IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GREGORY O'CONNOR, d/b/a
VISION ENTERPRISES,

Plaintiff,

OPINION AND ORDER

01-C-0604-C

v.

CINDY GERKE & ASSOCIATES, INC.,
REALTORS,

Defendant,

- -

In this civil action for monetary relief, plaintiff Gregory O'Connor, d/b/a Vision Enterprises, is suing defendant Cindy Gerke & Associates, Inc., Realtors, for copyright infringement, breach of contract and conversion relating to video production services provided by plaintiff.

On October 11, 2002, summary judgment was granted in favor of plaintiff as to liability on his copyright infringement claim and in favor of defendant as to his breach of contract claim. I stayed a ruling on defendant's and plaintiff's cross-motions for summary judgment as to damages on the infringement claim to allow defendant to respond to

plaintiff's value-in-use measure of damages calculation (which he raised in his reply brief only).

Presently before the court are (1) plaintiff's motion to reconsider the court's denial of plaintiff's request for indirect profits; and (2) plaintiff's and defendant's cross-motions for value-in-use damages as to the copyright infringement claim. For the reasons stated below, plaintiff's motion to reconsider will be denied, plaintiff's cross-motion for summary judgment as to value-in-use damages on his copyright infringement claim will be granted in the amount of $32,000 and defendant's cross-motion for summary judgment as to value-in-use damages will be denied.

OPINION

A. Plaintiff's Motion to Reconsider

In plaintiff's motion for summary judgment, he argued that he was entitled to plaintiff's gross revenues ($2,398,376.99) as listed on its tax returns and prorated relative to the period in which the infringing show aired. However, I denied this aspect of plaintiff's motion for summary judgment because plaintiff had done nothing more than put defendant's gross returns from its tax returns into the record and rested his case. See Taylor v. Meirick, 712 F.2d 1112, 1122 (7th Cir. 1983). Plaintiff now contends that he is entitled to a substantially lower amount of indirect profits, $304,801, and he argues that this court

should reconsider its denial of his request for these profits because defendant did not provide a copy of its 2001 income tax return until three days after the court ruled on the summary judgment cross-motions. (The tax return was not filed until September 30, 2002.) Plaintiff argues that this tax return provides the necessary nexus for an award of indirect profits that this court found lacking. (To recap, defendant reported gross revenues of $1,135,010 in 1999 and $1,1373,154 in 2000. In addition, defendant reported $1,090,572 in gross revenues on its 2001 tax return.)

It is undisputed that the infringing show aired from July 1999 to January 2001. Plaintiff's theory is that because defendant reported higher gross revenue in 1999 ($1,135,010) and 2000 ($1,373,154) relative to 2001 ($1,090,572), this difference represents a decline in homes sales that occurred when the infringing show ceased running. In terms of numbers, plaintiff argues that the 2001 tax return indicates that defendant lost $282,582 in gross revenues relative to its 2000 tax year ($1,090,572 minus $1,373,154) and lost $44,438 in gross revenues relative to its 1999 tax year ($1,090,572 minus $1,135,010). Therefore, plaintiff asserts, he is entitled to a loss of revenue of $304,801, which equals $282,582 (January 2000 to December 2000) plus $22,219 ($44,438 multiplied by 50%, which represents July 1999 to December 1999)). In other words, plaintiff argues that because the defendant showed a loss in gross revenue in the 2001 tax year (relative to 1999 and 2000), these differences represent defendant's gross revenues from property sales

attributable to the infringing show.

Despite plaintiff's characterization of his evidence, he has not established a nexus between the infringement and defendant's gross profits. Instead, he has merely put defendant's gross revenues from its tax return into the record and, as part of its motion to reconsider, performed speculative calculations. For example, plaintiff fails to reconcile his theory with the fact that defendant reported gross income of $1,884,993 on its 1998 tax return. Applying plaintiff's logic, because defendant reported lower gross revenue in both 1999 ($1,135,010) and 2000 ($1,373,154) relative to 1998, the airing of the infringing show caused defendant to sell *fewer* properties. Viewing the four tax years as a whole indicates nothing more than variable gross revenues. Plaintiff's mathematical manipulations do not link the infringement to defendant's gross profits. See Taylor, 712 F.2d at 1122.

Plaintiff argues that because the "tapes of the television show do not provide sufficient identifying information," he cannot match those homes with the gross revenue received by defendant if and when a home sold. See Mot. to Reconsider, dkt. #87, at 3. However, both videotapes that plaintiff submitted as evidence of infringement (which show infringing programs that aired on HGTV on November 12, 1999, and January 7, 2000) show each home with an identifying MLS (multiple listing service) number on the screen. See Aff. of Werner Erich Scherr, dkt. #52, at Exh. 54, 55. Plaintiff fails to explain why the MLS number does not provide sufficient identifying information to tie the houses shown to

defendant's data sheets showing addresses, sales prices and commission percentage. See Aff. of Roy H. Nelson, dkt. #88, at Exh. 28. Plaintiff blames his inability to establish a nexus on defendant's "poor record-keeping" because the data sheets do not indicate whether the home had been profiled on the show. To be sure, having such information would have made things easier for plaintiff. Nevertheless, plaintiff simply needed to cross-reference the MLS number shown on defendant's data sheets with the MLS number shown on each infringing show. In fact, plaintiff more or less concedes that the information exists but argues that he should not be required to "laboriously recreate information that is not readily available." See Mot. to Reconsider, dkt. #87, at 3. If plaintiff thought that establishing a nexus between the infringement and defendant's indirect profits would be too tedious or time-consuming, he certainly could have opted for statutory damages under the Copyright Act. See 17 U.S.C. § 504(c). In any event, plaintiff's motion to reconsider will be denied.

B. Value-in-Use Measure of Damages

Because plaintiff did not request value-in-use damages as an alternative to indirect profits until he filed his reply brief, I allowed defendant to respond to both his theory and calculations. Although defendant concedes that value-in-use is the appropriate measure of damages, it argues that there is no evidence showing the fair market value of the infringing material. Defendant fails to acknowledge the fact that by paying plaintiff for a year, it has

established the fair market value.

As I stated in the previous order, although plaintiff argued that the fair market value of his work equaled $200,000 ($2,500, the weekly contract fee, multiplied by the 80-week period of infringement), he overstated this figure because he included pass-through expenses that would have been incurred to broadcast the show ($800 a week) and to pay Video Preview for Metro Studio's production services ($1,300 a week). See Order dated Oct. 11, 2002, dkt. #79, at 28-29; see also Taylor, 712 F.2d at 1121 ("a loss of revenue is not the same thing as a loss of profits"). After subtracting these expenses, plaintiff has established a fair market value of $32,000 ($400 multiplied by 80 weeks). Defendant argues that $32,000 is too high because the infringing items (the opening montage and animated logo) make up only 30 to 45 seconds of the 30-minute show and creating the infringing items was a one-time production cost. Thus, defendant asserts that only 1.6% to 2.5% of the show is made up of the infringing elements (actually, defendant argues ".016% to .025%"; however, to express a decimal in terms of a percentage one must move the decimal point two places to the right), which amounts to $6.40 to $10.00 a show relative to the $400 baseline. However, I am unpersuaded by defendant's pro rata approach in light of the fact that it did not contract for the creation of the infringing elements as a one-time cost. Rather, defendant agreed to pay plaintiff on a weekly basis even though it supplied the homes and the accompanying scripts. See Deltak, Inc. v. Advanced Systems, Inc., 767 F.2d 357 (7th Cir.

1985) ("The burden of persuasion both as to showing a fair market value less than the stipulated list price . . . falls, of course, on [the defendant]."). Accordingly, I will grant plaintiff's motion for summary judgment as to value-in-use damages in the amount of $32,000.

ORDER

IT IS ORDERED that

1. The motion to reconsider filed by Plaintiff Gregory O'Connor, d/b/a Vision Enterprises, is DENIED;

2. Plaintiff's cross-motion for summary judgment as to value-in-use damages as to his copyright infringement claim is GRANTED in the amount of $32,000;

3. Defendant Cindy Gerke & Associates, Inc.'s cross-motion for summary judgment as to value-in-use damages is DENIED; and

4. Plaintiff's conversion claim is DISMISSED by stipulation of the parties.

Entered this 28th day of October, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge