

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOHN WILEY & SONS, INC., :

Plaintiff, :

-against- :

08 Civ. 7834 (GEL)

SUPAP KIRTSANG D/B/A :

ECF Case

BLUECHRISTINE99 AND JOHN :

DOE NOS. 1-5, :

Defendants. :

- - - - -x

MEMORANDUM OF PLAINTIFF IN SUPPORT OF
ITS APPLICATION FOR A PRELIMINARY INJUNCTION
AND AN ORDER OF PREJUDGMENT ATTACHMENT

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Plaintiff John Wiley & Sons, Inc. ("Wiley") respectfully submits this memorandum in support of its application for an order (i) preliminarily restraining defendant Supap Kirtsaeng ("Kirtsaeng") from infringing Wiley's copyrights through the sale of Wiley's textbooks printed outside of the United States and not authorized for sale in the United States ("Foreign Editions"), and (ii) attaching the funds of Kirtsaeng in his accounts at PayPal, Inc. ("PayPal"), Bank of America, and M&T Bank.

Preliminary Statement

This lawsuit arises because Kirtsaeng sold, in the United States, Foreign Editions of Wiley's textbooks. Since January 2005, Wiley has itself, or in a joint action with other publishers, commenced over 40 actions in this Court to prevent the infringement of its copyrights through the sale of Foreign Editions. Most of those actions have involved relatively modest amounts of money. Until April 22, 2009, Wiley had no reason to believe that this case presented any exception.

On April 22, 2009, from the response of PayPal to Wiley's subpoena, Wiley learned that Kirtsaeng had received approximately \$1.2 million in his PayPal account since 2005 and that the overwhelming proportion of those funds resulted from the sales of Foreign Editions. Wiley also learned that since he received notice of the pretrial conference, January 5, 2009,

Kirtsaeng has withdrawn \$188,100 from his PayPal account, leaving him with a balance on or about April 17, 2009, of \$93.42. Kirtsaeng continues to sell the Foreign Editions.

Accordingly, Wiley seeks a preliminary injunction to restrain further acts of copyright infringement thought the sale of its Foreign Editions and an order of prejudgment attachment with respect to the funds in Kirtsaeng's PayPal, Bank of America and M&T Bank accounts, so that Wiley has some expectation that the judgment that it should recover in this action will be paid.

Statement of Facts

The relevant facts are set forth in the accompanying declarations of Patrick Murphy and Laura Scileppi.

A. The Parties

Wiley is a New York corporation with its principal place of business in Hoboken, New Jersey. (Murphy Dec. ¶ 2)

Kirtsaeng is a natural person and a resident of the State of California. Kirtsaeng is subject to, and has not challenged, the personal jurisdiction of this Court. (Scileppi Dec. ¶ 4)

B. The Business Of Wiley

Wiley publishes a variety of works, including educational books. (Murphy Dec. ¶ 4)

As a standard practice, Wiley requires its authors to assign the copyright to it, or grant it the exclusive rights of

reproduction and distribution in the United States. This practice enables Wiley to maximize dissemination of each work. (Murphy Dec. ¶ 5)

Wiley invests significant monies to publish its copyrighted works. Wiley, for example, makes substantial investments in royalties, content creation, licensing, copyediting, proofreading, typesetting, layout, printing, binding, distribution, and promotion. (Murphy Dec. ¶ 6)

Wiley earns a substantial portion of its revenue from the publication of its copyrighted works and would suffer serious financial injury if its copyrights were not enforced. A substantial decline in its income could cause Wiley to cease publishing one or more deserving books or journals. This would adversely impact the creation of new works, scholarly endeavor, and, ultimately, scientific progress. (Murphy Dec. ¶ 7)

Wiley's educational books authorized for sale in the United States are of the highest quality (the "United States Editions"). These books are generally printed with strong, hard-cover bindings with glossy protective coatings and, in some cases, contain extra features such as sewn ribbon bookmarks. Wiley frequently offers academic supplements, such as CD-ROMs, computer passwords that provide purchasers with access to academic websites corresponding to the textbooks, and study guides with the United States Editions. (Murphy Dec. ¶ 8)

Wiley generally creates different versions of its educational books that are intended for sale in specific geographic markets outside of the United States, and are not authorized for resale in the United States (the "Foreign Editions"). The Foreign Editions materially differ from the United States Editions. The Foreign Editions have thinner paper and different bindings, different cover and jacket designs, fewer internal ink colors, if any, lower quality photographs and graphics, and generally lower prices than the United States Editions. Also, the Foreign Editions often lack academic supplements, such as CD-ROMs, website passwords, or study guides. The Foreign Editions are generally marked to indicate their lower cost by a legend indicating, in substance, that the title is a "Low Price Edition" and/or authorized for sale only in a particular country or geographic region. The Foreign Editions are uniformly manufactured outside of the United States. (Murphy Dec. ¶ 9)

C. Wiley's Copyrights

Wiley routinely registers its copyrights. Wiley has generally registered its copyrights in its works, including the eight copyrights that are listed in Schedule A to the complaint in this action ("Wiley Copyrights"). (Murphy Dec. ¶ 10) The Certificates of Copyright Registration for these works are annexed as Exhibit A to the Murphy Declaration.

D. The Infringing Sales Of Kirtsaeng

The CD-Rom that PayPal produced demonstrates that Kirtsaeng has sold a Foreign Edition of each of the Wiley Copyrights, as evidenced by the following chart.

<u>Title</u>	<u>PayPal Account</u>
<u>Date of Registration</u>	<u>Date of Sale</u>
<u>Registration Number</u>	<u>Row Number</u>
Management, 8 th Edition November 14, 2005 TX-6-269-257	1438043790167252209 January 5, 2009 4417
Information Technology for Management, 4 th Edition August 20, 2004 TX-6-013-876	1438043790167252209 July 5, 2007 25155
Accounting Principles July 13, 1987 TX-2-111-034	1438043790167252209 December 23, 2007 20719
Fundamentals of Heat and Mass Transfer, 6 th Edition July 28, 2006 TX-6-410-153	1438043790167252209 December 26, 2007 20594
Introduction to Heat Transfer, 5 th Edition August 14, 2006 TX-6-407-668	1438043790167252209 December 28, 2007 20373
Fundamentals of Physics: Part 1, 8 th Edition September 17, 2007 TX-6-827-902	1438043790167252209 August 16, 2008 11624
Materials Science and Engineering: An Introduction, 7 th Edition June 19, 2006 TX-6-405-304	1438043790167252209 August 5, 2007 24870

Organic Chemistry,
4th Edition
April 19, 1989
TX-2-544-723

1438043790167252209
May 21, 2008
13792

(Murphy Dec. ¶ 12) Kirtsaeng sold Foreign Editions of at least 25 other Wiley works. (Murphy Dec. ¶ 13)

E. The Initial States of this Action

Wiley commenced this action on September 8, 2008, alleging that Kirtsaeng had infringed the Wiley Copyrights by selling Foreign Editions in the United States. (Scileppi Dec. ¶ 3) When Wiley commenced this action, it had no knowledge of the extent of Kirtsaeng's sales that infringed Wiley's copyrights. (Scileppi Dec. ¶ 5)

Kirtsaeng answered on December 2, 2008, and did not raise the affirmative defense of lack of personal jurisdiction. He did not assert any counterclaim. (Scileppi Dec. ¶ 6)

Pursuant to a notice sent to counsel on January 5, 2009, the Court held a pretrial conference on January 21, 2009. At that conference, the Court set a discovery cutoff date of May 22, 2009.

On January 26, 2009, Wiley served a document request calling for Kirtsaeng to produce:

"Document Request 2

Any and all documents that constitute, refer, or relate to the sale, distribution, or transfer of any books, including Foreign Editions."

(Scileppi Dec. ¶ 8)

On January 26, 2009, Wiley also served an interrogatory on Kirtsaeng stating:

Interrogatory 2

State the amount of revenue that defendant has received from the sale of Foreign Editions of the textbooks of Wiley.

(Scileppi Dec. ¶ 9)

On February 16, 2009, Kirtsaeng responded:

"Estimated revenue from the sale of Wiley's international edition textbooks is \$1,600. This consists of 8 titles, 20 books per title @ \$10 per book."

(Scileppi Dec. ¶ 10, Ex. B)

On March 19, 2009, Kirtsaeng produced, in paper and compressed format, an Excel spreadsheet purporting to disclose his sales of Foreign Editions. However, because of the paper and compressed format, this document was unusable. (Scileppi Dec. ¶ 11) Wiley then served a subpoena on PayPal on or about March 23, 2009, requesting information concerning Kirtsaeng's sales of Foreign Editions. (Scileppi Dec. ¶ 12)

Despite repeated requests to his counsel, Kirtsaeng did not produce an electronic copy of this Excel spreadsheet until April 21, 2009. (He did so about four hours after counsel for Wiley e-mailed his counsel a draft of a joint letter addressed to the Court concerning this matter.) This electronic

document revealed that Kirtsaeng had sold Foreign Editions beginning in 2008. (Scileppi Dec. ¶ 13)

F. PayPal's Disclosure of Kirtsaeng's Sales
And Transfer Of Funds From His PayPal Account.

On April 22, 2009, PayPal responded to Wiley's subpoena by providing its business records on CD-Rom. (Scileppi Dec. ¶ 14) The documents that PayPal produced on April 22, 2009 demonstrate the following:

- Since March 3, 2005, Kirtsaeng has received \$1,199,483.13 from sales on PayPal. (Scileppi Dec. Ex C)
- The vast majority of these sales appear to be Foreign Editions of textbooks of various publishers, including Wiley. (Scileppi Dec. Ex. D)
- Kirtsaeng has continued selling Foreign Editions. He sold one on April 13, 2009. (Scileppi Dec. Ex. E)
- Since January 5, 2009, when Kirtsaeng received notice of the pretrial conference, Kirtsaeng has withdrawn from his primary PayPal account \$188,100. Prior to January 5, 2009, Kirtsaeng's last withdrawal was in September of 2008. (Scileppi Dec. Ex. F)
- As of April 14, 2009, Kirtsaeng had \$93.42 in his primary PayPal account. (Scileppi Dec. Ex. C)

- Two of Kirtsaeng's PayPal accounts are linked to bank accounts. One is linked to an account at Bank of America and another is linked to an account at M&T Bank. (Scileppi Dec. Exs. C and G)
- Despite his answer to interrogatory 2 stating that he had sold about 160 Foreign Editions of Wiley's books, the PayPal records demonstrate that Kirtsaeng sold more than 500 of only the 8 Wiley Copyrights. (Scileppi Dec. ¶ 15)

16. After receiving these PayPal documents, Wiley checked eBay for sales under the username Billytext and learned that Kirtsaeng is currently offering to sell, or has recently sold, Foreign Editions of at least four Wiley works.

- Kirtsaeng has recently offered a Foreign Edition of the work entitled Organic Chemistry, which has received Copyright Registration number TX-2-544-723 on April 19, 1989). Kirtsaeng has sold 21 Foreign Editions of this work since January 2009. (Scileppi Dec Ex. H)
- Kirtsaeng is currently offering a Foreign Edition of the work entitled Information Technology for Management, which has received Copyright Registration number TX-6-013-876 on August 20, 2004. (Scileppi Dec. Ex. I) Since January 2009,

Kirtsaeng sold at least 24 Foreign Editions of this work. (Scileppi Dec. Ex. J)

- Since January 2009, Kirtsaeng has sold 6 Foreign Editions of Cell and Molecular Biology, which has received Copyright Registration number TX-4-872-740 on October 28, 1998. (Scileppi Dec. Ex. K)
- Since January 2009, Kirtsaeng sold at least 1 Foreign Edition of Fundamentals of Heat and Mass Transfer, which has received Copyright Registration number TX-6-410-153 on July 28, 2006. (Scileppi Dec. Ex. L)

Argument

I.

WILEY IS ENTITLED TO A PRELIMINARY INJUNCTION
ENJOINING FURTHER ACTS OF COPYRIGHT INFRINGEMENT
THROUGH THE SALE OF FOREIGN EDITIONS

In Louis Vuitton Malletier v. Dooney & Bourke, Inc.,
454 F.3d 108, 113-114 (2d Cir. 2006), the Court of Appeals
stated:

"To obtain a preliminary injunction, plaintiff must show irreparable harm absent injunctive relief, and either a likelihood of success on the merits, or a serious question going to the merits to make them a fair ground for trial, with a balance of hardships tipping decidedly in plaintiff's favor. Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979) (per curiam)."

A. Wiley Will Suffer Irreparable Harm
Absent The Entry Of A Preliminary Injunction.

Proof of a likelihood of success on the merits of a copyright claim creates a presumption of irreparable injury. ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 64 (2d Cir. 1996); Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F.2d 189, 192 (2d Cir. 1985) ("Irreparable harm may ordinarily be presumed from copyright infringement.")

Kirtsaeng's sales of Foreign Editions in competition with Wiley's United States Editions cause actual irreparable harm, because every sale by Kirtsaeng represents a lost opportunity for a sale by Wiley. In Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc., 312 F.3d 94, 96-97 (2d Cir. 2002), the Court of Appeals stated:

"We have held that generally when a copyright plaintiff makes out a prima facie showing of infringement, irreparable harm may be presumed. [Citations omitted.] This case illustrates the rationale behind this presumption: Since Otsar sells essentially the same product as Merkos to the same market, it will obviously suffer considerable loss if Otsar disseminates its prayerbook, because each sale of an Otsar prayerbook probably results in one less sale of the Merkos' prayerbook. Merkos thus satisfies the 'irreparable harm' prong of the preliminary injunction standard, and we turn to the 'merits' prong." [Footnote omitted.]

B. Wiley Has A Likelihood Of Success On The Merits Of Its Claim That The Sale Of Foreign Editions Constitutes Copyright Infringement.

The Certificates of Copyright Registration annexed as Exhibit A to the Murphy Declaration create a prima facie case that the Wiley Copyrights are valid. 17 U.S.C. § 410(c). An examination of the documents PayPal produced demonstrates that Kirtsaeng has sold Foreign Editions of the Wiley Copyrights. (Murphy Dec. ¶ 12)

Kirtsaeng has no defense under the first sale doctrine, codified at 17 U.S.C. § 109. The language of the Copyright Act, its legislative history, and the case law interpreting it, demonstrate that the importation into the United States of copyrighted works printed outside the United States, or the subsequent resale of those works in the United States, without permission of the copyright owner, constitute copyright infringement in violation of 17 U.S.C. §§ 106 and/or 602.

1. The Language of the Copyright Act

As a general matter, 17 U.S.C. § 106 grants a copyright owner the exclusive right to distribute copies of the copyrighted work.

"Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

* * * * *

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;"

17 U.S.C. § 602(a) clarifies that this distribution right includes the right to prevent the importation into the United States of copies of the copyrighted works.

"(a) Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside the United States is an infringement of the exclusive right to distribute copies or phonorecords under section 106, actionable under section 501."

17 U.S.C. § 602(b) applies to both the importation of goods which were "lawfully made," but without the qualification "under this title," and those that were not "lawfully made."

"(b) In a case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited. In a case where the copies or phonorecords were lawfully made, the United States Customs Service has no authority to prevent their importation unless the provisions of section 601 are applicable." (Emphasis added.)

While 17 U.S.C. § 109(a), which codifies the First Sale Doctrine, places a limitation on the copyright owner's distribution right, § 109(a) applies only to copies "lawfully made under this title."

"Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully

made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord." (Emphasis added.)

The interpretation of the phrase "lawfully made under this title" that Wiley urges fits neatly within this statutory framework. Because the Copyright Act applies in the United States, but not in foreign countries, the phrase lawfully made "under this title" means where the Copyright Act applies.

Thus, under the plain meaning of the words "lawfully made under this title," the fact that Wiley authorized the printing of the textbooks in a foreign country is irrelevant.

2. The Legislative History

Congress intended that the importation of copies that a United States copyright owner authorized to be printed and sold outside of the United States would be an act of infringement. House Report No. 94-1476 provides:

"Scope of the section. Section 602, which has nothing to do with the manufacturing requirements of section 601, deals with two separate situations: importation of 'piratical' article (that is, copies or phonorecords made without any authorization of the copyright owner), and unauthorized importation of copies or phonorecords that were lawfully made. The general approach of section 602 is to make unauthorized importation an act of infringement in both cases, but to permit the United States Customs Service to prohibit importation only of 'piratical' articles." (Emphasis added.)

Accordingly, Congress intended the importation of a copy of a work printed outside of the United States, even with the permission of the copyright owner, to be unlawful.

3. The Case Law

The Supreme Court has indicated that it agrees with this analysis. In Quality King Distribs. v. L'Anza Research Int'l, 523 U.S. 135, 148, 118 S. Ct. 1125, 1132 (1998), the Supreme Court stated, without holding, that a book printed outside of the United States, even with permission of the United States copyright owner, was not "lawfully made under this title."

"If the author of the work gave the exclusive U.S. distribution rights -- enforceable under the Act -- to the publisher of the U.S. edition and the exclusive British distribution rights to the publisher of the British edition, however, presumably only those made by the publisher of the U.S. edition would be 'lawfully made under this title' within the meaning of § 109(a). The first sale doctrine would not provide the publisher of the British edition who decided to sell in the American market with a defense to an action under § 602(a) (or, for that matter, to an action under § 106(3), if there was a distribution of the copies)". (Emphasis added.)

The Ninth Circuit has also agreed with this analysis. Omega S.A. v. Costco Wholesale Corp., 541 F.3d 982, 983, reh. den., 07 Civ. 56206 (9th Cir. 2008) ("This circuit has construed 17 U.S.C. § 109(a) to provide no defense to an infringement action under §§ 106(3) and 602(a) that involves (1) foreign-made, nonpiratical copies of a U.S.-copyrighted work, (2) unless

those same copies have already been sold in the United States with the copyright owner's authority. We hold that the first portion of this construction is not 'clearly irreconcilable' with Quality King, and that it remains the law of this circuit. See Miller v. Gammie, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). Because there is no genuine dispute that Omega made the copies of the Omega Globe Design in Switzerland, and that Costco sold them in the United States without Omega's authority, the first sale doctrine is unavailable as a defense to Omega's claims.")

Judge Stein has agreed with Wiley's analysis. Pearson Education, Inc. v. Jun Liao, 2008 U.S. Dist. LEXIS 39222 at *11-12 (S.D.N.Y. May 13, 2008) ("The record also reveals that Liao and Gu have violated plaintiffs' exclusive right to 'distribute copies . . . of the copyrighted work[s] to the public' in violation of 17 U.S.C. §§ 106(3) and 602(a) by purchasing copies of plaintiffs' textbooks that were manufactured abroad and subsequently selling them within the United States without permission of the copyright holders.")

C. The Balance Of The Equities
Tips Decidedly In Favor Of Wiley.

Given the substantial likelihood that Wiley will prevail on the merits, it would make little sense to deny the preliminary injunction.

D. The Preliminary Injunction Should Extend To Wiley's Copyrights, Not Only Those Identified In The Complaint.

In cases involving large scale piratical copying, courts have entered injunctions enjoining the infringements of the plaintiff's copyrights, not simply those copyrights identified in the complaint. See SONY Music Entertainment, Inc. v. Elias, 2004 U.S. Dist. LEXIS 30385 at *13 (C.D. Ca. January 20, 2004) ("To promote judicial economy and avoid similar actions in the future, this injunction issued against Defendant will apply not only to existing works, but also to works created in the future by Plaintiff and Plaintiff's affiliates."); SONY Music Entertainment, Inc. v. Global Arts Prods., 45 F. Supp.2d 1345, 1347-48 (S.D. Fla. 1999) (enjoining defendants from infringing any of the copyrighted works owned by Plaintiff, including, but not limited to, those listed in the complaint); Canopy Music, Inc. v. Harbor Cities Broad, Inc., 950 F. Supp. 913, 916 (E.D. Wis. 1997) (enjoining radio station that infringed 10 musical composition copyrights "from performing any songs to which ASCAP possesses the right to license"); Picker Int'l Corp. v. Imaging Equip. Servs., Inc., 931 F. Supp. 18, 45 (D. Mass. 1995) (injunction entered which applies "not only to the works as to which infringement has already been adjudicated, but also to any other works presently owned by plaintiff") (quotation

marks omitted), aff'd, 94 F.3d 640 (1st Cir. 1996) (unpublished table decision).

II.

THE COURT SHOULD ATTACH THE FUNDS OF KIRTSAENG
AT PAYPAL, BANK OF AMERICA AND M&T BANK

Rule 64 of the Federal Rules of Civil Procedure allows a federal court to grant the prejudgment remedies available under the laws of the state in which it sits.

"(a) Remedies Under State Law - In General. At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies."

New York CPLR § 6201 allows prejudgment attachment.

It provides:

"An order of attachment may be granted in any action, except a matrimonial action, where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants, when:

1. the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or

* * * * *

3. the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts...."

Wiley meets these requirements under either § 6201(1) or (3). For § 6201(1), this is an action for a monetary judgment, and Kirtsaeng is a non-domiciliary of this state. For § 6201(3), Kirtsaeng has disposed of property, specifically the funds in his PayPal account. The fact that Kirtsaeng moved \$188,100 from his PayPal account since receiving the notice on January 5, 2009 of a pretrial conference in this action, leaving \$93.42, provides compelling evidence that Kirtsaeng has disposed of his assets, or is in the process of doing so.

In addition, pursuant to CPLR § 6212, Wiley must show "that there is a cause of action, that it is probable that the plaintiff will succeed on the merits, that one or more grounds for attachment provided in section 6201 exist, and that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff."

Wiley meets these requirements of CPLR § 6212. As set forth in Point I above, Wiley has a valid claim for copyright infringement and has a probability of succeeding on the merits of that claim. As set forth in the prior paragraph, Wiley has grounds for attachment under CPLR § 6201. Kirtsaeng has no counterclaim. Wiley has therefore demonstrated the statutory basis for a prejudgment attachment.

Once a party demonstrates the statutory basis for an award of attachment, the Court has limited discretion to deny an attachment. In reversing an order denying an attachment, the Court of Appeals in Capital Ventures International v. Republic of Argentina, 443 F.3d 214, 222 (2d Cir. 2006), held:

"In sum, a motion court presented with an application for an order of attachment must determine whether a statutory ground for attachment exists, whether the applicant has established a likelihood of success on the merits, and whether the remedy is needed to secure payment or obtain jurisdiction. It has discretion to the extent that these determinations require weighing of evidence and also in balancing competing considerations. It will be held to have abused that discretion only if it 'applies legal standards incorrectly or relies upon clearly erroneous findings of fact, or proceeds on the basis of an erroneous view of the applicable law.' [Citation omitted.] Where, however, a statutory ground for attachment exists and both need and likelihood of success are established, its discretion does not permit denial of the remedy for some other reason, at least absent extraordinary circumstances and perhaps even then." (Emphasis added.)

While not routine, orders of attachment are not unusual. Experience Hendrix, LLC v. Chalpin, 461 F. Supp.2d 165, 173-74 (S.D.N.Y. 2006) ("[T]he crux of the complaint is that Chalpin, who is a judgment debtor of the plaintiff, caused the fraudulent transfer of valuable assets by Enterprises, also a judgment debtor, to another Chalpin-controlled entity, International, for the purpose and with the effect of hindering plaintiff's ability to collect its judgment. . . Plaintiff's motion for a preliminary injunction and an order of attachment

is granted in both respects."); Marchese v. Leverage Group, 2009 U.S. Dist. LEXIS 13318 at *14 (E.D.N.Y. February 20, 2009) ("For the reasons set forth herein, plaintiff Brian Marchese's motion to attach certain assets belonging to the defendants is granted.")

The Court should attach the full amounts Kirtsaeng has available in these accounts. Wiley's complaint in this action asserts a claim for infringement of 8 copyrights. Pursuant to 17 U.S.C. § 504(c), potential statutory damages of \$150,000 per copyright create a potential award of \$1.2 million. If Wiley attaches more than that amount, Wiley will stipulate to release the attachment above \$1.2 million. Kirtsaeng can always move to reduce the attachment pursuant to CPLR § 6223.

Pursuant to CPLR § 6210, the Court may enter an order of attachment without notice. The Court should order the attachment promptly, to eliminate the risk that Kirtsaeng will attempt to further dispose of his funds.

Wiley requests a bond in a nominal amount. Kirtsaeng's ability to vacate the attachment pursuant to § 6223 at any time should prevent any meaningful damages resulting from the maintenance of the status quo until a final judgment is entered.

Conclusion

For the reasons set forth above, Wiley respectfully requests that the Court (i) preliminary enjoin Kirtsaeng from infringing the copyrights of Wiley, and (ii) attach the funds of Kirtsaeng at PayPal, Bank of America and M&T Bank.

Dated: New York, New York
April 27, 2009

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