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PATENTS,
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March 13, 2009

Judge Ramon E. Reyes
United States District Court
225 Cadman Plaza East
Brooklyn, NY 11201

Re: Index No. CV 08 3367
Vadim Mikhlyn, et al. v. Ana Bove, et al.
Our file No. 1851.004

Dear Judge Reyes:

This letter is submitted following a telephone conference March 6, 2009 with Your Honor concerning an objection by plaintiffs to the timeliness of defendants' amended answer and counterclaims as well as the issue of subject matter jurisdiction.

During the telephone conference, Your Honor indicated you were disposed to allow the amended answer and counterclaim to be entered, but Your Honor requested a letter concerning issues raised by plaintiff as to subject matter jurisdiction.

As a background, ^{Dkt. 66} this case arose when plaintiff sued defendant, alleging a number of counts, including interference with plaintiff's business. Defendant counterclaimed alleging copyright infringement for a copyright registration to a website involving the sale of embroidery patterns. The court denied both parties' motions and the court noted that defendants did not have registrations to the designs themselves apart from the website registration.

Subsequently, defendants began a program to register individual ones and collections of their designs. As of the date of filing the amended complaint, defendants had filed seventy (70) individual copyright applications, which are attached hereto as Exhibit A. Since February 18, 2009, when defendants had received three registrations, it has received an additional nineteen, for a total of twenty-two at this time (Exhibit B).

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The Copyright Office recently changed its procedures and allows filings to be made online. The experience of the firm of Levisohn Berger LLP, attorneys that practice before the Copyright Office, is that such applications take approximately four months from the filing date for an application to be issued as a registration. In the present instance, as of the current date twenty-two registrations have already been issued of the 70 applications, and the balance will be issued in due course. We say this because each of these registrations is substantially the same except for the design being registered. The fact that twenty-two have been approved as filed suggests all will be approved in due course, and it is merely a matter of time for the registration numbers to be assigned to the applications already filed.

With the foregoing as a backdrop, this letter is directed to the law on this situation.

A certificate of registration is generally required for a court to have subject matter jurisdiction over a copyright infringement matter. Greene v. Columbia Records, 03-CV-4333, 2004 WL 3211771 (March 1, 2004, S.D.N.Y.). However, some courts have allowed copyright actions to move forward despite the movant having filed a copyright application and still not receiving a response from the Copyright Office. Greene v. Columbia Records, 03-CV-4333, 2004 WL 3211771, *3 (March 1, 2004, S.D.N.Y.) (Even though the amended complaint was dismissed, court acknowledged that a few courts are satisfied with a pending application for subject matter jurisdiction); Well-Made Toy v. Goffa International Corp., 210 F.Supp. 2d 147, 157 (E.D.N.Y. 2002) (Action proceeded despite plaintiff submitting a copyright application and fee and having no response from the Copyright Office).

Even in those matters where copyright actions were dismissed due to movants having failed to cure the jurisdictional defect, courts still allotted time to acquire a registration and amend the complaint to remedy these jurisdictional defects. Greene v. Columbia Records, 03-CV-4333, 2004 WL 3211771, *4 (March 1, 2004, S.D.N.Y.) (Court dismissed case because plaintiff never indicated over a several month time period that he acquired a registration); Twisted Records v. Rauhofer, 2005 WL 517328 (March 3, 2005, S.D.N.Y.) (Court allotted one year time period after initiation of lawsuit to plaintiff to amend complaint with certificate partially due to the Copyright Office having lost the application); J.Racenstein & Co, Inc. v. Wallace, 96-CV-9222, 1997 WL 605107 (Oct. 1, 1997, S.D.N.Y.) (Court allotted a seven-month-time period for

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movant to amend the Complaint); Historical Truth Productions, Inc. v. Sony Pictures, 1995 WL 693189 (March 3, 2005, S.D.N.Y.) (Plaintiff amended the Complaint one year after filing of the Initial Complaint). The reason is that “a formalistic dismissal, followed by a re-registration and commencement of a new action, is unnecessary and would be wasteful.” Historical Truth Productions, Inc. v. Sony Pictures, 93-CV-5529, 1995 WL 693189 (March 3, 2005, S.D.N.Y.) quoting Computer Associates International, Inc. v. Altai, 775 F. Supp 544, 557 (E.D.N.Y. 1991), *aff’d in part, vacated in part on other grounds*, 982 F.2d 693 (2d Cir. 1992).

With regard to the issued registrations, plaintiffs can not raise a subject matter of jurisdiction defense. As to those which are pending, defendants’ issue is formalistic and will be mooted as the additional registrations are granted. It would be wasteful to have additional lawsuits filed as the registrations are granted since the likelihood of such granting is almost without question in view of the experience of the registration of the first 22 of the 70 applications.

Fed.R. Civ.P. 15(a) allows the court to grant leave to amend “when justice so requires.” However, in this case, Plaintiff has not been harmed to justify dismissing the case. A motion to amend should be denied “if there is an apparent or declared reason—such as undue delay, bad faith or dilatory motive . . . , repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of an amendment, [or] futility of an amendment.” Dluhos v. Floating and Abandoned Vessel Known as “New York,” 162 F.3d 63, 69 (2d Cir. 1998)(quoting Foman v. Davis, 371 U.S. 178, 182 (1962)).

To determine whether a party would be unduly prejudiced by an amendment, courts consider several factors to determine the impact of a new claim: whether the (i) opponent would be forced to expend significant additional resources to conduct discovery and prepare for trial, (ii) significantly delay the resolution of the matter, or (iii) prevent the opponent from bringing a timely action in another jurisdiction. Monahan v. New York City Department of Corrections, 214 F.3d 275, 284 (2d Cir. 2000).

However, delay by itself does not provide a basis for denying a motion to amend. Block v. First Blood Assocs, 988 F.2d 344, 250 (2d Cir. 1993). Defendant’s amended answer and counterclaims, containing a list of copyright applications filed with the Copyright Office, was filed within the calendar deadline set by this Court. Even though prejudice tends to increase with delay, delay

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by itself is rarely a basis to deny a motion to amend. Saxholm AS v. Dynal, Inc., 938 F.Supp 120, 123 (E.D.N.Y. 1996).

This amendment would also not delay resolution of this matter. Courts even have gone so far as to allow parties to amend the complaint after the close of discovery, especially when the new claim is based on the same set of key facts as compared to the original claims. Twisted Records, Inc. v. Rauhofer, 03-CV-2644, 2005 WL 517328, *7(March 3, 2005, S.D.N.Y.); Purdy v. Town of Greenburgh, 166 F.Supp.2d 850, 859 (S.D.N.Y. 2001). Defendant's request has certainly caused no delay in the resolution of this case.

There will be no delay in the resolution of this matter since issues relating to the registrations are substantially similar. As stated above, the only thing that changes is the designs, and plaintiffs have and make no claim to participating in any of the designs which are the subject of these registrations.

In the initial Answer and Counterclaims filed last fall in 2008, Defendant submitted one copyright registration and its deposit item was depicted as an internet catalog. As stated above, Judge Sifton noted that the deposit was a single deposit of a website and many individual designs, but there were no registrations to the designs or collections of designs by themselves.

The instant amendments revolve around similar sets of key facts as compared with the initial Answer and Counterclaims. Each of the applications is filled out substantially identically except for the first date of publication, date of creation and, sometimes, the actual authors who contributed to the designs. In no case were plaintiffs authors of any of the designs. The same set of key facts regarding the creation of the designs applies to each of the copyright registrations and applications. Since all of these designs are known to plaintiffs and were part of the initial copyright registration, plaintiffs already had notice that defendants were claiming copyright rights to the specific embroidery designs, and these amendments provide no surprise to plaintiffs.

The dispute between the parties arose because defendants' claim plaintiffs have essentially taken away the entirety of their business; changed passwords; taken over control of finances and the entirety of the business, all to the exclusion of defendants, who created, started and have always continued to work actively in this business. Plaintiffs have benefited by having the time to

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utilize all of defendants' assets, including their copyrights, so long as this case remains in process. The longer a decision is delayed, the longer plaintiffs will continue to use and abuse defendants' properties. All of these designs created by defendants are being infringed on a daily basis by plaintiffs, and since the court has subject matter jurisdiction for at least 22 copyright registrations which have already been issued, subject matter jurisdiction should allow to remain in place for the remaining applications so identified which will receive registration numbers in due course.

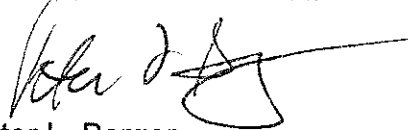
Conclusion

In view of the above and Exhibits 1 and 2 attached hereto, there is no question that the subject matter of jurisdiction attaches to the 22 registrations which have already been processed and approved. It would be prejudicial to defendants for the reasons stated above because failure to allow all 70 to be in this litigation will allow plaintiffs to continue to infringe as many as they can for so long as they can while they also continue to control defendants' money, all of which continues to damage defendants for which defendants are entitled to swift resolution.

There is no prejudice to plaintiffs, and to the extent that additional discovery is required, the court has indicated a willingness to allow such discovery so that this matter may proceed as efficiently as possible.

In view of the above, subject matter jurisdiction already exists for at least 20 of the registrations for which the Copyright Office has issued registration numbers and will shortly be also formally in place for the remaining applications as they also receive registration numbers. Plaintiffs' motion to dismiss for lack of subject matter jurisdiction will not succeed.

Respectfully submitted,
LEVISOHN BERGER LLP



Peter L. Berger
Copyright Attorneys for Defendants

PLB:wr
cc: Val Mandel, PC

EXHIBIT A

Application No.	Filing Date	Title
1) 1-134317046	11/17/2008	SweetFashion Roses set
2) 1-134312785	11/17/2008	Violets Borders set
3) 1-134312291	11/17/2008	All About Violets set
4) 1-136475634	11/23/2008	Violets Alphabet Large
5) 1-136541444	11/24/2008	Old Fashioned Charm
6) 1-136541382	11/24/2008	Heirloom
7) 1-136541342	11/24/2008	Applique
8) 1-136475713	11/23/2008	Violets Alphabet - Small
9) 1-136541577	11/24/2008	Sunflowers Alphabet
10) 1-136541547	11/24/2008	Roses Essentials set
11) 1-136541516	11/24/2008	Roses #1
12) 1-138274378	12/1/2008	Norway Roses
13) 1-138274345	12/1/2008	Lovely Lilies
14) 1-138274283	12/1/2008	Calla Lilies
15) 1-138274253	12/1/2008	Fall Decorations
16) 1-138274222	12/1/2008	Strawberries Flavour
17) 1-136541607	11/24/2008	3 Napkins Set
18) 1-152485869	1/19/2009	Classic Tableware
19) 1-155089625	1/28/2009	Frames set
20) 1-153485154	1/22/2009	Tea Cozies Set
21) 1-153485114	1/22/2009	Square Tablemap Set
22) 1-153485064	1/22/2009	Wreath & Borders Set

23)	1-153484944	1/22/2009	Small Tablemap Set
24)	1-153484774	1/22/2009	Large Tablemap Set
25)	1-153484654	1/22/2009	Celtic Ornaments
26)	1-155089625	1/28/2009	Frames set
27)	1-161906790	2/18/2009	Roses Set #6 - 5 cross stitch machine embroidery d...
28)	1-161906758	2/18/2009	Roses Set #5 - 3 cross stitch machine embroidery d...
29)	1-161906726	2/18/2009	Roses Set #4 - 5 cross stitch machine embroidery d...
30)	1-161906694	2/18/2009	Roses Set #3 - 4 cross stitch machine embroidery d...
31)	1-161906650	2/18/2009	Roses Set #2 - 6 cross stitch machine embroidery d...
32)	1-161906618	2/18/2009	Doggies - 6 cross-stitch machine embroidery design.
33)	1-161906576	2/18/2009	Applique Christmas - 9 machine embroidery designs
34)	1-161906544	2/18/2009	18 Snowflakes - standalone lace machine embroidery...
35)	1-161906502	2/18/2009	6 Snowflakes - standalone lace machine embroidery...
36)	1-161906970	2/18/2009	Blossoms font machine embroidery designs
37)	1-161906930	2/18/2009	Barocco Initials machine embroidery alphabet
38)	1-161906870	2/18/2009	Aster Decor - 10 monocolour and multicolour machine...
39)	1-161906822	2/18/2009	Applique Pumpkin Treasures - 8 machine embroidery ...
40)	1-161907948	2/18/2009	Poppies Lace - 9 free-standing lace machine embroi...
41)	1-161907918	2/18/2009	Pine Cones Tableware machine embroidery designs
42)	1-161907888	2/18/2009	In-hoop Iris Doilies machine embroidery designs
43)	1-161907857	2/18/2009	Iris Lace - 7 standalone lace machine embroidery
44)	1-161907827	2/18/2009	Iris Initials machine embroidery designs
45)	1-161907797	2/18/2009	Iris Blossoms - 10 machine embroidery designs

46)	1-161907767	2/18/2009	Freestyle Cyclamens - 12 machine embroidery design...
47)	1-161907737	2/18/2009	Evergreen Forest - 6 machine embroidery designs
48)	1-161907707	2/18/2009	Daffodils Book Cover- 2 standalone lace machine em. .
49)	1-161907194	2/18/2009	Christian Bible Lace - project oriented 13 standal ..
50)	1-161907164	2/18/2009	Chestnut Lace - 8 standalone lace machine embroide...
51)	1-161927344	2/18/2009	Cyclamens Lace - 8 machine embroidery designs
52)	1-161927314	2/18/2009	Curly Berries Font machine embroidery designs
53)	1-161927284	2/18/2009	Country Easter Applique - 8 machine embroidery des....
54)	1-161927224	2/18/2009	Colorful Butterflies - 6 machine embroidery design
55)	1-161907652	2/18/2009	Daffodils - 10 machine embroidery designs
56)	1-161939330	2/18/2009	Wild Vine Monograms machine embroidery designs
57)	1-161939300	2/18/2009	Wild Rose Font machine embroidery designs
58)	1-161939270	2/18/2009	Shamrock - 10 standalone lace machine embroidery d....
59)	1-161908200	2/18/2009	Shamrock Font machine embroidery designs
60)	1-161908140	2/18/2009	Seafoam Gothic machine embroidery alphabet
61)	1-161908098	2/18/2009	Royal Rose Font machine embroidery designs
62)	1-161908068	2/18/2009	Rose Lace for Table - 8 lace machine embroidery de...
63)	1-161908038	2/18/2009	Romantic Treasure font machine embroidery designs
64)	1-161908008	2/18/2009	Purple Fantasy font machine embroidery designs
65)	1-161907978	2/18/2009	Poppy Blossoms machine embroidery designs
66)	1-161927254	2/18/2009	County Charm Cutwork Alphabet for 4x4-inch hoops
67)	1-161907113	2/18/2009	Chestnut Dollies – 5 standalone lace machine emb ...
68)	1-161907063	2/18/2009	Butterfly Lace Medallions - 6 standalone lace machine emb ...

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- 69) 1-161907010 2/18/2009 Asters Initials machine embroidery designs,
monocolor and multicolor ...
- 70) 1-161184502 2/18/2009 Daffodils Lace – 8 free-standing lace machine
embroidery designs

EXHIBIT B

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#	Name (NALL) <	Full Title	Copyright Number	Date
<input type="checkbox"/> [1]	Anna Bove Company, LLC.	3 Napkins Set (TeaTime Roses collection)	VA0001653430	2005
<input type="checkbox"/> [2]	Anna Bove Company, LLC	Anna Bove Collection.	VA0001639284	2008
<input type="checkbox"/> [3]	Anna Bove Company, LLC.	Applique Pastel Tulips.	VA0001653395	2005
<input type="checkbox"/> [4]	Anna Bove Company, LLC.	Calla Lilies - 10 cross-stitch machine embroidery designs	VA0001654136	2004
<input type="checkbox"/> [5]	Anna Bove Company, LLC.	Fall Decorations - 7 cross-stitch machine embroidery designs.	VA0001654132	2003
<input type="checkbox"/> [6]	Anna Bove Company, LLC.	Heirloom machine embroidery designs.	VA0001653397	2003
<input type="checkbox"/> [7]	Anna Bove Company, LLC.	Heirloom monogram font - 27 machine embroidery designs.	VA0001653398	2004
<input type="checkbox"/> [8]	Anna Bove Company, LLC.	Lovely Lilies - 13 machine embroidery designs.	VA0001654302	2005
<input type="checkbox"/> [9]	Anna Bove Company, LLC.	Norway Roses - 11 machine embroidery designs	VA0001654303	2005
<input type="checkbox"/> [10]	Anna Bove Company, LLC.	Old Fashioned Charm Embroidery Font - 26 machine embroidery designs.	VA0001653421	2005
<input type="checkbox"/> [11]	Anna Bove Company, LLC.	Orient Flower Borders.	VA0001653422	2003
<input type="checkbox"/> [12]	Anna Bove Company, LLC.	Rose Heaven - 13 machine embroidery designs.	VA0001654301	2004
<input type="checkbox"/> [13]	Anna Bove Company, LLC.	Roses Essentials set - 19 machine embroidery designs.	VA0001653428	2004
<input type="checkbox"/> [14]	Anna Bove Company, LLC.	Strawberries Flavour - 13 cross-stitch machine embroidery designs.	VA0001654129	2005
<input type="checkbox"/> [15]	Anna Bove Company, LLC.	Sunflowers Alphabet - 26 cross-stitch machine embroidery designs.	VA0001653429	2005
<input type="checkbox"/> [16]	Anna Bove Company, LLC.	SweetFashion Roses set - 14 machine embroidery designs.	VA0001652598	2004
<input type="checkbox"/> [17]	Anna Bove Company, LLC.	Violets Alphabet - Large Letters - 26 cross-stitch machine embroidery designs.	VA0001653728	2005
<input type="checkbox"/> [18]	Anna Bove Company, LLC.	Violets Alphabet - Small Letters - 26 cross-stitch machine embroidery designs.	VA0001653727	2005
<input type="checkbox"/> [19]	Anna Bove Company, LLC.	Violets Borders set - 6 cross-stitch machine embroidery designs.	VA0001652595	2005

<input type="checkbox"/>	Anna Bove Embroidery	All About Violets set - 11 cross-stitch machine embroidery designs	VA0001652589	2004
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Lovely Lilies - 13 machine embroidery designs.

Type of Work: Visual Material**Registration Number / Date:** VA0001654302 / 2008-12-01**Application Title:** Lovely Lilies - 13 machine embroidery designs.**Title:** Lovely Lilies - 13 machine embroidery designs.**Description:** Electronic file (eService)**Copyright Claimant:** Anna Bove Company, LLC., Transfer: By written agreement. Address: 2100 E 21st str, Brooklyn, NY, 11229, United States.**Date of Creation:** 2005**Date of Publication:** 2005-02-12**Nation of First Publication:** United States**Authorship on Application:** Nataly Dolginov; Domicile: Israel; Citizenship: Israel. Authorship: 2-D artwork.**Names:** Dolginov, NatalyAnna Bove Company, LLC.

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Norway Roses - 11 machine embroidery designs.

Type of Work: Visual Material**Registration Number / Date:** VA0001654303 / 2008-12-01**Application Title:** Norway Roses - 11 machine embroidery designs.**Title:** Norway Roses - 11 machine embroidery designs.**Description:** Electronic file (eService)**Copyright Claimant:** Anna Bove Company, LLC., Transfer: By written agreement. Address: 2100 E. 21st str, Brooklyn, NY, 11229, United States.**Date of Creation:** 2005**Date of Publication:** 2005-04-09**Nation of First Publication:** United States**Authorship on Application:** Nataly Dolginov; Domicile: Israel; Citizenship: Israel. Authorship: 2-D artwork.**Names:** [Dolginov, Nataly](#)[Anna Bove Company, LLC.](#)

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Rose Heaven - 13 machine embroidery designs.

Type of Work: Visual Material**Registration Number / Date:** VA0001654301 / 2008-12-01**Application Title:** Rose Heaven - 13 machine embroidery designs.**Title:** Rose Heaven - 13 machine embroidery designs.**Description:** Electronic file (eService)**Copyright Claimant:** Anna Bove Company, LLC , Transfer: By written agreement. Address:
2100 E. 21st str, Brooklyn, NY, 11229, United States**Date of Creation:** 2004**Date of Publication:** 2004-06-21**Nation of First Publication:** United States**Authorship on Application:** Natalya Tsigelman; Domicile: Israel; Citizenship: Israel. Authorship: 2-D artwork.**Names:** [Tsigelman, Natalya](#)[Anna Bove Company, LLC.](#)

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