

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

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NOVELTY, INC.
Plaintiff

vs.

LEISURE TIME PRODUCTS, INC.
Defendant

1: 07-cv-1317-DFH-TAB

**COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF
AND DEMAND FOR JURY TRIAL**

and the amount in controversy is likely over \$75,000, and therefore, there is diversity jurisdiction under 28 U.S.C. §1332.

3. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391(a), (b) and (c).

4. This Court may exercise personal jurisdiction over Defendant because of Defendant's contacts with this forum, and because Defendant committed acts and crimes in the State of Indiana.

The Parties

5. Plaintiff, Novelty, is and at all times mentioned in this complaint, an Indiana corporation with its principal place of business at 351 West Muskegon Drive, Greenfield, Indiana 46140.

6. Upon information and belief, Defendant, Leisure Time Products, Inc. is a Colorado corporation with its principal place of business located at 1709 Heath Pkwy, Fort Collins, Colorado 80524-2718. Defendant is a major wholesaler and direct importer, focused on direct store distribution of sunglasses, novelties, headwear, lighters and energy supplements. Defendant's products are delivered nationwide by 70+ sales representatives to convenience stores, as well as grocery, drug and other retail stores.

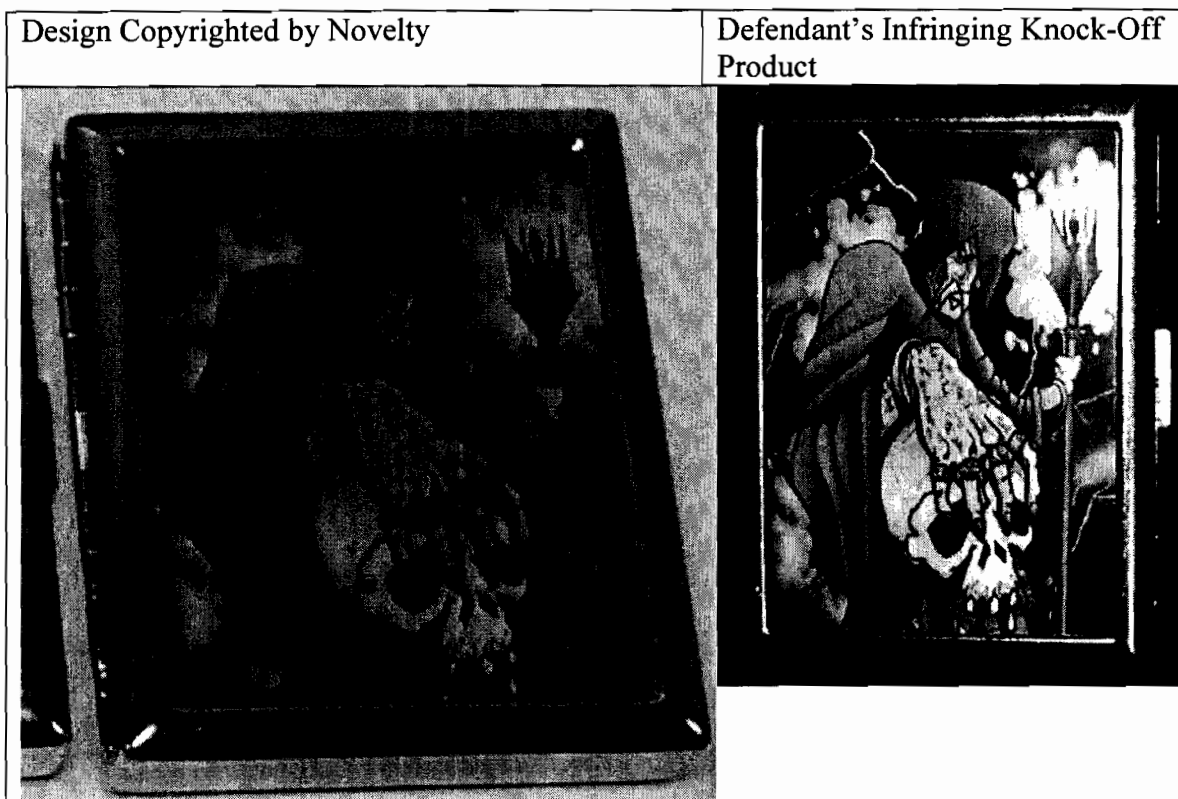
7. Also upon information and belief, Defendant transacts business in Indiana, regularly engaging in persistent courses of conduct in Indiana and deriving revenue from interstate commerce.

Factual Allegations

8. Novelty is one of the largest distributors of products to convenience stores in the United States. Novelty has been in the business since 1980, growing and expanding to service over 13,000 customers across the nation. Novelty distributes many novelty type items found for sale in convenience stores including lighters, t-shirts, hats and other items. Novelty is a licensed distributor of many well-known companies including Disney, Paramount Pictures and others.

9. Novelty created various distinctive designs for its exclusive use on Novelty's products including the designs that are the subject of U.S. Copyright Number VAu645-584 (the "Infringed Designs").

10. Defendant has infringed Novelty's copyrights and trade dress and competed unfairly with Novelty by making, importing, selling and distributing Novelty's Infringed Design. A copy of the design owned and copyrighted by Novelty, and Defendant's infringing products, are as follows.



11. Novelty owns all copyrights and trade dress rights in the Infringed Design and has registered its copyright thereto.

12. In addition to the Infringed Design, Novelty has amassed a substantial portfolio of other intellectual property rights including numerous trademarks, identifying trade dress and other source identifiers. Intellectual property is particularly important in Novelty's business. The intellectual property rights such as that in the Infringed Design are of incalculable value to Novelty's business and careful maintenance of its intellectual property rights is important to Novelty's success.

13. Novelty has developed substantial goodwill in its product designs, including the Infringed Design, that is inherently distinctive, arbitrary and nonfunctional, and which operates as a source identifier for Novelty's products. As a result of the design elements

in such trade dress, and Novelty's marketing and sales activities, products bearing the Infringed Design have acquired further distinctiveness.

14. These arbitrary and nonfunctional design elements, among others, both individually and in combination, constitute Novelty's proprietary trade dress in the Infringed Design, is inherently distinctive, operate as source identifiers for Novelty's products, and make the product bearing the Infringed Design and its packaging unusual and memorable. Such distinctiveness creates a strong secondary meaning in the minds of the consuming public in that it associates such trade dress with Novelty.

15. On October 3, 2007, the Stop In store #202, located at 4040 Electric Rd, Roanoke, VA, sold the following product:



16. Upon information and belief, Defendant supplied, distributed and/or sold the above infringing product to the Stop In store.

17. The design on and product sold at the Stop In store is identical to Novelty's designs and products.

18. Upon information and belief, Defendant has intentionally infringed Novelty's aforementioned intellectual property rights through the sale of "knock-offs," or infringing substantially similar copies of Novelty's design. Defendant copied, imported, manufactured, sold, distributed or otherwise used products with Novelty's design, including, but probably not limited to, the product described above.

19. Defendant sells and continues to sell products bearing Novelty's design. Defendant's products are knock-offs and infringing copies of Novelty's original design and are confusingly similar to Novelty's products. The copying, manufacture, sale and distribution of the Novelty's designs constitute infringement.

20. Novelty has no adequate remedy at law and damage continues to Novelty.

COUNT I
Copyright Infringement under 17 U.S.C. §101 et seq.

21. Novelty incorporates by reference the allegations contained in all previous paragraphs of this Complaint.

22. Novelty is the owner of copyrights regarding the above designs, and in other designs for Novelty products.

23. The Infringed Design is wholly original to Novelty and is copyrightable subject matter under the laws of the United States.

24. On October 24, 2004, Novelty obtained duly issued United States Copyright registration for its design, U.S. Copyright No. VAu645-584. Exhibit A.

25. Despite Novelty's valid copyright, Defendant willfully copied and infringed the Infringed Design, in violation of the Copyright Act, 17 U.S.C. §101 et seq.

26. On information and belief, Defendant's willful and intentional copying was undertaken with full knowledge that it violated Novelty's ownership rights.

27. Novelty has suffered injury in an undetermined amount as the result of Defendant's acts of infringement that is irreparable in nature. However, as a direct and proximate result of Defendant's conduct, Novelty has at least suffered actual damages, lost profits, statutory damages, and statutory damages for willful infringement. In addition, Novelty is entitled to an award of attorney fees as a part of costs under 17 U.S.C. §505, and all other reasonable relief available.

COUNT II
False Designation of Origin, Trade Dress Infringement and Unfair Competition
Under 15 U.S.C. §1125(a)

28. Novelty incorporates by reference the allegations contained in all previous paragraphs of this Complaint.

29. The acts complained of herein constitute false designation of origin, false representations or descriptions and/or unfair competition by Defendant in violation of Section 43(a) of the United States Trademark Act of 1946, as amended, 15 U.S.C. §1125 (a).

30. Novelty's products bear a distinctive trade dress that is nonfunctional. The totality of the elements of Novelty's products bearing its designs have acquired exclusive legal rights as a type of identifying symbol of origin, i.e. protectible trade dress.

31. Products having Novelty's designs were advertised and promoted for years using a continuous style of advertising, and this exclusive use causes the trade and purchasing public to identify products bearing the design with Novelty. The widespread public acceptance and recognition have also caused products bearing Novelty's designs to have acquired secondary meaning as a distinctive identifier of Novelty, and have become assets of substantial value as symbols of high quality products and goodwill.

32. Defendant's actions of copying, designing, manufacturing, packaging, selling or distributing infringing knock-offs bearing Novelty's designs in interstate commerce, without Novelty's consent, constitute false designation of origin, trade dress infringement and unfair competition, and has caused and continues to cause a likelihood of confusion, mistake and deception as to source, sponsorship, affiliation, and/or connection in the minds of the public.

33. Defendant's conduct has created confusion, mistake and deception, and is likely to cause further confusion, mistake and deception among members of the general public. Defendant's false designation of origin, trade dress infringement and unfair competition in interstate commerce has infringed Novelty's trademarks rights in violation of Section 43(a) of the Lanham Act, 15 U.S.C. §1125(a).

34. Novelty has been injured in an amount to be determined, and irreparable harm is imminent as a result of Defendant's conduct. Unless Defendant is enjoined and restrained by this Court, Defendant's continuing wrongful acts will further damage the ownership rights in its distinctive designs. Novelty is entitled to an injunction restraining Defendant and all persons acting in concert with it for engaging in any further acts in violation of the Lanham Act. Novelty is also entitled to recover Defendant's profits,

actual damages, treble damages, costs of suit and attorney's fees, and all other reasonable relief available.

COUNT III
Common Law Trademark Infringement and Unfair Competition

35. Novelty incorporates by reference the allegations contained in all previous paragraphs of this Complaint.

36. Defendant's acts as set forth herein are intended to and are likely to cause confusion or mistake and to deceive the public into falsely believing that Defendant's products are sponsored by, or otherwise associated with Novelty.

37. Novelty's business reputation and goodwill have been injured, and the distinctive character and quality of the Novelty's trade dress has been and is being diluted or otherwise injured.

38. Moreover, Defendant is improperly using Novelty's designs to derive financial benefit, unfairly trading upon and misappropriating for Defendant's benefit Novelty's valuable goodwill, reputation, and business opportunities.

39. Novelty has suffered substantial and irreparable harm for which there is no adequate remedy at law. Defendant's unlawful conduct constitutes unfair competition, trade dress infringement, dilution, and misappropriation under the common law and the statutes of the State of Indiana, entitling Novelty to all reasonable relief available.

COUNT IV
Indiana Crime Victims Act

40. Novelty incorporates by reference the allegations contained in all previous paragraphs of this Complaint.

41. Defendant's acts complained of herein constitute violations of the Indiana Crime Victims Act, I.C. Sec. 34-24-3-1 by engaging in "Deception" as expressed in I.C. 35-43-5-3(a)(6) and (9). Specifically, Defendant, with intent to defraud, misrepresented to the public the source of the Novelty's designs, and Defendant disseminated to the public products that Defendant knew are false, misleading, or deceptive, with intent to promote the purchase or sale of Novelty's design; to-wit Defendant knew that the Novelty's designs were owned by Novelty, and that any such use was expressly prohibited, false, misleading or deceptive.

42. Defendant has caused irreparable injury to Novelty and Novelty's trade, business, reputation and goodwill. Defendant's actions also caused Novelty to incur fees and expenses. Accordingly, Novelty is entitled to three times its actual damages, costs of this action, reasonable attorney's fees, all other recovery authorized by I.C. 34-24-3-1, and all other reasonable relief available.

PRAYER FOR RELIEF

WHEREFORE, Novelty demands judgment as follows:

1. That judgment be entered in favor of Novelty on all causes of action set forth herein finding Defendant violated, infringed and diluted exclusive rights in Novelty's design, that Defendant copied, manufactured, sold, advertised, promoted and otherwise improperly used Novelty's design, copied Novelty's design, and committed acts of false designation of origin, trade dress infringement, unfair competition and copyright infringement in violation of federal, state and common law;
2. That Defendant, its officers, directors, principals, agents, servants, affiliates, employees, attorneys, representatives, successors and assigns, and all those in

privity or acting in concert or participation with Defendant, and each and all of them, be preliminarily and permanently enjoined and restricted from directly or indirectly:

a. Copying, selling, offering for sale, promoting, advertising, distributing or providing or offering to provide any goods in conjunction with any trade dress or copyright that is identical to or similar to Novelty's design;

b. Using, in any manner whatsoever, any other intellectual property identical to or confusingly similar to Novelty's design.

3. That a declaration of Novelty's rights be issued as follows:

a. That the trade dress rights claimed herein exist;

b. That the copyright rights claimed herein exist;

c. That Defendant's acts complained of herein violate those rights;

d. That Defendant should be enjoined from further violations of those rights; and

e. Such other declarations as this Court may deem necessary and/or proper;

4. That Defendant be required to deliver to Novelty proof of destruction or all merchandise, packaging, labels, boxes, cartons, advertising, brochures, plates, molds, documents advertising and promotional materials and other things possessed, used or distributed by Defendant, or on its behalf, which refer to or are at all similar to Novelty's design;

5. That Defendant be required to account to Novelty for any and all profits gained by Defendant through the conduct complained of herein and to pay all such profits over to Novelty;

6. That Defendant be required to compensate Novelty for any and all damage suffered by Novelty as a result of the actions complained of herein;

7. That Novelty recover monetary relief to the extent provided by 15 U.S.C. § 1117 et seq., 17 U.S.C. § 501 et seq., as well as state and common law, including but not limited to treble damages;

8. That Novelty recover actual damages, lost profits, statutory damages, statutory damages for willful infringement, attorney's fees and costs as available by relevant statutes and laws;

9. That Novelty recover its costs, expenses and attorney's fees incurred in the prosecution of its claims against Defendant including but not limited to such costs, expenses and fees awardable pursuant to 15 U.S.C. § 1117 et seq., 17 U.S.C. § 505 as a prevailing party and I.C. 34-24-3-1; and

10. That Novelty obtain such other and further relief as this Court may deem appropriate.

NOVELTY DEMANDS A TRIAL BY JURY ON ALL ISSUES SO TRIABLE.

Respectfully submitted,


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Exhibit A: U.S. Copyright No. VAu645-584