

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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THE PAPER MILL STORE, INC.,

Plaintiff,

OPINION AND ORDER

v.

13-cv-164-wmc

BOYD USA, INC. d/b/a BOYD'S IMAGING  
PRODUCTS, and DOES 1-10,

Defendants.

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In response to plaintiff The Paper Mill Store, Inc.'s amended complaint naming Boyd USA, Inc. d/b/a Boyd's Imaging Products as a defendant in this copyright action, defendant Boyd USA filed a motion for summary judgment, asserting that plaintiff's allegations concern infringement by "Boyd's Imaging Products," and specifically an internet website located at [www.iboyds.com](http://www.iboyds.com), and "Boyd USA, Inc. does not and has never done business as Boyd's Imaging Products," and "has no relationship to Boyd's Imaging Products." (Def.'s Br. (dkt. #13) 2.) In response to the motion, plaintiff filed both an opposition brief, as well as a motion to stay defendant's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56(d). (Pl.'s Mot. for Stay (dkt. #17).) For the reasons provided below, the court will grant plaintiff's motion for a stay, allowing a period of discovery to proceed to determine whether the Boyd USA, Inc. is the proper defendant.

## BACKGROUND

On March 13, 2013, plaintiff The Paper Mill Store, Inc. filed the original complaint against Boyd's Imaging Products alleging infringement of plaintiff's copyrights based on photographs of plaintiff's products at iboyds.com. (Dkt. #1.)<sup>1</sup> Before defendant filed an answer or otherwise appeared, plaintiff filed an amended complaint, on March 20, 2013, naming Boyd USA, Inc. d/b/a Boyd's Imaging Products as the defendant. (Dkt. #7.) In response, and without answering or otherwise responding to plaintiff's complaint, on April 9, 2013, defendant filed a motion for summary judgment. (Dkt. #12.) As explained above, plaintiff now seeks to stay a decision on defendant's motion for summary judgment to allow discovery on the limited issue of whether defendant Boyd USA, Inc. is the proper defendant in this action.

As of the date of plaintiff's motion to stay, the parties have not yet met and conferred under Rule 26(f). (Declaration of Conor H. Kennedy ("Kennedy Decl.") (dkt. #20) ¶ 7.) As such, pursuant to Rule 26(f), plaintiff has not yet served any discovery. (*Id.*)

## OPINION

Federal Rule of Civil Procedure 56(d) provides:

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<sup>1</sup> In opposing plaintiff's motion for stay, defendant states in its brief that "Plaintiff has yet to produce any evidence it owns the copyright in any of the photographs at issue." (Def.'s Opp'n (dkt. #25) 1.) To the contrary, Brian Cowie, founder and president of The Paper Mill Store, submitted a declaration averring that plaintiff registered and owns several active copyright registrations, and attaches copies of the certificates of registration for the listed copyright registrations. (Declaration of Brian Cowie (dkt. #19) ¶¶ 2-3; *id.*, Ex. A (dkt. #19-1).)

When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

*See also Kalis v. Colgate-Palmolive Co.*, 231 F.3d 1049, 1058 n.5 (7th Cir. 2000) (“A party seeking the protection of Rule 56(f) must make a good faith showing that it cannot respond to the movant’s affidavits. The rule requires the filing of an affidavit stating the reasons for a claimant’s inability to submit the necessary material to the court.” (internal citation and quotation marks omitted)).

In support of the motion for summary judgment and in opposition to plaintiff’s motion for stay, Aaron Boyd, the professed President and CEO of Boyd USA, Inc., submitted declarations. (Declaration of Aaron Boyd (“Boyd Decl.”) (dkt. #15); Supplemental Declaration of Aaron Boyd (“Suppl. Boyd Decl.”) (dkt. #27).) In his initial declaration, Boyd simply averred that he and his brother Darris Boyd are the shareholders of Boyd USA, Inc. (dkt. #15) at ¶ 4.); that Boyd USA, Inc. ceased operations in September 2011 (*id.* at ¶ 6); and that Boyd USA, Inc. does not and never has done business at Boyd’s Imaging Products, has no relationship with Boyd’s Imaging Products, and does not own, operate or control, and never did own, operate or control [www.iboyds.com](http://www.iboyds.com) (*id.* at ¶¶ 9-10, 12).

In its motion for a stay and accompanying materials, including a declaration from plaintiff's counsel, plaintiff points to the following publicly-available information appearing to undermine certain of Boyd's statements -- or at least the import of those statements -- that neither he nor his company Boyd USA, Inc. has any relationship with Boyd's Imaging Products:

- [www.iboyds.com](http://www.iboyds.com) lists "Boyd's Imaging Products" as the owner, operating from 3375 Scott Blvd., Suite 434, Santa Clara, CA. This address is the same address identified with Boyd USA. (Pl.'s Br. (dkt. #18) 3 (citing Kennedy Decl. (dkt. #20) ¶¶ 10-11; *id.*, Exs. C & D (dkt. #20-3, 20-4).)
- Boyd USA, Inc.'s website boydusainc.com was registered to Boyd's Imaging Products. The domain name boydusa.net is also currently rejected to Boyd's Imaging Products. (*Id.* at 3-4 (citing Kennedy Decl. (dkt. #20) ¶¶ 12-13); *id.*, Exs. F & G (dkt. ##20-6, 20-7).)
- Boyd USA operated several ecommerce websites and conducted businesses under fictitious business names which are now under the name or registered to Boyd's Imaging Products. (*Id.* at 4 (citing Kennedy Decl. (dkt. #20) ¶¶ 14-23; *id.*, Exs. H-Z (dkt. ##20-8 to 20-26).)
- The contract information for the Boyd USA website is "[aaron@iBoyds.net](mailto:aaron@iBoyds.net)." This is the same contact information used for domain names "iboyds.com" and "iboyds.net." (*Id.* at 4 (citing Kennedy Decl. (dkt. #20) ¶ 24; *id.*, Exs. AA, CC-DD (dkt. ##20-27, 20-29, 20-30).)
- Aaron Boyd identified himself as the "Owner" of Boyd's Imaging Product and of [www.iboyds.com](http://www.iboyds.com) on his social media profile. (*Id.* at 5 (citing Kennedy Decl. (dkt. #20); *id.*, Exs. FF-GG (dkt. ##20-32, 20-33).)
- In May 2012, the domain name owner for boydusainc.com was changed to Boyd's Imaging Products. (*Id.* (citing Kennedy Decl. ¶ 28; *id.*, Exs. II-JJ (dkt. ##20-35, 20-36).)

In the face of plaintiff's evidence suggesting a relationship between Boyd USA, Inc. and Boyd's Imaging Products and between Aaron Boyd and Boyd's Imaging Products, Aaron Boyd submitted a supplemental declaration in which he avers that Boyd's Imaging Products is a sole proprietorship of Benton Boyd, Jr., and that Benton

Boyd, Jr. also owns [www.iboyds.com](http://www.iboyds.com). (Suppl. Boyd Decl. (dkt. #27) ¶¶ 2-3.) Boyd also acknowledges that he has been employed by Boyd's Imaging Products at various times but has never been an owner. (*Id.* at ¶ 7.) Boyd also offers plausible explanations for the other discrepancies or inconsistencies noted in plaintiff's motion for stay and accompanying affidavit and evidence.

Aaron Boyd's supplemental declaration and the evidence attached to it is compelling -- it appears Benton Boyd d/b/a Boyd's Imaging Products may be the (or at least, a) proper defendant. Still, in light of Aaron Boyd's undisputed employment relationship with Boyd's Imaging Products, his public claim to be the "owner" of Boyd's Imaging Products, and other indications of the relatedness of these two purportedly separate entities, the court finds a sufficient basis for granting plaintiff's relief. Not to mention Boyd's initial declaration which appears to be so narrowly crafted as to fall short of the candor this court expects of litigants before it.

Accordingly, the court will stay further briefing and a decision on defendant's motion for summary judgment to permit plaintiff to conduct discovery relating to the issue raised in defendant's motion for summary judgment. Specifically, plaintiff is granted leave to:

- Depose Aaron Boyd;
- Seek discovery of the written records regarding the ownership of the domain name [iboyds.com](http://www.iboyds.com) from third-parties;
- Seek discovery of the business formation, operation and finance records for Boyd USA and Boyd's Imaging Products;
- Seek discovery of documents regarding the transfer of assets among Boyd USA, Boyd's Imaging Products, Aaron Boyd and Benton Boyd, Jr.;

- Seek discovery of communications where a shareholder of Boyd USA Inc. has held himself out as Boyd's Imaging Products.

Plaintiff will have sixty days to conduct this discovery. An amended response to defendant's motion for summary judgment is due on or before July 15, 2013. If plaintiff determines through the course of discovery that Boyd USA, Inc. d/b/a Boyd's Imaging Products is not the proper defendant, plaintiff may amend its complaint to add new defendants without leave of court. If plaintiff files an amended motion for summary judgment, defendant may have until July 29, 2013, to file a reply brief.

#### ORDER

IT IS ORDERED that:

- 1) Plaintiff's motion to stay defendant's motion for summary judgment (dkt. #17) is GRANTED;
- 2) Plaintiff may have sixty days to conduct discovery on the items listed above;
- 3) Plaintiff's amended opposition to defendant's motion for summary judgment (dkt. #12) is due on or before July 15, 2013. A reply, if any, is due on or before July 29, 2013.

Entered this 10th day of May, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge