

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOHN WILEY & SONS, INC.,

08 CV 7834

Plaintiff,
-against-

SUPAP KIRTSAENG D/B/A BLUECHRISTINE99
and JOHN DOE NOS. 1-5,
Defendants

_____X

**MEMORANDUM OF LAW IN SUPPORT
OF MOTION *IN LIMINE* TO PRECLUDE
EVIDENCE OF UNRELATED PROFITS AT TRIAL**

The Plaintiff John Wiley & Sons, Inc., (“**Plaintiff**” or “**Wiley**”) wishes to introduce evidence of unrelated profits achieved by Defendant Supap Kirtsaeng (“**Kirtsaeng**” or “**Defendant**”) during the trial of this case. The Court should not permit such material or testimony to enter into evidence.

The Plaintiff claims that the profits are relevant to net worth and that net worth is a matter a jury may consider in a case where punitive damages are at issue. In general, however, “[p]unitive damages are rarely appropriate in copyright infringement actions, and the purpose of punitive damages, to punish, is already accomplished in the statute. See 17 U.S.C. § 504(c)(2) (2004) (allowing increases of statutory damages in cases where “willful” infringement is shown).” Mager v. Brand New School and Viacom, Inc., (October 28, 2004, S.D.N.Y.).

See Davis v. The Gap, Inc., 246 F.3d 152, 172 (2d Cir. 2001): “[a]s a general rule, punitive damages are not awarded in a statutory copyright infringement action.”

Here, the Court itself ruled that the issue of whether there is a complete defense to infringement under the First Sale doctrine is a *close call*. Under such circumstances, it is nearly inconceivable that a jury could –or should –find that an infringement was willful. The Defendant would have had to have known that what he was doing was illegal and to have then willfully ignored the law.

In fact, the Defendant will show that he relied upon research concluding that the sales were legal. Moreover, the Court itself found the matter susceptible to different interpretations. If the Court struggled with the legality of the sales, the Defendant certainly cannot be said to have known that the sales were illegal before undertaking them.

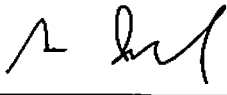
Not only is the matter a close call at best but if the Plaintiff were allowed to introduce this material into evidence it would before the introduction of evidence have settled the matter conclusively against the Defendant: the introduction of this evidence would entail an *a fortiori* finding of willfulness and the propriety of punitive damages—something rarely appropriate in a copyright infringement case even where the plaintiff has elected to pursue statutory damages. See Davis v. The Gap, Inc., 246 F.3d 152, 172 (2d Cir. 2001).

In that a conclusion of willfulness is not readily at hand and because the Plaintiff “cannot show a ‘causal link’ between defendants' infringement and claimed revenues [it] is not entitled to any claim of damages based on defendants' profits.” Mager v Brand New School and Viacom, Inc., (October 28, 2004, S.D.N.Y.) citing Davis v. The Gap, Inc., 246 F.3d 152, 172 (2d Cir. 2001) (only profits “related to the infringement” are available to the owner); see also Bouchat v. Baltimore Ravens Football Club, Inc., 346 F.3d 514, 522-23 (4th Cir. 2003); Zoll v. Ruder Finn, Inc., 2004 U.S. Dist. LEXIS 4129, 2004 WL 527056, *2 (quoting Davis, 246 F.3d at 160).

For the foregoing reasons, the Plaintiff should be precluded from introducing evidence of the Defendant's profits achieved on sales of unrelated, non-infringing goods at trial.

Dated: New York, New York
November 3, 2009

Sam P. Israel, P.C.

By: 

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