

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

)	
Arline Paul, James A. Bellanca, and)	
Mark Paul, individuals,)	
)	
Plaintiffs,)	13-cv-7746
)	
v.)	Hon. Matthew F. Kennelly
)	
)	Hon. Arlander Keys, Magistrate Judge
Eric L. Miller, an individual, and Wicker)	
Park Press, Ltd.,)	
)	
Defendants.)	

**PLAINTIFFS’ MEMORANDUM IN SUPPORT OF
THEIR MOTION FOR A TRO AND A PRELIMINARY INJUNCTION**

Plaintiffs (sometimes “Editors”) submit this Memorandum in support of their motion for a TRO and a preliminary injunction against Defendants (sometimes collectively “Miller”).

I. WHY THIS RELIEF IS NEEDED

At the 28th International Self-Directed Learning Symposium taking place in early February, 2014, Plaintiff Editors will personally launch a high-level campaign to introduce their just completed and important book, *Becoming Self-Directed Learners: Student & Faculty Memoirs of an Experimenting High School 40 Years Later* (“the Center Book”), which they have been working on, wholly as volunteers, for almost five years.¹ On July 12, 2013 the Editors filed an application to register their copyrights in the Center Book, which is a collection of essays that were written specifically for inclusion in it. [PI Ex. 2, Editors’ July 12, 2013 Application to Register Copyrights in, *Becoming Self-Directed Learners: Student & Faculty Memoirs of an*

¹Apart from the delays Defendants have caused, the Center Book has taken years to complete because James Bellanca and Mark Paul have been earning livings while volunteering, and Arline Paul, who is 90, has for several years been providing home care for her husband, Stanley, 95, who suffers from advanced Alzheimer’s Disease. [PI Ex. 1, Affidavit of Arline Paul, ¶ 4]

Experimenting High School 40 Years Later, and related documents]

Plaintiff Editor James A. Bellanca, is an experienced and successful teacher, author, and publisher [PI Ex. 3, Aff. James A. Bellanca, ¶¶2-16, 20]² He has been asked to deliver a major address at the Symposium, and he will receive the prestigious Malcolm Knowles Award for lifetime contributions to the field of self-directed learning. [PI Ex. 3, Aff. James A. Bellanca, ¶ 27] Not least of these contributions were his central role in establishing New Trier High School's pioneering Center for Self-Directed Learning (the subject of the Center Book), which was open from 1972 through 1983, and his service as the Center's first Coordinator. [PI Ex. 3, Aff. James A. Bellanca, ¶¶ 3-6]

Plaintiff Editor Arline Paul was also instrumental in the establishment and success of the Center, where she served from the beginning as a teacher/facilitator and then also as its Coordinator from the time Mr. Bellanca retired from teaching until the Center closed. [PI Ex. 1, Aff. of A. Paul, ¶ 5-7] She will be formally recognized at the Symposium for her involvement in the Center and has been selected to participate on a panel of international experts that will discuss how to integrate self-directed learning approaches into existing educational settings. [PI Ex. 1, Aff. of A. Paul, ¶20]

Critically important third parties including potential reviewers, vendors, and purchasers of the Center Book will be attending the Symposium. During the event and after it, specialty media will certainly cover the book, bolstering the Editors' own efforts. There really could not be a more opportune time or place to introduce the Center Book into the current discussion taking place about the state of education today and about its future direction. [PI Ex. 1, Aff. of A. Paul, ¶¶19, 21]

Unfortunately, Miller, with whom the Editors had a publishing contract for six months until

² Defendants recognize this, see, PI Ex. 12, Defendants' State Court Complaint without Exhibits, ¶ 5.

the Editors terminated it, is claiming to own the copyrights in the Editors' work and has leveled wild accusations of copyright infringement against the Editors. [PI Ex. 4, 5/31/13 Letter of Gareth E. Gollrad, Esq.; 7/8/13 Letter of Gareth E. Gollrad, Esq.; 9/11/13 Letter of Gareth E. Gollrad, Esq.] Miller's copyright ownership claim and his scurrilous charges based on it are without factual or legal foundation as will appear, but unless they are blunted by the requested preliminary relief before, during, or at least soon after the upcoming Symposium and launch Plaintiffs will be irreparably harmed. [PI Ex. 3, Aff. J. Bellanca, ¶¶ 21-27; PI Ex. 1, Aff. of A. Paul, ¶ 21]

The requested relief will greatly reduce the irreparable harm the Editors would otherwise suffer because they will be able to point out that Defendants' charges and threats have been preliminarily evaluated by the Court and have been found lacking, at least at this point. Without the relief the Editors seek, Defendants can be expected to continue to spread their unsupportable charges just at the time those charges will cause the Editors the gravest irreparable harm with respect to book promotion, distribution, review, and sales as well as with regard to the Editors' reputations. [PI Ex. 3, Aff. J. Bellanca ¶¶ 23, 26] Indeed, one of the reasons the Editors have refrained from bringing their motion sooner is to narrow the opportunity Miller will have to cause mischief and interference once he learns of the launch and its prestigious venue. Based on Miller's prior conduct, described more fully below, the Editors' concern in this regard is completely justified.

In addition to the irreparable harm that will be caused by permitting Miller to persist in his irresponsible claims of copyright ownership and his onerous threats against the Editors based on them, his literally false advertising comprising false statements made on Miller's website, www.wickerpark-3ibooks.com and on his Face Book page, will continue to create market

confusion, thus irreparably harming the Plaintiff Editors and the public. This false advertising by Miller includes the literally false indications that Miller and his company remain involved with, and are the commercial source for, the authorized Center Book, and that the Editors are associated with the incomplete, inferior, and unauthorized work Miller is actually offering in its place. The truth is that the Editors repudiate the unauthorized work and that it forms the basis for the Editors' allegations of willful copyright infringement and unfair competition against Miller that are the subject of Plaintiffs' Complaint in this action.

Attempting to obviate the need for the instant motion, on December 23, 2013 the Editors' undersigned counsel hand delivered to Defendants' counsel a letter asking Defendants to withdraw in writing their allegations of copyright ownership in the Center Book and the threats of copyright infringement charges they have made against the Editors and also to correct their website. [PI Ex. 5, 12/23/13 Letter from C. Michael Kendall to Gareth E. Gollrad]

The letter requests Defendants to respond in writing prior to January 8, 2014, which was the date of the initial status conference in this action. They did not do so. *After* the January 8 status conference, in response to a direct oral inquiry, Defendants' attorney stated that Defendants would not take any of the actions Plaintiffs requested.

Just after the status conference, the Editors' undersigned counsel received an email from the U.S. Copyright Office indicating that Defendant Miller filed an application to register the infringing work *On Becoming a Self-Directed Learner: Memoirs of an Experimenting High School*, on behalf of Defendant Wicker Park Press, Ltd. [PI Ex. 6, 1/8/14 Email from Jennifer Ormson to C. Kendall] In addition to seeking clarifications of certain informalities in the Editors' application, the email contains the observation that the parties' respective file specimens "appear to have content in common," and informs the Editors that "the Office has also received a

statement, (undoubtedly made by Miller or his representative), that the works are identical.”³

Miller has no contractual basis for claiming ownership by assignment or otherwise, as appears below, and he did not “create” or author any portion of the Center Book. [PI Ex. 1, Aff. A. Paul ¶¶ 13, 14] His filing likely constitutes fraud on the Copyright Office, and it will hold up the Editors’ application and cast a shadow over the Editors’ good names and the Center Book.

The requested temporary and preliminary relief is appropriately tailored and is reasonably directed to protecting the Editors’ interests in maximizing the benefits to be derived from launching their book at an ideal place and time. To achieve these benefits, which include vital early sales, they must be able to make good-faith representations to potential endorsers, sponsors, reviewers, vendors, and even purchasing libraries that there is little threat of a successful copyright action against the Editors by Defendants, and therefore little chance of any negative publicity in connection with the Editors’ Center Book, and virtually no potential for third-party liability arising from commercial or other involvement with the Editors in connection with the Center Book. [PI Ex. 3, Aff. J. Bellanca, ¶¶ 22, 23, 25]

The requested temporary and preliminary relief is appropriately tailored and reasonably directed to protecting the Editors from the irreparable reputational harm they would otherwise suffer as victims of irresponsible allegations of copyright infringement by Defendants and from further false association on Defendants’ website with an inferior, incomplete work that in reality they repudiate.

The requested temporary and preliminary relief is appropriately tailored and reasonably directed to protecting the Editors and the public from the market confusion that will otherwise be caused by the literally false and misleading statements made on Defendants’ website,

³ Defendants can acknowledge this up front, or it can be conclusively established during an evidentiary hearing held in connection with the present motion, if necessary.

www.wickerpark-3ibooks.com and Facebook page, especially now that internet searches for the Editors' Center Book will undoubtedly soon become frequent.

II. BACKGROUND

The Center Book is a unique and significant contribution to the field of education. [PI Ex. 1, ¶¶ 22-24] All the memoirs were written for the Center Book in response to Jim Bellanca's and Arline Paul's requests, and all of them were provided *gratis*. Each author signed a transfer of rights in his or her memoir, giving the Editors the right to use it in perpetuity and in any and all media. [PI Ex. 7, Transfer of Rights Signed by Center Book Contributors]

Contributors include United States Senator Mark Kirk, Oscar nominated actress Virginia Madsen, and London based musical conductor David Abell. It also includes reviews and essays contributed at James Bellanca's request by several leading educators who were not involved with the Center for Self-Directed Learning [PI Ex. 1, Aff. of A. Paul ¶¶ 7, 25], parents of Center students, essays by Arline Paul and James Bellanca, photos of Center activities, and the heretofore unpublished writings about the Center by several Center faculty members who have passed away. A further description of the Center Book is provided in its catalogue sheet. [PI Ex. 8, Catalogue Sheet for Center Book]

Miller's infringing product undoubtedly comprises entirely or predominantly the memoirs and essays that he had received from the Editors and that were in his possession at the time the Editors terminated the publishing contract. [PI Ex. 1, Aff. of A. Paul, ¶14] While it is perforce substantially similar to the Editors' authorized work for that reason, it indisputably does not include updated and new materials added since the contract was terminated.

In the spring of 2012, when most of the former student memoirs for the Center Book had been collected, the Editors contacted Defendant Miller, a Center alumnus, about whether he

might be interested in publishing the Center Book. In November 2012 the parties entered into a publishing contract. [PI Ex. 3, Aff. of J. Bellanca, ¶¶ 17, 18; PI Ex. 9, Publishing Contract]⁴ Less than six months later, disappointed by a general lack of competence and a marked failure to follow through with tasks and responsibilities on Miller's part, the Editors terminated the contract on April 26, 2013 pursuant to the contract's at-will termination clause, paragraph 2(g) and, pursuant to the contract, asked Miller to provide an accounting of his "sunk costs." [PI Ex. 10, Emails: 4/25/13 from M. Paul to E. Miller, 4/25 from E. Miller to M. Paul, 4/26 from M. Paul to E. Miller]

On April 27, 2013, Miller sent the Editors a "Fees" invoice for types and amounts of charges with which the Editors vigorously disagree and have refused to pay [PI Ex. 1, Aff. of A. Paul, ¶ 12, 13] This seven and a half page invoice establishes unambiguously that Defendants drafted the terminated publishing contract [see, PI Ex. 11, 4/27/13 "Fees" Invoice, entry of 09/03/2012]

The contractual dispute over Miller's money demand resulted in Miller's filing a state court action against the Editors, *The Wicker Park Press, Ltd., and Eric Miller v. James Bellanca, Arline Paul, and Mark Paul*, 2013 L 009464. [PI Ex. 12, Defendants' State Court Complaint without Exhibits]⁵ Although the numbered paragraphs of the rambling state court complaint aver many disparate and dubious things, the complaint does not include any claim of copyright ownership by Miller. It also does not ask the state court to rule on Miller's singular legal theory that he is entitled to offer the accused work for sale and is entitled to represent that Defendants are publishing the Editors' book until such time as the Editors pay him the money he demands. The state court action seeks only damages.

⁴ Letter designations and page numbers hand written in marker on some of the Exhibits reflect the fact that those Exhibits were taken from Defendants' state court complaint against the Editors. (See, below)

⁵ The Editors have filed a Motion to Dismiss, which is currently pending and fully briefed.

Outside of his state court lawsuit, Miller has made statements to third parties that Defendants own “all rights” to the Center Book and that the publishing contract remains in “full force.” [See, e.g., PI 12, Miller’s State Court Complaint ¶ 77; PI Ex. 13, Comments Made by Miller on the Center for Self-Directed Learning Facebook page, pp. 7, 10] In addition, as described above, through his attorney Miller has repeatedly and aggressively threatened the Editors with charges of copyright infringement.

Miller has also continued on his website, www.wickerpark-3ibooks.com, to use the Editors’ names in a completely false association with the inferior, infringing book he is offering to the public, albeit with a different cover and under a former working title, *On Becoming a Self-Directed Learner: Memoirs of an Experimenting High School*, which title is confusingly similar to the title of the actual Center Book. Specifically, at least as recently as October 29, 2013, which is filing date of the Editors’ Complaint in this action, Miller was still offering the infringing book for sale on his website. [PI Ex. 14, October 29, 2013 Screen Grabs from Miller’s Website; PI Ex. 1, Aff. of A. Paul, ¶15]

Among other things, Miller represented on an order page that the book was “in stock,” and had a purchase price of \$22.50. As also appears in PI Exhibit 14, Miller makes literally false representations about the Editors’ association with the book, and the totally false representation that the Plaintiff Editors are Wicker Park Press, Ltd. “editors” apart from any connection with the book.

Sometime after the Editors filed their instant action in this Court, Defendants modified their website. Screen grabs taken January 25, 2014 reveal that Miller has removed the order page for the book and, while still claiming to be the source for the book and while still making all the actionable misrepresentations about the Editors, states that the book has been “POSTPONED!”

[PI Ex. 15, 1/25/14 Screen Grabs from Defendants' Website; PI Ex.1, Aff. of A. Paul ¶¶17, 18,] Defendants provide no reason for the "postponement" nor offer any information as to when "availability" may resume. Miller's false representations that what is presented as the Center Book is "postponed" just as the real book is about to be launched will cause the Editors irreparable harm and constitute further evidence of Defendants' conduct justifying the relief the Editors are seeking by way of their instant motion. Recent searches using the Google web browser reveal that a search for the term "Becoming Self-Directed Learners," which is the short title of the real Center Book, and other relevant terms lead to Miller's website and specifically to the literally false advertising about what Miller purports to be the Editors' book that he is promoting using their names. [PI Ex. 16, Various Recent Google Search Results]

In the near-term aftermath of the launch interest in and demand for the Center Book will be likely be greatest and [PI Ex. 3, Aff. of James Bellanca, ¶ 22] Ironically, the more successful the Editors are in promoting their book the more people will be led to the false statements on Miller's website which, among other things, state that the book is "POSTPONED," which is the opposite of the truth and which is the last thing the Editors want potential readers to think at this point. [PI Ex. 1, Aff. A. Paul, ¶¶ 26]

III. DISCUSSION

A. The Legal Standards Applying to The Editors' Motion Generally

In considering a motion for a preliminary injunction a court will first determine whether the moving party, 1) has an adequate legal remedy or will suffer irreparable harm if the requested relief is not granted and, 2) has some likelihood of success on the merits. *Ezell v. City of Chicago*, 651 F.3d 684, 695 (7th Cir. 2011). If these showings are made the court decides whether the balance of harms favors the movant or the opposing party and whether granting the

injunction is in the public interest. Id.

With respect to the balance of harms analysis, courts will not deny preliminary relief against a copier or plagiarist who complains that his “vested interests” would be disturbed by it. *Helene Curtis Industries v. Church & Dwight Co., Inc.*, 560 F.2d 1325, 1333 (7th Cir. 1977). As for the public interest consideration, with respect to copyright law it is served by active enforcement of the copyright laws, which encourages the creation of literary and artistic works. See, *Mazer v. Stein*, 347 U.S. 201, 219, 74 S.Ct. 460, 471 (1954). With respect to unfair competition—false advertising, passing off, trademark infringement and the like—the public interest is served by enjoining violations of the Section 43(a) of the Lanham Act, 15 U.S.C. §1125. *Abbott Laboratories, v. Mead Johnson & Co.*, 971 F.2d 6, 19 (7th Cir. 1992) (preliminary injunction against false advertising would serve public’s interest in truthful advertising); *Northern Star Industries, Inc., v. Douglas Dynamic LLC*, 848 F.Supp.2d 934, 950 (E.D. Wis. 2012) (enforcement of the Lanham Act protects consumers from confusion).

The standard for granting a motion for a temporary restraining order is identical to the standard for granting a preliminary injunction. *Crawford & Co. Med. Ben. Trust. v. Repp*, 2011 WL 2531844 (N.D. Ill. June 24, 2011); *The Little Tikes Co. v. Kid Station Toys, Ltd.*, 2008 WL 1805379 (N.D. Ill. Apr.18, 2008).

District Courts have broad discretion to grant preliminary injunctions, *Hoosier Penn Oil Co. v. Ashland Oil Co.*, 934 F.2d 882, 884-85 (7th Cir. 1991), and in this Circuit, even after *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 129 S.Ct. 365 (2008), courts use a “sliding scale” whereby, “...the more net harm an injunction can prevent, the weaker the plaintiff’s claim on the merits can be while still supporting some preliminary relief.” *Hoosier Energy Rural Electric Cooperative, Inc., v. John Hancock Life Insurance, Co.*, 582 F.3d 721, 725 (7th Cir.

2009). Presumably, the survival of the sliding scale analysis means that the converse remains true as well, i.e., that the stronger the plaintiff's case on the merits the less irreparable harm it must show, as was held in, e.g., *Ty v. GMA Accessories, Inc.*, 132 F.3d 1167, 1172 (7th Cir. 1997), although the plaintiff must show a likelihood that it will suffer *some* degree of irreparable harm in the absence of the requested preliminary relief. *Winter*, 555 U.S. at 22, 129 S.Ct. at 375.

In this case the scale “slides” in favor of Editors both ways. With respect to the merits the Editors' case is strong and Defendants really have no defense on the merits at all. The Editors' burden on this element is not heavy. In order to prevail they must demonstrate only more than a negligible likelihood of success. *Meridian Mutual Ins. Co., Inc., v. Meridian Ins. Group, Inc.*, 128 F.3d 1111, 1114-15 (7th Cir. 1997) With respect to irreparable harm, the Editors will likely suffer significant, practical, identifiable irreparable harm if their motion is not granted as Mrs. Paul and Mr. Bellanca detail in their respective affidavits [PI Exs. 1 & 3]. As such, the instant motion with respect to the Editors' copyright claims more than satisfies the standard reemphasized in *eBay Inc., v MercExchange, L.L.C.*, 547 U.S. 388, 392, 26 S.Ct. 1837, 1840 (2006) (irreparable harm cannot be presumed just on the basis that infringement has occurred.)

Whether the Seventh Circuit will apply *eBay* to Lanham Act cases is not known, but in the past, irreparable harm from false advertising and trademark infringement has been presumed *Abbott Labs*, 971 F.2d at 16, 18 (irreparable harmed presumed, “even absent showing of business loss.”) In any event, in this case the Editors do not need to rely on a legal presumption. Miller's literally false advertising, which amounts to an attempt at passing off the infringing work as that of the Editors and includes the prominent use of the Editors' names in an obvious attempt to trade on their name recognition and good will in the self-directed learning, meets the *eBay* requirements.

The “balance of harms” overwhelming favors the Plaintiff Editors. While their interests will never recover if Defendants’ conduct is not enjoined, Defendants, who have no right to do what they are doing in any event, have an adequate remedy at law to whatever extent is provided by the parties’ former contract.

B. THE EDITORS ARE ENTITLED TO A TRO AND A PRELIMINARY INJUNCTION BASED ON THEIR COPYRIGHT CLAIMS

There are two elements a plaintiff must establish in a copyright infringement case, namely: 1) that the plaintiff holds valid copyrights; and, 2) that the defendant has copied the plaintiff’s work. *Schrock v. Learning Curve International, Inc.*, 586 F.3d 513, 517, citing, *Feist Publications, Inc., v. Rural Telephone Service Co., Inc.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 1296 (1991).

The Center Book, a compilation or collective work comprising discrete works created specifically for it, is a proper subject for copyright ownership and registration, 17 U.S.C. §101 (“The term ‘compilation’ includes collective works”), and 17 U.S.C. § 103. Defendants cannot gainsay this, having themselves filed an application to register, albeit a fraudulent one. Copyrightability is an issue of law for the court, *Gaimain v. McFarlane*, 360 F.3d 644, 648-49 (7th Cir. 2004), but the Editors respectfully submit that copyrightability is not an issue in this case.

The authors of the memoirs collected in the Center Book transferred their rights in them to the Editors in writing. These transfers of right meet the requirements of 17 U.S.C. §§ 201(c), 201(d), and 204(a).

Given Miller’s comments to the Copyright Office and all the other evidence, the issue of “substantial similarity” between the Center Book and the accused product is not a controversial one and, of course, neither is Miller’s access to the Editors’ work. Under the facts of this case,

therefore, inference of copying may be drawn without additional evidence. *Bucklew v. Hawkins, Ash, Baptiste & Co., LLP*, 329 F.3d 923, 926 (7th Cir. 2003). In addition, just the fact that they filed a copyright application necessarily means Defendants have copied the Editors' protected intellectual property. And for months Miller has been offering the accused work for sale to the public, which the Copyright Office considers, "publication." See, Copyright Office Circular 1, <http://www.copyright.gov/circs/circ01.pdf>. "Copyright infringement is an intentional tort," *Id.* at 931, and Miller's intent to copy is not open to serious dispute.

The Editors may pursue their copyright infringement action in this Court having met the requirements of this Circuit for doing so. *Chicago Board of Education v. Substance, Inc.*, 354 F.2d 624, 631 (7th Cir. 2003) ("***an application for registration must be filed before the copyright can be sued upon.")

In contrast to the prodigious merits of the Editors' case, Miller cannot raise any supportable assertions of copyright ownership. In the extinguished publishing contract Miller effectively acknowledges the Editors' copyright ownership in the Center Book. The contract provided that Miller could register the copyright, but only "***in the *Author's* name***", and Defendants could only sue third parties for copyright infringement in the *Author's* name.⁶ (Emphasis added) [Ex. 8, p.2, clause 3(c); p.3, clause 4(c)] As the Court can easily confirm, there is no provision in the short contract that assigns copyrights to Miller under any circumstances.

This is typical for the industry, as Editor James Bellanca explains. [PI Ex. 3, Aff. of J. Bellanca, ¶¶ 19, 20] Miller acknowledges that Mr. Bellanca "is experienced as an author and publisher in the field of academic publishing. [PI Ex. 11, ¶ 5] As is standard in the industry, what Miller had was a license to publish the Center Book, which license was extinguished when the publishing contract was terminated prior to publication. Even before the license was

⁶ The contract contains standard form provisions and refers to the Editors as "Author."

terminated it would have been a violation of it for Miller to attempt to register copyrights in the Editors' work, or an early version of it, in his name or in the name of his company. By doing so, he has committed copyright infringement:

It is an 'axiomatic copyright principle that a person may exploit only such copyrighted literary material as he either owns or is licensed to use.' *Stewart v. Abend*, 495 U.S. 207, 223, 110 S.Ct. 1750, 109 L.Ed.2d 184 (1990). It is also undisputed that a 'use' of copyrighted material which exceeds the scope of the license constitutes an infringement. *NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 235 n. 5 (7th Cir.1995).

Liu v. Price Waterhouse, LLP, 182 F.Supp. 666, 673(N.D. Ill. 2001).

Recently, since this case for willful copyright infringement was filed, Miller has stated that he never sold any copies of the infringing work. That remains to be seen. Financial loss is not a necessary legal element of the Editors' copyright infringement cause of action anyway. *In re Aimster Copyright Litigation*, 334 F.3d 643, 649 (7th Cir. 2003). Very, very recently, after this action was filed, Miller withdrew the "for sale offer" on this website, but that tardy act certainly does not render the requested preliminary relief unnecessary or unjustified. "...[C]essation of an unlawful practice doesn't exonerate a defendant, since unless enjoined he might resume infringing." *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 762 (7th Cir. 2012), citing, *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189(2000). The Editors respectfully submit that this is especially true in this case where Defendants are still engaged in so many unlawful acts that are harming the Editors.

B. THE EDITORS ARE ENTITLED TO A TRO AND A PRELIMINARY INJUNCTION BASED ON THEIR LANHAM ACT CLAIMS

Miller's acts of unfair competition against the Editors are myriad and include literally false representations in his advertising that were and are being made in a commercial setting (Miller's website) in interstate commerce, and that includes, but is not limited to producing the Editors'

names on depictions of the cover of the accused work and elsewhere in association with it. *Cf.*, *Abbot Laboratories* 971 F.2d at 13-14, and referencing, *PPX Entertainers Inc., v. Audiofidelity Entertainers, Inc.*, 818 F.2d 266, 272 (2nd Cir. 1987) (“record album cover falsely represents that enclosed record includes musical performances by Jimi Hendrix.”) Since the advertising is literally false, the Editors do not need to show any actual consumer confusion in order to be entitled to the preliminary relief they seek. *Hot Wax, Inc., v. Turtle Wax, Inc.*, 191 F.3d 813, 821 (7th Cir. 1999). While the Editors are not trying to personally enrich themselves through sales of the Center Book, [PI. Ex. 1, Aff. of A. Paul, ¶ 26], Miller’s false advertising, if not stopped now, will unquestionably hurt sales and distribution in ways that cannot easily be quantified, but which constitute irreparable harm nonetheless. *Cf. Hyatt Corp. v. Hyatt Legal Services*, 736 F.2d 1153, 1158-59 (discussing effect of trademark dilution).

CONCLUSION

For the reasons stated herein and in their accompanying motion, the Editors earnestly submit to the Court that the relief they have requested, which only places them where they rightfully should be and would be without Defendants’ wholly unjustified conduct, should be granted.

Respectfully submitted,
/s/ C. Michael Kendall

C. Michael Kendall
Plaintiffs’ Attorney
662 Green Briar Lane
Lake Forest, IL 60045
847-987-2597
cmkendall5555@gmail.com

CERTIFICATE OF SERVICE

I filed the attached Memorandum in Support of Plaintiffs' Motion for a Temporary Restraining Order and a Preliminary Injunction using the CM/ECF system and thereafter, on January 29, 2014, emailed a copy of the filed document to Defendants' attorney at gareth@garethgollrad.com since, to the best of my knowledge, Mr. Gollrad is not yet an electronic filer. I further certify that on January 29, 2014, I caused a copy the identified document to be served via next day mail, to:

Gareth E. Gollrad, Esq.
GARETH E. GOLLRAD, LLC
1338 W. Madison Street,
Apartment 3E
Chicago, IL 60607

/s/ C. Michael Kendall