

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

JOHN CAFIERO

Plaintiff,

Civil Action No. _____

-vs-

DOUG CUSTER, a/k/a DOUG EVIL,

Electronically Filed

Defendant.

JURY TRIAL DEMANDED

COMPLAINT

Plaintiff John Cafiero, by and through his undersigned counsel, respectfully submits this Complaint against Defendant Doug Custer a/k/a Doug Evil (“Defendant”).

NATURE OF THE ACTION

1. This is an action for copyright infringement in violation of the Copyright Act of the United States, 17 U.S.C. § 101 et seq. (the “Copyright Act”) and for misrepresentation in violation of the Digital Millennium Copyright Act, 17 U.S.C. § 512(f) (“DMCA”) arising from Defendant’s willful exploitation, reproduction, public display and digital uploading of Mr. Cafiero’s copyrighted work and knowing misrepresentation to YouTube.com that he was the owner of that copyrighted work. In addition, Mr. Cafiero asserts claims for defamation and false light arising from Defendant’s knowingly false statements regarding the ownership of that work and Mr. Cafiero generally.

2. Beginning in or around late-2005, Defendant launched an unprovoked attack on Mr. Cafiero’s personal and professional credibility by posting on the Internet numerous false, harassing and defamatory statements about Mr. Cafiero.

3. Specifically, Defendant began his attack by falsely accusing Mr. Cafiero of “erasing” Defendant’s name and copyright notice from certain video footage, stealing Defendant’s alleged copyrighted material, using that material for Mr. Cafiero’s own gain, supposedly “enjoy[ing] the fruits of [Defendant’s] labor,” and generally claiming that Mr. Cafiero “ripped” him off. All of these statements are patently false.

4. Upon information and belief, Defendant continued his assault on Mr. Cafiero’s business credibility by posting false and defamatory statements on Internet message boards under various aliases, including Doug Evil, Travis Crabtree and Wayne Sneigal. The false and defamatory statements again included claims that Mr. Cafiero stole Defendant’s copyrighted material and that Mr. Cafiero plagiarized Defendant’s work.

5. Upon information and belief, Defendant escalated his harassing conduct towards Mr. Cafiero by attacking Mr. Cafiero personally through more false statements. Among other things, Defendant posted numerous homosexual slurs referring to Mr. Cafiero, who is not a homosexual, outright fraudulent quotes that Defendant attributed to Mr. Cafiero and derogatory and vulgar comments regarding Mr. Cafiero’s band, OSAKA POPSTAR.

6. Defendant’s harassing conduct and cyber-stalking has continued to intensify and expanded to include the copyright infringement and false and defamatory statements alleged herein.

7. Moreover, Defendant’s infringement of Mr. Cafiero’s copyrighted work is simply a continuation of the pattern of abusive and harassing misconduct that Defendant has directed against Mr. Cafiero.

8. As a result of Defendant's willful infringement of Mr. Cafiero's intellectual property and Defendant's defamatory statements, Mr. Cafiero has been and will continue to be irreparably harmed.

THE PARTIES

9. Plaintiff John Cafiero is, and for over a decade has been, a successful artist, musician, producer, director and businessman in the entertainment industry. Among other things, Mr. Cafiero has directed films and videos that have ranked at the top of the Billboard charts and received gold and platinum certification from the Recording Industry Association of America. Since in or around 2000, Mr. Cafiero has managed the iconic horror punk band, THE MISFITS. From in or around 1997 through 2000, Mr. Cafiero was the creative director of THE MISFITS. Currently, Mr. Cafiero serves on the board of directors of, and manages, the world-famous and Rock and Roll Hall of Fame members, The Ramones. Mr. Cafiero also manages the estate of The Ramones' legendary guitarist, Johnny Ramone. In addition to his work with THE MISFITS, THE RAMONES, and other high-profile entertainment properties, Mr. Cafiero currently is the creator and lead singer of Warner Bros. recording artist, OSAKA POPSTAR. Mr. Cafiero is a resident of the State of New York.

10. Defendant Doug Custer, a/k/a Doug Evil, is, upon information and belief, an individual residing at 293 Main St., Osterburg, Pennsylvania 16667.

JURISDICTION AND VENUE

11. This Court has personal jurisdiction over Defendant because, upon information and belief, Defendant resides in this judicial district. In addition, Defendant consented to this

Court's jurisdiction under Section 512(g)(3)(D) of the DMCA.

12. This Court has original jurisdiction over the subject matter of the claims herein under the Copyright Act, 17 U.S.C. § 101 *et seq.*, and the DMCA, 17 U.S.C. § 512, pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338. This Court has supplemental jurisdiction over the state law claims asserted herein pursuant to 28 U.S.C. § 1367.

13. Venue is properly founded in this judicial district pursuant to, *inter alia*, 28 U.S.C. § 1391(b)(1).

FACTUAL BACKGROUND

A. Mr. Cafiero's Intellectual Property Rights

14. In or around 1997, Mr. Cafiero created and produced an animated audio-visual program entitled "Misfits Re-Animated." This work is copyrightable subject matter under the laws of the United States.

15. The "Misfits Re-Animated" program contained certain artwork by various individuals, including, among others, Defendant. On July 19, 1996, Defendant signed a release, acknowledging that the "Misfits Re-Animated" program in its "produced, directed, shot, edited final form as it exists on video tape" is the sole property of Cheese TV—the name of an entertainment property created and owned by Mr. Cafiero. Defendant further acknowledged that "[a]fter its debut, the animation remains the sole (c.) property of Cheese TV and cannot be used by any other television program or broadcast medium, including music videos without the involvement and/or the written authorization of Cheese TV and/or Producer / Director John Cafiero." A copy of the release signed by Defendant is attached at Exhibit 1.

16. Mr. Cafiero obtained similar releases from other individuals who contributed to the “Misfits Re-Animated” program. Mr. Cafiero also obtained a release for THE MISFITS music, trademarks, likenesses, and other intellectual property used in connection with the “Misfits Re-Animated” program from Jerry Caiafa, p/k/a Jerry Only, a founding member of THE MISFITS and the principal of the company that owns rights to THE MISFITS music and trademarks.

17. Mr. Cafiero has complied in all respects with the Copyright Act and all other laws governing copyright, and secured the exclusive right and privilege in and to the copyright of the “Misfits Re-Animated” Program. Mr. Cafiero received from the Register of Copyrights a certificate of registration for the work “Misfits Re-Animated”, U.S. Copyright No. PA U2-177-673, having an effective date of February 7, 1997. A copy of the Certificate of Registration for the work “Misfits Re-Animated” is attached at Exhibit 2.

18. Aside from a brief clip of the “Misfits Re-Animated” program that aired on the MTV network in 1997 to promote a music video of THE MISFITS (that was also directed by Mr. Cafiero), the “Misfits Re-Animated” program was never released to the public. Because the video had never been publicly released in its entirety, and because THE MISFITS have particularly passionate fans for whom such unique MISFITS-related materials create special interest, the initial public release of the “Misfits Re-Animated” program is a valuable and potentially-lucrative commodity.

B. Defendant’s Infringing Conduct

19. Upon information and belief, Defendant participates in various online forums such as YouTube.com and MisfitsCentral.com under different aliases, including, but not limited

to Doug Evil, FestivalPublishing, and Travis Crabtree.

20. Using these and other aliases, Defendant has uploaded the MTV clip as well as the complete “Misfits Re-Animated” program to various internet websites, including YouTube.com, MisfitsCentral.com, MySpace.com, and megaupload.com.

21. By uploading the “Misfits Re-Animated” program, Defendant has exploited, reproduced and/or publicly displayed Mr. Cafiero’s copyrighted work without Mr. Cafiero’s authorization or consent.

22. At no time has Mr. Cafiero given Defendant a license or other form of express or implied authorization or consent for Defendant’s display of Mr. Cafiero’s copyrighted work.

23. Defendant’s infringement was the first public release of the complete “Misfits Re-Animated” program. In fact, Defendant posted statements on the internet in which he acknowledged that the “Misfits Re-Animated” program had never previously been publicly-released in its entirety. As a result, Mr. Cafiero was deprived of his rights as the copyright owner to release the program at a time and in a manner of his choosing and to receive the economic benefits associated with such an initial release.

24. Defendant’s infringement of Mr. Cafiero’s copyright was willful. Upon removal of Defendant’s first upload of the “Misfits Re-Animated” program to megaupload.com and MisfitsCentral.com at the insistence of Mr. Cafiero’s counsel, Defendant re-uploaded the infringing material to megaupload.com and MisfitsCentral.com and encouraged others to “get it and host it on your own YouTube and Myspace sites.”

25. Defendant also encouraged further copyright infringement in connection with uploading the complete “Misfits Re-Animated” program at YouTube.com by stating “[p]lease download this video and host it on your own channel.” Later, after YouTube.com disabled Defendant’s posting of “Misfits Re-Animated” at the insistence of Mr. Cafiero’s counsel, Defendant again stated “[p]lease contact me to get a download of [the “Misfits Re-Animated”] video to host on your own channel!”

C. Defendant’s Defamatory Statements

26. In addition to Defendant’s willful infringement of Mr. Cafiero’s copyrighted work, Defendant’s online postings at YouTube.com, MisfitsCentral.com, and MySpace.com contained false and defamatory statements regarding Mr. Cafiero.

27. Specifically, in connection with his uploading of the “Misfits Re-Animated” program to YouTube.com under the alias FestivalPublishing, Defendant posted the following:

“The Misfits as animated characters are © 1994/2008 J. Only/D. Evil. The content shown here is property of Festival Publishing. The copyright attributed to John Cafiero/ Cheese T.V. has been falsely labeled as I have never given Cafiero rights to my animation and/or characters for exclusive use by him or his company. The names ‘Skully’, ‘Baby’, etc. were given to my characters by Cafiero as well.”

28. Defendant has also claimed on YouTube.com that he is “the owner of this material [Misfits Re-Animated].”

29. Additionally, in connection with the upload of an animated video entitled “120 Minutes” Fall 1997 Cartoon to YouTube.com, Defendant stated that he “created the animation

and initiated the process of having the ‘Dig Up her Bones’ [MISFITS] video made” and that his “work had been distributed without my name credited” by Mr. Cafiero.

30. Defendant’s statements are false and reflect negatively on the personal and professional reputation of Mr. Cafiero.

31. Defendant made such false statements with actual malice and/or with knowledge that his statements were false at the time they were made or with reckless disregard as to the truth or falsity of the statements.

32. On July 15, 2008, attorneys for Mr. Cafiero electronically filed copyright complaints using YouTube.com’s Copyright Complaint Form. The complaints listed the URL addresses where Defendant had uploaded the “Misfits Re-Animated” program which infringed Mr. Cafiero’s intellectual property rights.

33. On July 16, 2008, attorneys for Mr. Cafiero sent an email message to copyright@youtube.com listing those same URLs where Defendant uploaded the “Misfits Re-Animated” program that infringe Mr. Cafiero’s intellectual property rights and requested that, under the DMCA, 17 U.S.C. § 512(c), access to the infringing content be disabled.

34. On or about July 17, 2008, access to the listed infringing material uploaded by Defendant was disabled by YouTube.com.

35. On July 17, 2008, Defendant submitted a DMCA Counter-Notification (the “Counter-Notification”) to YouTube.com under 17 U.S.C. § 512(d), representing himself to be the rightful owner of the intellectual property contained within the listed uploads and accusing “the party who has filed the infringement case” of committing “perjury.”

36. The statements made by Defendant in the Counter-Notification are false and misleading and harm the personal and professional reputation of Mr. Cafiero.

37. Defendant made such false statements with actual malice and/or with knowledge that his statements were false at the time they were made or with reckless disregard as to the truth or falsity of the statements.

38. As a direct result of Defendant's false statements in the Counter-Notification, Mr. Cafiero incurred the cost of preparing and filing a federal complaint against Defendant for the infringement of Mr. Cafiero's intellectual property.

D. Defendant's Ongoing Harassment of Mr. Cafiero

39. Defendant's infringement of the "Misfits Re-Animated" program and false and defamatory statements about Mr. Cafiero in that regard, are simply the latest incidents in a pattern of abusive and harassing misconduct that Defendant has directed against Mr. Cafiero.

40. Indeed, in late-2005, Defendant began his abusive and harassing actions directed toward Mr. Cafiero on Internet message boards. Defendant posted a message that stated, among other things, that Mr. Cafiero "erase[d] my name and my copyright from the footage [Mr. Cafiero] put in [his] demo reel and shopped around" and that Mr. Cafiero "left a really, really clear trail of blatantly ripping people off." Defendant went on to state regarding Mr. Cafiero, "some of your earliest personal achievements were really my personal achievements." Revealing his malicious intent against Mr. Cafiero, Defendant also stated, "if I ever were so inclined I could do a lot of damage."

41. In mid-2006, Defendant continued his false accusations against Mr. Cafiero on his MySpace.com page and accused Mr. Cafiero of plagiarism in a post on a message board under his alias Travis Crabtree. Specifically, Defendant stated the following:
“<http://en.wikipedia.org/wiki/Plagiarism>. This also may help you understand who John Cafiero is.”

42. Defendant followed that post a week later by again claiming that Mr. Cafiero stole his copyrighted material. Defendant, again as Travis Crabtree, stated “you should see the proof that [Mr. Cafiero] removed copyrights and credits off video material and passed them on to Geffen Records as solely his own.”

43. However, Defendant was not satisfied with simply harassing Mr. Cafiero with false and defamatory claims directed at his alleged copyrighted material. In or around early-2008, Defendant launched a blog on the internet at thumblogger URL <http://osukapapsmear.thumblogger.com>. As suggested by the internet address, which is a vulgar and disparaging manipulation of the name of Mr. Cafiero’s band, OSAKA POPSTAR, the blog is a forum for Defendant to publish offensive, vile, and vulgar disparagements regarding Mr. Cafiero and to encourage others to do the same.

44. On the opening page of the blog, Defendant has prominently depicted the name “Osuka Papsmear” identical to the stylized depiction of the OSAKA POPSTAR trademark that is registered with the U.S. Patent and Trademark Office. Defendant also has depicted various vulgar and graphic images protruding from the name “Osuka Papsmear.” Immediately below the name “Osuka Papsmear,” in a clear reference to Mr. Cafiero and his band, OSAKA POPSTAR,

Defendant has depicted the slogan, “Lie, Steal . . . It’s Alright!”—a reference to the lyrics of an OSAKA POPSTAR song that have been taken out-of-context.

45. The blog also depicts various graphic images of Mr. Cafiero as effeminate and wearing women’s clothing and accessories (including sex toys) in an unmistakable attempt to portray Mr. Cafiero as a homosexual, which he is not.

46. Immediately below the graphic images of Mr. Cafiero is certain text that refers to Mr. Cafiero as a “swishy manager—slash—director—slash—writer—fluff girl.”

47. In fact, acknowledging the legal impropriety of his conduct, Defendant expressly posts on the blog, “Please DO NOT show this blog to any lawyers.”

48. Defendant made similar postings on MySpace.com, including the following statement in one blog, “Lies, Deception, Fraud, Fakers, Phonies . . . the **true story** of a not so great Rock ‘n Roll swindle Osuka Papsmear.”

49. In connection with Defendant’s infringing uploading of the “Misfits Re-Animated” program on YouTube.com, Defendant has made use of various “tags” to further his harassment of Mr. Cafiero. “Tags” are keywords that can be used to describe a video that has been uploaded on YouTube.com. YouTube.com’s search engine then sorts through the “tags” in response to search requests from YouTube.com users to identify and locate content by a particular artist or involving a particular subject matter.

50. Specifically, Defendant uses, among other things, the “tags” “Osuka Papsmear,” “John Cafiero,” and “Cafiero Gay” to describe the “Misfits Re-Animated” program. Thus, a YouTube.com user who searches for material by “John Cafiero” would be directed to

Defendant's infringing posting. Defendant also has posted his thumblogger URL <http://osukapapsmear.thumblogger.com> in conjunction with his infringing posting of the "Misfits Re-Animated" program on YouTube.com to link to his malicious and unlawful conduct directed towards Mr. Cafiero and to attempt to increase traffic to his harassment of Mr. Cafiero on <http://osukapapsmear.thumblogger.com>.

51. Such portrayals of Mr. Cafiero are false, defamatory, and offensive, and intended to reflect negatively on the personal and professional reputation of Mr. Cafiero.

52. Defendant made such false statements with actual malice and/or with knowledge that his statements were false at the time they were made or with reckless disregard as to the truth or falsity of the statements.

53. Because of Defendant's violations of Mr. Cafiero's copyright and because of Defendant's false, misleading, and defamatory statements regarding ownership of Mr. Cafiero's intellectual property and Mr. Cafiero generally, Mr. Cafiero seeks a permanent injunction from this Court enjoining Defendant from using, exploiting, displaying, or in any way trading on Mr. Cafiero's copyrighted works. Separately, Mr. Cafiero seeks to recover damages, including, but not limited to, statutory damages, attorneys' fees, and the costs of litigation in accordance with federal and state law.

COUNT I – COPYRIGHT INFRINGEMENT

54. Mr. Cafiero incorporates herein by reference each of the foregoing allegations as if fully set forth at length.

55. Plaintiff John Cafiero is the owner of federal Copyright Registration No. PA U2-177-673 for the animated program “Misfits Re-Animated.”

56. Defendant has, unlawfully and without consent, exploited, reproduced and/or publicly displayed Mr. Cafiero’s copyrighted work in violation of Mr. Cafiero’s exclusive rights as the copyright owner of the work.

57. Defendant’s infringement of Mr. Cafiero’s copyright was willful.

58. Defendant’s misconduct has injured Mr. Cafiero in an amount to be determined at trial.

59. Defendant’s misconduct has caused and will continue to cause irreparable injury to Mr. Cafiero, for which he has no adequate remedy at law.

COUNT II – MISREPRESENTATION IN VIOLATION OF 17 U.S.C. § 512(g)

60. Mr. Cafiero incorporates herein by reference each of the foregoing allegations as if fully set forth at length.

61. In his Counter-Notification submitted pursuant to 17 U.S.C. § 512, Defendant materially misrepresented himself to be the rightful owner of the intellectual property contained in video clips which Defendant uploaded to YouTube.com.

62. Defendant’s misrepresentations were made knowingly.

63. Mr. Cafiero has been injured by Defendant’s misrepresentation in that he was required to incur the expense of initiating litigation against Defendant pursuant to the DMCA, in order to prevent YouTube.com from reinstating access to the infringing materials.

COUNT III - DEFAMATION

64. Mr. Cafiero incorporates herein by reference each of the foregoing allegations as if fully set forth at length.

65. Defendant made and published the false and defamatory statements described herein regarding Mr. Cafiero, including false assertions that Mr. Cafiero's claim to the copyright in the "Misfits Re-Animated" program was improper and false accusations of perjury.

66. Defendant's statements are false and attribute to Mr. Cafiero business misconduct by ascribing to him conduct, character, or a condition that would adversely affect his fitness for the proper conduct of his lawful business, trade, or profession.

67. Defendant's statements further falsely impute criminal conduct to Mr. Cafiero.

68. Defendant's statements harmed Mr. Cafiero in that it impaired his reputation and standing in the community, and caused him personal humiliation, mental anguish, and/or suffering.

69. Defendant made such false statements with actual malice and/or with knowledge that his statements were false at the time they were made or with reckless disregard as to the truth or falsity of the statements.

70. Defendant's actions involved outrageous conduct that is the result of Defendant's bad motive and ill will toward Mr. Cafiero, and/or reckless indifference to Mr. Cafiero's rights.

COUNT IV – FALSE LIGHT

71. Mr. Cafiero incorporates herein by reference each of the foregoing allegations as if fully set forth at length.

72. Defendant made and published the false statements described herein regarding Mr. Cafiero that tend to portray Mr. Cafiero in a false light.

73. A reasonable person would find such statements to be highly offensive.

74. Defendant's statements would tend to cause mental suffering, shame, or humiliation to a person of ordinary sensibilities.

75. Defendant made such false statements with actual malice and/or with knowledge that his statements were false at the time they were made or with reckless disregard as to the truth or falsity of the statements.

76. Defendant's actions involved outrageous conduct that is the result of Defendant's bad motive and ill will toward Mr. Cafiero and/or reckless indifference to Mr. Cafiero's rights.

PRAYER FOR RELIEF

WHEREFORE Mr. Cafiero respectfully requests that this Court award him the following relief:

1. A permanent injunction enjoining and restraining Defendant Doug Custer and all others acting in concert therewith or having knowledge thereof from publicly displaying or otherwise exploiting any copyrighted works owned by Plaintiff John Cafiero.

2. A permanent injunction enjoining and restraining Defendant Doug Custer and all others acting in concert therewith or having knowledge thereof from defaming or otherwise disparaging Plaintiff John Cafiero.
3. All damages sustained by Mr. Cafiero as a result of Defendant's wrongful acts.
4. Statutory damages as a result of Defendant's wrongful acts.
5. Treble damages stemming from Defendant's willful acts.
6. Mr. Cafiero's costs and attorneys' fees and expenses of litigation, together with prejudgment interest.
7. All such other and further relief as this Court deems just and appropriate.

JURY TRIAL DEMANDED

Respectfully submitted,

/s/ Christopher M. Verdini
Curtis B. Krasik
Christopher M. Verdini
K&L Gates LLP
Henry W. Oliver Building
535 Smithfield Street
Pittsburgh, PA 15222
(412) 355-6500 – phone
(412) 355-6501 – facsimile

Dated: August 14, 2008

Attorneys for Plaintiff John Cafiero