

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

Ryan McLaughlin,	:	
	:	
	:	CIVIL ACTION
	:	
Plaintiff,	:	No.
	:	
v.	:	JURY TRIAL DEMANDED
	:	
Microsoft Corporation	:	
	:	
Defendant.	:	
_____	:	

AND NOW, this _____ day of _____, 2005, after a full hearing on Plaintiff's motion for a Preliminary Injunction, and as more fully set out in the Findings of Fact and Conclusions of Law issued in conjunction with the motion, the court has determined that Plaintiff Ryan McLaughlin is likely to prevail on the merits and that he may suffer irreparable harm if Defendant Microsoft is not enjoined during the pendency of this action. Therefore,

IT IS ORDERED THAT:

1. The motion for a preliminary injunction is GRANTED;
2. Defendant Microsoft and its officers, agents, servants, employees, attorneys, and those in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are RESTRAINED and ENJOINED, each and every one of them, from:
 - a. Selling or distributing, directly or indirectly, any copy of Defendant Microsoft's video game, Amped, or any Xbox video game console containing Amped, worldwide;
 - b. Advertising any product that contains, implements, or emulates Plaintiff's name and/or likeness, in any fashion, worldwide;
3. Defendant Microsoft must, within 7 days, notify its officers, agents, servants, employees, attorneys, and those in active concert or participation with them in the sale of Amped and the Xbox of this Order and its directives.

BY THE COURT:

J.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Ryan McLaughlin,
Individually and a/k/a Ink & Dagger
1120 Sheffield Court
Bensalem, PA 19020,

Plaintiff,

v.

Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Defendant.

CIVIL ACTION

No.

JURY TRIAL DEMANDED

MOTION FOR PRELIMINARY INJUNCTION
Pursuant to Fed. R. Civ. P. 65(a)

Plaintiff moves the court for a preliminary injunction pending the final judgment in this action, and hereby incorporates Plaintiff's Memorandum of Law in Support of Motion for Preliminary Injunction as though fully set forth herein at length.

Grounds for Relief

I. Injunction Requested

The Plaintiff, Ryan McLaughlin, individually and also known as Ink & Dagger, moves for a preliminary injunction against the Defendant in this case pending the final judgment. The injunction will order the Defendant, its agents, servants, and employees, and all persons in active concert and participation with Defendant Microsoft, to remove any and all reference to Plaintiff from their websites and home pages on the Internet and to otherwise cease and desist from copying, advertising, distributing, and selling the Amped video game and/or the Xbox video game console containing the Amped video game, pending the ultimate trial of this case on the merits.

II. Grounds for Injunction

In support of its request for a preliminary injunction, the Plaintiff shows:

1. The copyright statutes, particularly [17 U.S.C. § 502\(a\)](#) , specifically empower the Court to grant preliminary injunctive relief in copyright infringement cases.
2. At the time this action for copyright infringement was instituted, Plaintiff had a registered copyright for a music album and the songs therein from the Library of Congress with an effective registration date of June 9, 2005, recorded at registration number SR 370-512.
3. Because the Plaintiff's copyright is valid and Defendant Microsoft pirated three of the Plaintiff's copyrighted songs for inclusion in the Amped video game - a video game that was not only marketed, advertised and sold on its own merit, but was also utilized as an inducement and/or package deal in the sale of the Xbox video game console - the Defendant is liable to the Plaintiff for copyright infringement. Therefore, the Plaintiff is likely to succeed on the merits of its copyright infringement claim.
4. As a result of the Defendant's infringing activities, the Plaintiff is suffering and will continue to suffer irreparable injury unless the Court grants the Plaintiff the preliminary injunctive relief requested in this motion. The damage that the Defendant's activities continue to do to Plaintiff's artistic integrity, to his right to choose whether or not to sell or market his music in any fashion, and to his right to control the appropriation of his name and likeness, is not capable of estimation, and the Plaintiff therefore lacks an adequate remedy at law to redress the damages that he presently suffers at the hands of the Defendant.
5. The injury that the Plaintiff will continue to suffer unless the activities of the Defendant is restrained by an order, as aforementioned, outweighs any inconvenience that the Defendant may claim as the result of having to cease its infringing activities.
6. Granting the preliminary injunction requested in this motion will serve the public interest in encouraging the creation and publication of creative works. *See* [17 U.S.C. § 101](#) et seq.

III. Support for Injunction

In support of its motion for preliminary injunction, the Plaintiff relies on the verified pleadings, the evidence of record, the affidavit of Plaintiff, and its brief filed in support of this motion.

Date: _____

Respectfully Submitted,

CC4013
J. Conor Corcoran, Esquire
Attorney for the Plaintiff

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Ryan McLaughlin,
Individually and a/k/a Ink & Dagger
1120 Sheffield Court
Bensalem, PA 19020,

Plaintiff,

v.

Microsoft Corporation
One Microsoft Way
Redmond, WA 98052

Defendant.

CIVIL ACTION

No.

JURY TRIAL DEMANDED

**BRIEF IN SUPPORT OF
PLAINTIFF’S MOTION FOR PRELIMINARY INJUNCTION**

Plaintiff, Ryan McLaughlin, individually and also known as Ink & Dagger, by and through his undersigned counsel, J. Conor Corcoran, Esquire, respectfully submits this Brief in Support of Plaintiff’s Motion for Preliminary Injunction.

I. Statement of Facts and Procedural History

The Complaint in the above captioned matter, and the Plaintiff’s Motion for Preliminary Injunction, were simultaneously filed.

Plaintiff Ryan McLaughlin is a locally based musician. Plaintiff is a director, member, agent and/or servant of a musical performance group called “Ink & Dagger,” based in Philadelphia, with an extensive and passionate underground following in the United States and Europe. Ink & Dagger no longer performs in any capacity whatsoever.

The other members of Ink & Dagger are Sean Patrick McCabe (now deceased), Don Devore, Joshua Brown, and Jennifer Layne Park. They are not parties to this action, and Plaintiff has no contact with them.

In May of 1998, Plaintiff, as a member of Ink & Dagger and in conjunction with the above listed individuals, recorded an album entitled The Fine Art of Original Sin (hereinafter “the album”) in Philadelphia, Pennsylvania. The album consisted of seven

(7) songs, three of which were specifically entitled “The Fine Art of Original Sin,” “The History in Ecstasy,” and “VampireFastCode Ver. 1.5.” Plaintiff composed and/or performed a significant portion of each of these songs.

Plaintiff’s album was first published on or about September 1, 1998, and was clearly identifiable as the album The Fine Art of Original Sin by Ink & Dagger. Plaintiff has an official copyright for the album and the songs therein from the Library of Congress with an effective registration date of June 9, 2005, recorded at registration number SR 370-512.

Nonetheless, beginning in November of 2001, and continuing to the present day, Defendant Microsoft has marketed, advertised, and/or sold a video game, created by Defendant Microsoft, entitled Amped. Amped was not only marketed, advertised and/or sold independently. In addition, it was also used as an inducement to purchase a video game system called the Xbox, also created by Microsoft. The Defendant marketed, advertised, sold and/or included video game(s) such as Amped with the purchase of an Xbox, and such game(s) were contained inside the packaging for the Xbox.

One of the most prominent features of Defendant’s advertising and marketing of the Amped video game is that the game contains “150 INDIE MUSIC TRACKS” and “10 CDs worth of music.” Microsoft advertised Amped on its website, Xbox.com, and revealed that the Plaintiff’s three aforementioned songs, from the Ink & Dagger album The Fine Art of Original Sin, are included in the video game. Those songs, though not visually identified while playing the video game, are instantly and audibly recognizable as Plaintiff’s songs as the game is played.

Microsoft did not have any license to use Plaintiff’s songs. Microsoft did not have the permission of the Plaintiff to use his songs. Nonetheless, Microsoft pirated the Plaintiff’s songs for inclusion in the Amped video game, a video game that was not only marketed, advertised and sold on its own merit, but was also utilized as an inducement and/or package deal in the sale of the Xbox video game console.

Plaintiff is extraordinarily offended and aggrieved that his name and/or likeness, not to mention the brazen pirating of his copyrighted music, was perverted from its intended purpose as pure artistic expression into a vehicle for Microsoft’s commercial aspirations. Defendant Microsoft has not explained its reasons for so doing at any time.

Plaintiff filed the above captioned matter asserting two claims of copyright infringement, one claim for a declaratory judgment concerning the validity of Defendant’s copyright in Amped, and one claim for misappropriation of Plaintiff’s name and/or likeness.

II. Argument

In ruling on Plaintiff’s motion for preliminary injunctive relief, the court must consider four factors: (1) the likelihood that the Plaintiff will prevail on the merits at the

final hearing; (2) the extent to which the Plaintiff is being irreparably harmed by the conduct complained of; (3) the extent to which the Defendant will suffer irreparable harm if the preliminary injunction is issued; and (4) the public interest. The court must find that all four factors favor issuing the injunction before it grants the motion. The burden of proof lies with the Plaintiff. *See R & B, Inc. v. Needa Parts Mfg.*, 2001 U.S. Dist. Lexis 17406 (E.D. Pa. 2001).

A. Plaintiff will likely prevail on the merits of its copyright infringement claims

There is a substantial likelihood that the Plaintiff will prevail on its claims against the Defendant. To succeed on the copyright infringement claims, Plaintiff must show (1) that the Defendant copied the music in question and (2) that Plaintiff owns a valid copyright in the music in question. *See R & B, Inc. v. Needa Parts Mfg.*, 2001 U.S. Dist. Lexis 17406 (E.D. Pa. 2001).

To that end, there is no doubt that the Defendant copied Plaintiff's music – the Defendant itself admits to as much on its website. *See Plaintiff's Complaint*, ¶¶ 18-21. Furthermore, as of June 9, 2005, the Plaintiff owns a valid, registered copyright in the music that the Defendant pirated onto its video game. Plaintiff enjoyed copyright protection from the time the music was first published and made available to the public, though the filing of the registered copyright years later admittedly affects the extent of his claims for punitive and statutory damages and attorney's fees. *See 17 U.S.C. § 412.*

B. Plaintiff has been irreparably harmed by the Defendant's pirating of Plaintiff's copyrighted music

Plaintiff was shocked and upset that Microsoft included his music in the creation, marketing, advertising and sale of both Amped and the Xbox – actions that were conducted unlawfully, and without Plaintiff's permission, license or consent. At no time did Microsoft obtain Plaintiff's permission to use Plaintiff's music, let alone profit from it.

Plaintiff is extraordinarily offended and aggrieved that his name and/or likeness, not to mention the brazen pirating of his copyrighted music, was perverted from its' origin as pure artistic expression into a vehicle for Microsoft's commercial aspirations. It is immediately apparent to the Plaintiff that the Defendant has no regard for the artistic integrity of Plaintiff's music – integrity that the copyright laws are designed to protect. The damage that the Defendant's activities continue to do to Plaintiff's artistic integrity, his right to choose whether or not to sell market his music in any fashion, and his right to control the appropriation of his name and likeness, is not capable of estimation, and the Plaintiff therefore lacks an adequate remedy at law in that regard to redress the damages that he presently suffers at the hands of the Defendant.

C. A preliminary injunction would not irreparably harm the Defendant

According to the Tuck School of Business at Dartmouth, by December 7, 2001 *alone*, Microsoft had shipped 1.1 million Xbox units to retailers, and by the end of 2001 *alone*, Microsoft had sold approximately \$573,000,000 worth of Xbox machines. Furthermore, by the end of 2002 alone, Microsoft had sold approximately **\$1,692,000,000** worth of Xbox machines. See Plaintiff's Complaint, Exhibit E (exhibit 5 therein).

Since its first introduction to the public, the Xbox video game console and the Amped video game have been extraordinarily popular and wildly successful on a global scale, producing profits for Microsoft so large as to be almost incomprehensible. None of these profits have been shared with the Plaintiff.

Finally, according to Xbox.com, Microsoft is about to introduce a new, updated version of the Xbox video game console, entitled Xbox 360, in the United States on November 22, 2005, in Europe on December 2, 2005 and in Japan on December 10, 2005. Therefore, the vast majority of Defendant's total profits from infringing sales of the Xbox and Amped have already accrued.

Indeed, according to Microsoft's own disclosures on its website, located at (http://www.microsoft.com/msft/ar05/flashversion/10k_fr_not_17.html), Microsoft has generated 2.779, 2.870, and 3.211 billion dollars for the 2003 through 2005 fiscal years, respectively, from its home and entertainment products, which includes the Xbox video game console system.

A permanent injunction in this regard would clearly not harm the Defendant irreparably, and certainly not in comparison to the harms suffered by the Plaintiff, as aforementioned.

D. There is a great public interest in the protection of Plaintiff's copyrighted music

The public's interest in the protection of copyrighted material is inviolate and well established. One of the founding purposes of the federal government, and Congress in particular, is "(t)o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." See U.S. Constitution, § 8, cl. 8.

Indeed, Plaintiff's request for a preliminary injunction is to protect this fundamental public interest in the security of a copyright. It is particularly acute in the case of the Plaintiff, who never granted the Plaintiff any permission or license whatsoever to use his copyrighted music, and whose artistic integrity has been pirated into a vehicle for Defendant's commercial motivations.

III. Conclusion

Therefore, in light of the Plaintiff's substantial likelihood of success on the merits of his claims, the irreparable harm which he has thus far suffered, the lack of irreparable

harm that would befall the Defendant from a preliminary injunction, and the public interest in protecting Plaintiff's copyright, Plaintiff respectfully requests this Honorable Court to enter the attached Order granting Plaintiff's Motion for Preliminary Injunction, and order the Defendant to cease and desist from the sale of Amped and/or Xbox video game consoles containing Amped, worldwide.

Respectfully Submitted,

Date: _____

CC4013

J. Conor Corcoran, Esquire
Attorney for the Plaintiff

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

Ryan McLaughlin,	:	
	:	
	:	CIVIL ACTION
	:	
Plaintiff,	:	No.
	:	
v.	:	JURY TRIAL DEMANDED
	:	
Microsoft Corporation	:	
	:	
Defendant.	:	
_____	:	

CERTIFICATE OF SERVICE

I, J. Conor Corcoran, Esquire, hereby certify that a true and correct copy of Plaintiff's Motion for Preliminary Objection has been sent to the following by first class, United States, certified mail:

Microsoft Corporation
 c/o Corporation Service Company
 2704 Commerce Drive
 Harrisburg, PA 17110

Date: _____

 J. Conor Corcoran, Esquire

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

Ryan McLaughlin,

:
:
:
:
:
:
:
:
:
:
:
:
:

Plaintiff,

CIVIL ACTION

No.

v.

JURY TRIAL DEMANDED

Microsoft Corporation

Defendant.

AFFIDAVIT

Ryan McLaughlin, being duly sworn, deposes and states:

1. My name is Ryan McLaughlin. I am over 18 years of age. I reside at 1120 Sheffield Court, Bensalem, PA 19020. I am fully competent to make this affidavit, and I have personal knowledge of the facts stated in this affidavit. To my knowledge, all of the facts stated in this affidavit are true and correct.
2. I am the Plaintiff in the above captioned matter. This affidavit is in support of Plaintiff's motion for a preliminary injunction enjoining the Defendant from selling its video game, Amped, and its video game system (the Xbox) contained a copy of Amped.
3. I was the drummer in a band called Ink & Dagger, which was never formally organized under the laws of any state. The other members of Ink & Dagger were Sean Patrick McCabe (now deceased), Don Devore, Joshua Brown, and Jennifer Layne Park. I am not in contact with them on any regular basis.
4. In May of 1998, Ink & Dagger recorded an album entitled The Fine Art of Original Sin, consisting of seven (7) songs, three of which were specifically entitled "The Fine Art of Original Sin," "The History in Ecstasy," and "VampireFastCode Ver. 1.5." I composed and/or performed a significant portion of each of these songs.
5. The Fine Art of Original Sin, and all the songs therein, were officially registered with the Copyright Registrar on June 9, 2005, at registration number SR 370-512.
6. Since November 2001, the Defendant has sold its video game, Amped, independently and also as part and parcel of its video game system (the Xbox), which contained a copy of Amped. Amped has the aforementioned three songs in its soundtrack, and while not identified in the game in any fashion (other than the fact that the songs themselves are audible and identifiable), Defendant has identified and acknowledged the three songs, and their inclusion in Amped, on Xbox.com.

7. In conjunction with the other members of the band, I am the owner of all rights, title, and interests in the aforementioned copyright as well as the name and likeness of Ink & Dagger.

8. I learned of the pirating of Ink & Dagger's songs by Microsoft before Halloween of 2004.

9. I engaged the services of my attorney, J. Conor Corcoran, Esquire, on or about March 3, 2005.

10. My attorney has informed me that Defendant's in house counsel, Bradford Smith, Esquire and Jana Smith, Esquire, and local counsel James Cashel, Esq. at Montgomery, McCracken, Walker & Rhoads, have not answered his requests for information concerning the pirating of my songs.

11. The Defendant continues, to this day, to sell its video game, Amped, independently and also as part and parcel of its video game system (the Xbox).

12. I never consented to, or licensed, my interest in Ink & Dagger's copyrighted music for use in any fashion in Defendant's video game. I do not wish my music to be a part of any video game whatsoever.

13. I am outraged that my artistic integrity has been so brazenly violated. My self-respect as a musician has been sullied by the perception that I, individually and as Ink & Dagger, have "sold out" to a major corporation such as Defendant. As I clearly cannot expect Defendant to have any concept of artistic integrity, I have decided to remedy the violation thereof in a fashion that will surely gain Defendant's attention, and that is the above captioned action for copyright infringement.

14. I am convinced that the Defendant's advertising and sale of Amped and the Xbox will result in damage to Plaintiff that could never be accurately calculated or fully compensated. Irreparable injury to the fine reputation of the Plaintiff's artistic integrity, let alone our right to control and market the same, is likely to occur if the defendants are allowed to continue to sell its products by associating them with the Plaintiff's music.

15. I have exhausted all self-help remedies conceivably available to me to prevent this irreparable injury - namely, having my attorney contact the Defendant regarding the pirating of Ink & Dagger's music on Amped. Only injunctive relief by this court is available to prevent the perpetuation of the injuries described.

16. I could not possibly post a bond to the Court in lieu of a freeze of the sale of Amped or Xbox's that contained Amped, as such a bond would likely be thousands if not millions of dollars. As a working musician and carpenter, I could not possibly afford to do so.

Ryan McLaughlin

