift, it is designed to discourage cell phone overuse by humorously critiquing such use.

9. Cellrderm created two commercials to market the Cell-R-Derm Product. These commercials, called "Cellrderm: In the Bathroom" ("In the Bathroom") and "Cellrderm: In the Bedroom" ("In the Bedroom") (collectively, the "Cellrderm Commercials"), demonstrate the effects of cell phone overuse, particularly in inappropriate settings. The commercials are included on the CD submitted herewith as **Exhibit A**. Additionally, both commercials can be viewed online through the YouTube website. "In the Bathroom" is available at http://www.youtube.com/watch?v=Sq4E_njDM4s. "In the Bedroom" is available at <http://www.youtube.com/watch?v=DlAZuQHpe4U>.

10. Cellrderm is the sole owner of all rights, title, and interest in the Cellrderm Commercials. The Cellrderm Commercials are protected through federally registered copyrights. "In the Bathroom" is protected through Copyright Registration No. PA 1-735-906. "In the Bedroom" is protected through Copyright Registration No. PA 1-735-905. True and correct copies of these federal copyright registrations are attached hereto as **Exhibits B and C**.

11. The Cellrderm Commercials depict humorous scenes in which cell phone users use their phones in inappropriate settings. "In the Bathroom" begins as a man enters a public

restroom and walks to a urinal. While using the urinal, he looks judgmentally at the man next to him, who is using his cell phone at the urinal. The cell phone user then drops his phone into the urinal, and is forced to reach in to retrieve it. In “In the Bedroom,” a man lies in his bed texting, while a woman dressed in a black camisole attempts to attract his attention. When the man ignores her, the woman looks at him in surprise and confusion and then throws her camisole at him.

12. “In the Bathroom” has been available for public viewing on YouTube since September 29, 2009. “In the Bedroom” was uploaded to YouTube on October 19, 2009. Around this same time, the Cellrderm Product was widely advertised through a variety of online sources, including Facebook, Twitter, and other websites such as www.poshglam.com, www.radaronline.com, and www.blogs.hairboutique.com. Each of these online sources includes a link to the Cellrderm website in its advertisement. The Cellrderm website contains links to the Cellrderm Commercials on YouTube.

13. Samples of the Cellrderm Product were also widely distributed to magazines, newspapers, talk shows, and radio programs. The Cellrderm Product includes a link to the Cellrderm website, which links to the Cellrderm Commercials. Cellrderm specifically targeted its advertising efforts in the southern part of Florida, where both Cellrderm and CPB are located.

Defendants Copied Cellrderm’s Commercials

14. Approximately one year after Cellrderm released its commercials, Microsoft released two commercials called “Bathroom Really” and “Bedroom Really” to promote the product launch of its Windows Phone 7. According to the Microsoft Commercials, the phones are designed to reduce excessive cell phone use by getting the user “in, and out, and back to life.”

15. CPB is an advertising agency. On information and belief, Microsoft hired CPB to prepare its advertising campaign for the Windows Phone 7.

16. On information and belief, CPB “created” the “Bathroom Really” and “Bedroom Really” commercials for Microsoft. It did so by extensively copying the copyrightable expression from Cellrderm’s “In the Bathroom” and “In the Bedroom” commercials.

17. On information and belief, CPB created a compilation “Really” commercial, which features a montage of clips from various Windows Phone 7 commercials. The compilation commercial incorporates “Bathroom Really” and “Bedroom Really”—and the copyrightable elements copied from Cellrderm’s commercials—as focal points of the commercial.

18. Microsoft’s “Really,” “Bathroom Really,” and “Bedroom Really” commercials (collectively the “Microsoft Commercials”) are included on the CD submitted herewith as **Exhibit A**. They are also available to view on YouTube. “Really” is available at <http://www.youtube.com/watch?v=EHIN21ebeak>, “Bathroom Really” is available at <http://www.youtube.com/watch?v=7Z3KbFBf89Y>, and “Bedroom Really” is available at http://www.youtube.com/watch?v=k6__UnrRSGo.

19. Like the Cellrderm Commercials, “Bathroom Really” and “Bedroom Really” satirize the effects of cell phone overuse. “Bathroom Really” and “Bedroom Really” derive their entire sequence of events from the Cellrderm Commercials.

20. In “Bathroom Really” a man enters a public restroom and walks to a urinal. While using the urinal, he looks judgmentally at the man next to him, who is using his cell phone at the urinal. The cell phone user then drops his phone into the urinal, and is forced to reach in and retrieve it. In “In the Bedroom,” a man reclines in bed texting, while a woman dressed in a

black camisole attempts to get his attention. When the man ignores her, the woman looks at him in surprise and confusion. She then throws a pillow at the man.

21. The Microsoft Commercials copy substantial copyrightable expression from the Cellrderm Commercials. The Microsoft Commercials copy both the sequence of events and the character interplay found in the Cellrderm Commercials, which constitutes infringement of Cellrderm's copyrights. The Microsoft Commercials also copy other copyrightable expression, including but not limited to clothing, gestures, character appearance, camera angles, and other visual elements from the Cellrderm Commercials.

22. By way of example only, both "In the Bedroom" and "Bedroom Really" begin with similar framing and angling of the camera on the man, as he texts and leans in bed against propped up pillows. The women in both commercials wear black camisoles and have dark hair and olive-colored skin. Both women cast similar surprised expressions and gesture with their arms at the men who have rejected them.

23. In "In the Bathroom" and "Bathroom Really," both protagonists raise an eyebrow and look judgmentally at the cell phone user next to them who ultimately drops his phone into the urinal. At the moment the cell phone falls in the urinal, both commercials depict the cell phone user from his waist up, with the camera on his back, left side.

24. On information and belief, Microsoft has broadcast the infringing Microsoft Commercials as television advertisements and on YouTube since at least October 2010.

25. Cellrderm never authorized Defendants to copy the Cellrderm Commercials or to use them in any way. By copying the Cellrderm Commercials without compensating Cellrderm, Cellrderm has been deprived of the fair value for the use of its intellectual property rights.

26. On information and belief, both Microsoft and CPB are aware of Cellrderm's

ownership of the Cellrderm Commercials and that their conduct infringes Cellrderm's copyrights. On January 20, 2011, Cellrderm sent CPB a cease and desist letter regarding CPB and Microsoft's infringing activities. Nevertheless, the infringing Microsoft Commercials continue to be used in Microsoft's advertising campaign for the Windows Phone 7.

V. CAUSES OF ACTION

Count One: Copyright Infringement

27. Cellrderm re-alleges and incorporates by reference the allegations in the preceding paragraphs as though fully set forth herein.

28. Cellrderm owns the Cellrderm Commercials. The Cellrderm Commercials are original works of creation by Cellrderm.

29. When Cellrderm created the Cellrderm Commercials, Cellrderm was, and has since been, a citizen of the United States. Cellrderm's Commercials were created in the United States.

30. The Cellrderm Commercials have been federally registered and are entitled to the protection of federal copyright law. Cellrderm has complied in all respects with the Copyright Act of 1976, 17 U.S.C. § 101, *et seq.*, and all other laws of the United States with regard to the Cellrderm Commercials.

31. The Cellrderm Commercials contain a substantial amount of original material that constitutes copyrightable subject matter pursuant to 17 U.S.C. § 102(a) and which is protected under the Copyright Act of 1976, 17 U.S.C. § 101, *et seq.*

32. Defendants had access to the Cellrderm Commercials and subsequently started to reproduce, distribute, publicly perform, and/or publicly display copies of the Cellrderm Commercials and/or prepare derivative works based on the Cellrderm Commercials. These

copies and derivative works are substantially similar to the copyrightable elements contained in the Cellrderm Commercials. Defendants' conduct violates Cellrderm's exclusive rights under the Copyright Act of 1976, 17 U.S.C. § 101, *et seq.*

33. Defendants have acted without license from Cellrderm.

34. On information and belief, Defendants have knowingly, willfully, and deliberately infringed Cellrderm's copyrights in the Cellrderm Commercials and continue to do so in conscious disregard and violation of Cellrderm's exclusive rights. Defendants are liable as direct, vicarious, and/or contributory infringers.

35. On information and belief, Defendants have illegally profited from their infringement of Cellrderm's rights.

36. Cellrderm is entitled to recover actual damages and all profits received or otherwise achieved, directly or indirectly, by Defendants in connection with their infringement of the Cellrderm Commercials, in an amount within the jurisdictional limits of this Court.

37. As a result of Defendants' infringement, Cellrderm has suffered and, unless Defendants' use of the Cellrderm Commercials is enjoined, will continue to suffer irreparable injury for which there is no adequate remedy at law.

Count Two: Request for Injunctive Relief

38. Cellrderm re-alleges and incorporates by reference the allegations in the preceding paragraphs as though fully set forth herein.

39. Defendants have violated 17 U.S.C. § 101, *et seq.*, and Cellrderm is entitled to injunctive relief under 17 U.S.C. § 502(a).

40. Cellrderm requests that the Court issue preliminary and permanent injunctions enjoining Defendants and their respective officers, agents, servants, employees, and attorneys,

and all other persons in active concert or participation with Defendants or their respective officers, agents, servants, employees, and attorneys who receive actual notice of the injunction by personal service or otherwise, from doing, aiding, causing, or abetting the following:

- (a) Reproducing, distributing, publicly performing, or publicly displaying copies of any of Cellrderm's copyrighted works, including its commercials "In the Bathroom" and "In the Bedroom";
- (b) Preparing derivative works based upon any of Cellrderm's copyrighted works, including its commercials "In the Bathroom" and "In the Bedroom"; and
- (c) Engaging in any other acts that infringe Cellrderm's copyrights, including its copyrights in its commercials "In the Bathroom" and "In the Bedroom."

41. Cellrderm has shown a substantial likelihood that it will succeed on the merits of its claim of copyright infringement.

42. Cellrderm will suffer immediate and irreparable harm for which there is no adequate remedy at law if Defendants are not immediately enjoined from the conduct listed above.

43. The threatened injury to Cellrderm outweighs any injury that the injunction could cause Defendants. Furthermore, public policy favors the protection of copyrights, as through the requested injunction.

VI. JURY DEMAND

Plaintiff hereby demands a trial by jury of all issues alleged in this Complaint.

VII. PRAYER

WHEREFORE, Plaintiff Cellrderm, LLC (“Cellrderm”) prays that the Court enter judgment against Defendants Microsoft Corporation and Crispin Porter & Bogusky, LLC (collectively “Defendants”) as follows:

1. Ordering Defendants to account to Cellrderm for all profits derived by Defendants’ from their use of the “Bathroom Really,” “Bedroom Really,” and “Really” commercials;

2. Ordering Defendants to pay Cellrderm their profits and Cellrderm’s actual damages in an amount to be proven at trial;

3. Finding that Defendants have willfully and deliberately infringed Cellrderm’s rights, and that this is an exceptional case entitling Cellrderm to enhanced damages;

4. Awarding Cellrderm its costs of suit, including reasonable and necessary attorneys’ fees and expenses for prosecution and appeal, if any, of this matter;

5. Ordering Defendants to pay Cellrderm pre-judgment and post-judgment interest at the highest allowable rate on all sums awarded;

6. Preliminarily and permanently enjoining Defendants and their respective officers, agents, servants, employees, and attorneys, and all other persons in active concert or participation with Defendants or their respective officers, agents, servants, employees, and attorneys who receive actual notice of the injunction by personal service or otherwise, from doing, aiding, causing, or abetting the following:

- (a) Reproducing, distributing, publicly performing, or publicly displaying copies of any of Cellrderm’s copyrighted works, including its commercials “Cellrderm: In the Bathroom” and “Cellrderm: In the Bedroom”;

- (b) Preparing derivative works based upon any of Cellrderm's copyrighted works, including its commercials "Cellrderm: In the Bathroom" and "Cellrderm: In the Bedroom"; and
- (c) Engaging in any other acts that infringe Cellrderm's copyrights, including its copyrights in its commercials "Cellrderm: In the Bathroom" and "Cellrderm: In the Bedroom."

7. Ordering Defendants to file with this Court and to serve on Cellrderm within thirty (30) days after service on Defendants of the preliminary and permanent injunctions granted herein a report in writing, under oath, setting forth in detail the manner and form in which Defendants have complied with the injunction and order of the Court; and

8. Ordering all such other and further relief, at law or in equity, to which Cellrderm may be justly entitled.

Dated: July 11, 2011

Respectfully submitted,



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