

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

HAUNTED THINGS, LLC,)	
)	
Plaintiff,)	Civil No.: 1:09-cv-677-SJD
)	
v.)	Chief Judge Susan J. Dlott
)	
HALLOWEEN PRODUCTIONS, INC.,)	
)	
Defendant.)	

DEFENDANT’S ANSWER AND COUNTERCLAIM

NOW COMES Defendant Halloween Productions, Inc. (“Halloween Productions”), by and through its undersigned counsel, and, for its response to Plaintiff’s Complaint, hereby admits, denies, and avers as follows:

NATURE OF THE ACTION

1. The allegations of Paragraph 1 of the Complaint state legal conclusions to which no response is required. To the extent Paragraph 1 is deemed to contain allegations of fact, Defendant denies those allegations.

2. Halloween Productions admits that, as alleged in Paragraph 2 of the Complaint, Plaintiff is in the business of publishing a magazine directed to aspects of the haunted attraction and haunted entertainment industry, which Plaintiff publishes under the title, “Haunted Attraction Magazine.” Defendant also admits that Plaintiff operates a website at the URL www.HauntedAttraction.com that is directed to promoting and discussing the haunted attraction industry. Halloween Productions denies that Plaintiff owns or has “trademarks” incorporating the generic terms HAUNTED ATTRACTION and HAUNTED ATTRACTION MAGAZINE, or that

Plaintiff may claim any trademark rights or other exclusivity in either of those terms. Halloween Productions denies that “The Haunted Attraction Trademarks,” as defined by Plaintiff but which characterization and definition Halloween Productions denies and disputes, have been used substantially exclusively and continuously in connection with the Plaintiff’s magazine publishing services in interstate commerce since at least August 1, 1995. Halloween Productions is without knowledge or information sufficient to form a belief as to the remainder of the allegations of Paragraph 2 of the Complaint, and therefore denies same.

3. For its response to Paragraph 3 of the Complaint, Halloween Productions admits that it is a corporation organized and existing under the laws of the State of Missouri and that it operates a website under the domain name, www.HauntWorld.com. Halloween Productions further admits that it uses this website to discuss, review, and advertise different types of haunted-themed entertainment attractions (i.e., “haunted attractions”), including, for example, haunted houses, haunted theaters, haunted towns, haunted fields, and haunted mazes. Halloween Productions further admits that it is listed as the owner of the domain names www.HauntedAttractionMagazine.com and www.HauntedAttractionsMagazine.com. Halloween Productions denies the remaining allegations contained in Paragraph 3 of the Complaint.

4. Halloween Productions denies the allegations in Paragraph 4 of the Complaint.

JURISDICTION AND VENUE

5. Paragraph 5 of the Complaint states legal conclusions to which no response is required. To the extent Paragraph 5 of the Complaint is deemed to contain allegations of fact, Defendant denies those allegations.

6. Paragraph 6 of the Complaint states legal conclusions to which no response is required. To the extent Paragraph 6 of the Complaint is deemed to contain allegations of fact, Defendant denies those allegations.

7. Halloween Productions denies the allegations in Paragraph 7 of the Complaint.

8. Halloween Productions denies the allegations in Paragraph 8 of the Complaint.

9. Halloween Productions denies the allegations in Paragraph 9 of the Complaint.

THE ALLEGED TRADEMARK RIGHTS

10. Halloween Productions denies the allegations in Paragraph 10 of the Complaint.

11. Halloween Productions denies the allegations in Paragraph 11 of the Complaint.

12. Halloween Productions denies the allegations in Paragraph 12 of the Complaint.

COUNT I

13. Paragraph 13 of the Complaint states legal conclusions to which no response is required. To the extent Paragraph 13 of the Complaint is deemed to contain allegations of fact, Defendant denies those allegations. Halloween Productions also incorporates its responses to the allegations of Paragraphs 1 through 12 of the Complaint as though fully set forth here.

14. For its response to Paragraph 14 of the Complaint, Halloween Productions denies that it has used the “Haunted Attraction Trademarks” (as defined by Plaintiff, which definition Defendant disputes) and further denies that the permission, consent, or authorization of Haunted Things would be required for use of the generic terms HAUNTED ATTRACTION and/or HAUNTED ATTRACTION MAGAZINE.

15. Halloween Productions denies the allegations in Paragraph 15 of the Complaint.

16. Halloween Productions denies the allegations in Paragraph 16 of the Complaint.

17. Halloween Productions denies the allegations in Paragraph 17 of the Complaint.

18. Halloween Productions denies the allegations in Paragraph 16 of the Complaint.

COUNT II

19. For its response to Paragraph 19, Halloween Productions incorporates its responses to the allegations of Paragraphs 1 through 18 of the Complaint as though fully set forth here.

20. As alleged in Paragraph 20, Defendant admits that it has registered the domain names www.hauntedattractionmagazine.com and www.hauntedattractionsmagazine.com. Defendant denies all other allegations in Paragraph 20 of the Complaint and specifically denies that Plaintiff has any protectable rights, title, or interest in the terms HAUNTED ATTRACTION or HAUNTED ATTRACTIONS MAGAZINE.

21. Halloween Productions denies the allegations in Paragraph 21 of the Complaint.

22. Halloween Productions denies the allegations in Paragraph 22 of the Complaint.

23. Halloween Productions denies the allegations in Paragraph 23 of the Complaint.

24. For its response to Paragraph 24, Halloween Productions denies that it has engaged in trafficking and/pr use of the www.HauntedAttractionsMagazine.com and www.HauntedAttractionMagazine.com domain names and denies that it ever had any intent of any type to profit from Haunted Things in any way. Defendant denies all other allegations in Paragraph 24 of the Complaint.

25. Halloween Productions denies the allegations in Paragraph 25 of the Complaint.

COUNT III

26. For its response to Paragraph 26, Halloween Productions incorporates its responses to the allegations of Paragraphs 1 through 25 of the Complaint as though fully set forth here.

27. Halloween Productions denies the allegations in Paragraph 27 of the Complaint.

28. Halloween Productions denies the allegations in Paragraph 28 of the Complaint.

29. Halloween Productions denies the allegations in Paragraph 29 of the Complaint.

30. Halloween Productions denies the allegations in Paragraph 30 of the Complaint.

COUNT IV

31. For its response to Paragraph 31 of the Complaint, Halloween Productions incorporates its responses to the allegations of Paragraphs 1 through 30 of the Complaint as though fully set forth here.

32. Halloween Productions denies the allegations in Paragraph 32 of the Complaint.

33. Halloween Productions denies the allegations in Paragraph 33 of the Complaint.

COUNT V

34. For its response to Paragraph 34 of the Complaint, Halloween Productions incorporates its responses to the allegations of Paragraphs 1 through 33 of the Complaint as though fully set forth here.

35. Halloween Productions denies the allegations in Paragraph 35 of the Complaint.

36. Halloween Productions denies the allegations in Paragraph 36 of the Complaint.

37. Halloween Productions denies all allegations set forth in the Complaint that are not specifically admitted elsewhere herein.

AFFIRMATIVE DEFENSES AS TO ALL COUNTS

In further answer to the allegations contained in the Complaint, and to the extent Defendant Halloween Productions bears the burden of proof, Halloween Productions asserts the following as and for separate, affirmative defenses:

1. Plaintiff's Complaint fails to state a claim upon which relief can be granted.
2. Plaintiff's claims are barred in whole or in part by the fact that Plaintiff has not been injured by any conduct of Halloween Productions.

3. Plaintiff's claims are barred in whole or in part because Plaintiff has no enforceable trademark or other rights in the term "haunted attraction" or "haunted attraction magazine."

4. Plaintiff's claims are barred in whole or in part because Plaintiff is unable to rely upon, or claim rights and/or priority based upon, use of "haunted attraction" and/or "haunted attractions magazine" by Prion, Inc. or any other third-party.

5. Plaintiff's claims are barred in whole or in part because, as between Plaintiff and Defendant, and to the extent any party may claim rights in the term "haunted attraction" and/or "haunted attraction magazine," Plaintiff is the junior user of those terms.

6. Plaintiff's claims are barred in whole or in part by the doctrines of laches, waiver, and/or estoppel.

7. Plaintiff's claims are barred in whole or in part by the doctrine of unclean hands.

8. Plaintiff's claims are barred, in whole or in part, because, upon information and belief, Plaintiff has failed and neglected to use reasonable means to protect itself from its alleged damage and to minimize the alleged damage complained of in its Complaint.

9. Plaintiff's claims are barred, in whole or in part, because, upon information and belief, Plaintiff has abandoned any alleged trademark rights in the term "haunted attraction" (and, consequently, "haunted attraction magazine") by allowing numerous other competitors, including Halloween Productions, to use the term "haunted attraction" for many years without objection.

10. Plaintiff's claims are barred, in whole or in part, because Halloween Productions registered the domain names www.HauntedAttractionMagazine.com and www.HauntedAttractionsMagazine.com with the reasonable belief that the registration and use of the domain names was a fair use or otherwise lawful.

11. Halloween Productions states that it registered the domain names www.HauntedAttractionMagazine.com and www.HauntedAttractionsMagazine.com with the knowledge and consent of the prior owner of Prion, Inc.

12. Plaintiff's claims are barred in whole or in part because the purported trademarks, "haunted attraction" and "haunted attraction magazine," are, or have become, generic.

13. Alternatively, Plaintiff's claims are barred in whole or in part because the purported trademarks, "haunted attraction" and "haunted attraction magazine," are merely descriptive and are not distinctive of Plaintiff's goods or services.

14. Alternatively, Plaintiff's claims are barred in whole or in part because Halloween Productions' alleged use of the term "haunted attraction" is a permissible use of a descriptive term to identify the type of locations that Halloween Attractions reviews, discusses, and promotes.

15. Upon information and belief, Plaintiff's alleged trademark rights in the terms "haunted attraction" and "haunted attraction magazine" are invalid because Plaintiff's alleged rights rely upon a naked transfer of such rights from a third party.

16. Defendant Halloween Productions reserves all additional affirmative defenses available to it and that become known as this case proceeds.

WHEREFORE, Defendant Halloween Productions, Inc. requests that Counts I through V of Plaintiff's Complaint be dismissed with prejudice, that a judgment be entered in favor of Defendant Halloween Productions, Inc., that Defendant be awarded its costs and expenses, including reasonable attorneys' fees, incurred herein; and Defendant be awarded such further relief that this Court deems just and proper.

DEFENDANT'S COUNTERCLAIM

Defendant/Counterclaim-Plaintiff Halloween Productions, Inc. (“Halloween Productions”), by and through its undersigned counsel, and for its Counterclaim against Plaintiff/Counterclaim-Defendant Haunted Things, LLC (“Haunted Things”) alleges and avers as follows:

NATURE OF ACTION

1. This is an action by Defendant Halloween Productions against Plaintiff Haunted Things for a declaration that the terms “haunted attraction” and “haunted attraction magazine,” as used in the haunted-themed entertainment industry, are a generic terms or are or common, descriptive terms that are not distinctive of Plaintiff’s goods or services, and, in either case, are not protectable as trademarks by Plaintiff. Defendant seeks a declaration that the alleged trademark rights claimed by Plaintiff in “haunted attraction” and “haunted attraction magazine” are invalid.

THE PARTIES

2. Defendant Halloween Productions, Inc. is a corporation organized and existing under the laws of the State of Missouri. Since at least 1996, Halloween Productions has been in the business of developing and promoting haunted attractions such as haunted houses, haunted theaters, haunted towns, haunted fields, and haunted mazes.

3. On information and belief, Plaintiff Haunted Things, LLC is a limited liability corporation organized and existing under the laws of the State of Ohio. Plaintiff is in the business of, *inter alia*, publishing a magazine that discusses, reviews, promotes, and advertises haunted attractions.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this counterclaim for declaratory judgment regarding Plaintiff’s purported trademark rights pursuant to 15 U.S.C. § 1051 et seq. (Lanham Act); 28 U.S.C.

§ 1131 (federal question); 28 U.S.C. §1138 (trademarks); and 28 U.S.C. § 2201 (Declaratory Judgment Act).

5. This Court has personal jurisdiction over Plaintiff by virtue of its residing in and conducting business in the State of Ohio.

6. Venue is proper in this Court pursuant to 28 U.S.C. §1391.

7. An actual case or controversy has arisen between the parties. Plaintiff has threatened and instituted litigation against Defendant Halloween Productions and has asserted that Halloween Production's use the term "haunted attraction" constitutes trademark infringement. These actions threaten injury to Halloween Productions.

GENERAL ALLEGATIONS

8. The term "haunted attraction" is a common, generic, and popular term in the haunted entertainment industry, used generically to identify the genre of haunted-themed entertainment attractions, including, for example, haunted houses, haunted theaters, haunted towns, haunted fields, and haunted mazes. A Google search for "haunted attraction" turns up more than 237,000 results, with dozens (if not hundreds or thousands) of different haunted-themed entertainment companies using the term "haunted attraction" to identify and describe their haunted-theme entertainment services and entertainment venues. See Google Search, submitted herewith as Exhibit 1. Likewise, Wikipedia defines "haunted attraction" as "a venue which simulates the experience of visiting a structure or outside space that is inhabited by what appear to be supernatural beings—such as ghosts or entities," and further recognizes that, "[t]here are estimated to be over 1,500 haunted attractions in the United States attracting roughly 12,000,000 guests per year." See Wikipedia, http://en.wikipedia.org/wiki/Haunted_attraction, copy submitted herewith as Exhibit 2.

9. Alternatively, the term “haunted attraction” is highly descriptive and pervasively used by the haunted entertainment industry generally (and is not associated uniquely with Plaintiff’s goods or services) to identify and describe haunted-themed entertainment attractions, including, for example, haunted houses, haunted theaters, haunted towns, haunted fields, and haunted mazes.

10. Since at least 1996, Halloween Productions has used the term “haunted attraction” to identify and describe the theme or genre of its haunted-themed entertainment attractions and services. For example, Halloween Productions uses its Haunt World Magazine and www.HauntWorld.com website to discuss, review, and advertise different types of haunted attractions and uses the term “haunted attraction” within its publications to identify and describe these haunted attractions.

11. In 2005, Defendant Halloween Productions registered a number of generic domain names that include the term “haunted attraction” to generically, accurately, and plainly identify and define with precision the genre or category of Defendant’s goods and services.

12. On September 8, 2009, Plaintiff, for the first time, complained to Halloween Productions alleging that Plaintiff is the only entity in the haunted attractions industry that may use the term “haunted attraction” in connection with promoting, discussing, and reviewing haunted attractions. Under threat of litigation, Plaintiff demanded that Defendant transfer a number of “haunted attraction” domain names, and a substantial sum of monetary, to Plaintiff. See Letter, submitted herewith as Exhibit 3 and incorporated herein by reference. Seven (7) days later, on September 15, 2009, Plaintiff initiated this dispute by filing its Complaint, asserting (a) infringement of a federally registered trademark under Section 32(1) of the Lanham Act of 1946 (even though, on information an belief, Plaintiff owns no federal trademark registrations that include the term “haunted attraction”), (b) violation Section 43(a) of the Lanham Act for unfair competition, (c)

violation of the Anti-Cyberquatting Consumer Protection Act, 15 U.S.C. § 1125(d), and numerous analogous claims under Ohio law.

13. Prior to September 8, 2009, Plaintiff had never asserted or advised Halloween Productions that it believes that Plaintiff has exclusive rights to the term “haunted attraction” or that, in using this generic or descriptive term, Halloween Productions was somehow infringing Plaintiff’s alleged trademark rights.

14. With the sole exception of the current dispute, on information and belief, Plaintiff has never taken any steps to protect its alleged trademark rights in the term “haunted attraction” against any alleged infringement or against any of the hundreds of other entities who routinely use the term in their businesses.

15. On information and belief, Plaintiff owns no trademark application or registration for any trademark containing the term “haunted attraction.”

16. On information and belief, Plaintiff does not use, and has never used, any designation of trademark use or trademark ownership, e.g., “TM” or “®,” in association with its use of the term “haunted attraction,” to assert, announce, or declare publicly its claim of exclusive trademark rights in the term.

17. Plaintiff has not enjoyed substantially exclusive and continuous use of the term “haunted attraction” in connection with haunted-themed entertainment attractions.

18. Consumers do not associate the term “haunted attraction” with any particular company or entity in the haunted attraction industry. Instead, consumers recognize this term as generically identifying a category of entertainment and entertainment venues by which one may be scared or frightened. See Exhibit 1 and Exhibit 2 hereto.

19. The term “haunted attraction” is not, and has not become, distinctive of Plaintiff’s goods or services. See Exhibit 1 and Exhibit 2 hereto.

20. Allowing Plaintiff to continue to claim and assert trademark rights in the term “haunted attraction” over the haunted entertainment attraction industry as a whole would be unjust and would effectively remove from the haunted attraction industry’s lexicon the most generic, simple, and accurate term to define or categorize for the public their haunted-themed entertainment attractions or to identify or define a type of associated media intended to promote haunted attractions.

21. Because “haunted attraction” is a generic and/or a common descriptive term in the haunted attraction industry that is not distinctive of Plaintiff’s goods or services, and because there is a clear and ripe dispute as to Plaintiff’s alleged exclusive right to use the term “haunted attraction,” it is appropriate now for this Court to resolve, through a declaratory judgment, that Plaintiff’s claimed trademarks for “haunted attraction” and “haunted attraction magazine” are invalid.

COUNTERCLAIM

22. Halloween Productions incorporates by reference Paragraphs 1 through 21 above as fully set forth here.

23. As reflected in Plaintiff’s Complaint, Claims I through V, as well as in its letter dated September 8, 2009, an actual, present, and real and justiciable controversy exists as to whether Plaintiff has valid and enforceable trademark rights in the terms “haunted attraction” and “haunted attraction magazine.”

24. Halloween Productions seeks a declaratory judgment from this Court that Plaintiff has no valid, enforceable trademark rights in the terms “haunted attraction” and “haunted attraction magazine” and that Halloween Production’s use of the terms “haunted attraction,” “haunted

attraction magazine,” and “haunted attractions magazine” does not constitute trademark infringement.

PRAYER FOR RELIEF

WHEREFORE, Counterclaim-Plaintiff Halloween Productions, Inc. respectfully requests that the Court will declare the rights and legal relations of the parties in respect of the controversy set forth above and to that end adjudge and decree:

A. That, as used in the haunted-themed entertainment industry, the terms “haunted attraction,” “haunted attraction magazine,” and “haunted attractions magazine” are generic or, alternatively, are common, descriptive terms that are not distinctive of Plaintiff’s goods or services;

B. That Plaintiff Haunted Things, LLC’s alleged trademark rights in “haunted attraction,” “haunted attraction magazine,” and “haunted attractions magazine” are invalid;

C. That Defendant Halloween Productions, Inc. and others have the right to use the terms “haunted attraction,” “haunted attraction magazine,” and “haunted attractions magazine,” or any derivation or colorable imitation thereof, on or in connection with the promotion or sale of any haunted-themed venues and related goods or services, either alone or with other words or design elements;

D. That Defendant Halloween Productions, Inc.’s use of the terms “haunted attraction,” “haunted attraction magazine,” and “haunted attractions magazine,” or any derivation or colorable imitation thereof, on or in connection with the promotion or sale of any haunted-themed venues or related goods or services does not infringe any rights of Plaintiff, is not likely to cause confusion or mistake, and is not a false designation of origin or a false representation;

Counterclaim-Plaintiff Halloween Productions, Inc. respectfully requests that the Court will further:

A. Permanently enjoin Plaintiff Haunted Things, LLC from charging Defendant Halloween Productions, Inc. with a violation of Plaintiff's rights by reason of Defendant Halloween Productions, Inc.'s use of the terms "haunted attraction," "haunted attraction magazine," and/or "haunted attractions magazine," or any derivation or colorable imitation thereof, on or in connection with the promotion or sale of any haunted-themed venues or related goods or services;

B. Permanently enjoin Plaintiff Haunted Things, LLC from interfering in any manner with Defendant Halloween Productions, Inc.'s exercise of its right and privilege to use the terms "haunted attraction," "haunted attraction magazine," and/or "haunted attractions magazine," or any derivation or colorable imitation thereof, on or in connection with the promotion or sale of any haunted-themed venues or related goods or services;

C. Award Defendant Halloween Productions, Inc. its costs and fees, including its reasonable attorneys' fees, incurred in this action; and

D. Award such other further relief to which Defendant Halloween Productions, Inc. may be entitled as a matter of law or equity, or which the Court determines to be just and proper.

Respectfully submitted,

/s/T. Earl LeVere

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of October 2009, I filed a copy of the foregoing DEFENDANT'S ANSWER AND COUNTERCLAIM via the Court's CM/ECF system, which sends notice of the filing to all parties in this action. Other parties may obtain copies of this filing through the Court's CM/ECF system.

/s/ T. Earl LeVere

T. Earl LeVere