

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

FUNDAMENTAL TOO, LTD. : CIVIL ACTION  
 :  
v. :  
 :  
UNIVERSAL MUSIC GROUP, INC., :  
MCA, INC., AND :  
DUCHESS MUSIC CORPORATION : NO. 97-1595

MEMORANDUM

Dalzell, J.

July 8, 1997

I. Factual Background

Plaintiff Fun-Damental Too, Ltd. ("Fun-Damental"), the importer and distributor of a novelty toy called a "Shark Cookie Jar," has sued the defendants Universal Studios, Inc., and MCA-Duchess Music Corporation under the Declaratory Judgment Act, 28 U.S.C. § 2201, et seq., for a judicial declaration that it is not infringing the defendants' copyright. As we explained in our previous Memorandum and Order, see Fundamental v. Universal Music Group, Inc., No. 97-1595, 1997 WL 181255, 42 U.S.P.Q.2d 1624 (E.D. Pa. April 10, 1997), defendants claim copyright ownership to the theme music for the motion picture Jaws, and assert that Fun-Damental's "Shark Cookie Jar" is infringing on their copyright and trademark.

Fun-Damental describes their "Shark Cookie Jar" as "a whimsical toy sculpture which depicts a smiling shark holding a half-eaten surfboard. The head portion of the shark sculpture forms a hinged lid, when opened, activates an audible pre-recorded sound effect. This sound is the familiar `da-dum, da-

dum' sound effect which was created to mimic the sound used with the shark animal character in the movie, `JAWS'." Fundamental, 1997 WL 181255, at \*1, 42 U.S.P.Q.2d at 1625-26.

Given Fun-Damental's description of its novelty product, it is not surprising that the defendants have counterclaimed,<sup>1</sup> asserting, among others,<sup>2</sup> claims for (1) "appropriation of the property rights [of the defendants], trademark infringement, unfair competition and unfair business practices within the meaning and in violation of state statutory and common law including without limitation California Business & Professions Code § 17200 et seq. and the common law of California and Pennsylvania," Count III, at ¶ 29, and (2) a Pennsylvania state law claim for dilution, which, the defendants claim, entitles them to an injunction under 54 Pa. Cons. Stat. § 1124, see Count IV. Fun-Damental has, in response, now moved to dismiss Counts III and IV because, in its view, § 301 of the Copyright Act preempts these claims. See Fun-Damental's Mem. of Law in Support of Mot. for Summ. J. at 9 (hereinafter "Fun-

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1. For the sake of simplicity, we will continue to refer to Universal Studios, Inc., and MCA-Duchess Music Corporation, who are both defendants and counter-claimants, as the defendants.

2. In Count I, defendants contend that Fun-Damental has violated their copyright in the Jaws theme music. It appears, however, that the defendants are unclear as to who, if anyone, in fact owns the copyright to the music. As a result, the parties have entered into a stipulation dismissing Count I of the counterclaim until defendants have completed their research on the matter. Count II alleges false designation of origin under the Lanham Trade-Mark Act, specifically § 1125(a) of the Act. Fun-Damental has not moved to dismiss this claim, and, thus, we shall not address it.

Damental Mem. of Law at \_\_\_\_."). For the reasons set forth below, we shall grant Fun-Damental's motion to dismiss with regard to defendants' unfair competition and anti-dilution claims and deny it as to defendants' trademark infringement cause of action.

## II. Legal Analysis

### A. Preemption of State Law Claims

As the Supreme Court noted in Goldstein v. California, 412 U.S. 546, 559-60 (1973), the Copyright Clause of the United States Constitution, although giving Congress the power to establish a national copyright system and even to occupy the entire copyright field, does not, of its own force, displace state law. Until the 1976 Amendments to the Copyright Act, state-law copyright schemes were permitted to co-exist alongside the federal scheme. The 1976 Amendments, however, eliminated the dual copyright systems and expressly preempted state copyright laws or their equivalents. See Storer Cable Communication v. City of Montgomery, 806 F. Supp. 1518, 1531 (M.D. Ala. 1992).

Section 301(a) of the Copyright Act now provides that:

[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 . . . are governed exclusively by the [Copyright Act].

17 U.S.C. § 301(a).<sup>3</sup>

Section 301(a) establishes a two-step test for preemption: a state law cause of action is preempted by federal copyright laws if (1) the subject matter of the state law claim falls within the subject matter of the copyright laws, and (2) the state law right asserted is equivalent to the exclusive right federal law protects. See Kregos v. Associated Press, 3 F.3d 656, 666 (2d Cir. 1993), cert. denied, 510 U.S. 1112 (1994); Wilson v. Mr. Tee's, 855 F. Supp. 679, 684 (D.N.J. 1994).

As to the first prong of the test, there is no doubt (and the parties agree, see Fun-Damental's Mem. of Law at 10-12 &

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3. The legislative history of § 301 sheds light on Congress's intent to preempt state law copyright systems and their equivalents:

The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a state that are equivalent to copyright and that extend to works coming within the scope of the federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal way possible, so as to foreclose any possible misinterpretation of its unqualified intention that Congress should act preemptively, and to avoid the development of any vague borderline area as between State and Federal protection.

Storer Cable Communications, 806 F. Supp. at 1532 n.7 (quoting Crow v. Wainwright, 720 F.2d 1224, 1225 (11th Cir. 1983) (quoting, in turn, H.R. Rep. No. 94-1476, 94th Cong., 2d Sess. 130 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5746), cert. denied 469 U.S. 819 (1984)).

Defs.' Mem. of Law in Opp. at 1) that the theme music at issue here is within the subject matter of the Copyright Act.

Under the second prong of the test, § 301(a) expressly preempts any state law claim asserting the violation of a right that is the equivalent of any right the Act grants in § 106. See Kregos, 3 F.3d at 666 ("A state cause of action is preempted by federal copyright laws if the subject matter of the state-law right falls within the subject matter of the copyright laws and the state-law right asserted is equivalent to the exclusive rights protected by the federal copyright law."); Fyk v. Roth, No. 94-3826, 1995 WL 290444, at \*2 (E.D. Pa. May 9, 1995).

Section 106 of the Copyright Act, in turn, grants copyright holders the exclusive right:

- (1) to reproduce the copyrighted work . . . ;
- (2) to prepare derivative works based upon the copyrighted work . . . ;
- (3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) . . . to perform the copyrighted work publicly; and
- (5) . . . to display the copyrighted work publicly.

Thus, under § 301(a), when a state law is violated by an action that also violates a right the Copyright Act grants in § 106, state law is preempted. That is, when the acts of

"reproduction, performance, distribution or display . . . will in itself infringe the state created right, then such right is preempted" by the Copyright Act. Unix Sys. Lab., Inc. v. Berkeley Software Design, Inc., No. 92-1667, 1993 WL 414724, at \*15 (D.N.J. March 3, 1993); see also Lone Wolf McQuade v. CBS, Inc., --- F. Supp. ---, 1997 WL 181038, at \*11 (S.D.N.Y. April 10, 1997); Associated Film Distrib. Corp. v. Thornburgh, 614 F. Supp. 1100, 1119-21 (E.D. Pa. 1985); Ronald Litoff, Ltd. v. American Express Co., 621 F. Supp. 981, 985 (S.D.N.Y. 1985); 1 M. Nimmer & D. Nimmer, Nimmer on Copyright § 1.01[B], at 1-12 to 1-13 (1996) ("[I]n essence a right is `equivalent to copyright' is one which is infringed by the mere act of reproduction, performance, distribution or display.").

Section 301(b) of the Copyright Act, however, limits this preemption of state law, providing that:

Nothing in the title annuls or limits any rights or remedies under the common law or statutes of any State with respect to . . . activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 . . . .

(emphasis added). Thus, in order for state law not be to preempted under § 301(a), § 301(b) requires that the rights state law protects be qualitatively different from the rights the Copyright Act grants, as evidenced by the addition of an extra element that alters the nature of the state law action. See Del

Madera Properties v. Rhodes & Gardner, Inc., 820 F.2d 973, 977 (9th Cir. 1987); Harper & Row, Publishers, Inc. v. Nation Enterprises, 501 F. Supp. 848, 852 (S.D.N.Y. 1980), aff'd, 723 F.2d 195 (2d Cir. 1983), rev'd on other grounds, 471 U.S. 539 (1985). That is, if "[a]n extra element is required instead of or in addition to the acts of reproduction, performance, distribution or display, in order to constitute a state-created cause of action . . . , [a] state law claim is not preempted [so long as] the extra element changes the nature of the action so that it is qualitatively different from a copyright infringement claim." Kregos, 3 F.3d at 666 (internal quotation marks omitted) (quoting Computer Assocs. Int'l v. Altai, Inc., 982 F.2d 693, 716 (2d Cir. 1992)); see also Data General Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1164 (1st Cir. 1994).

The dispute between the parties here is whether the state law rights defendants are asserting -- trademark infringement, unfair competition, and dilution -- are preempted under § 301(a). We address each claim seriatim.

#### B. State Law Trademark Infringement

Count III is entitled "State Trademark and Unfair Competition." Fun-Damental argues that § 301(a) preempts the state law trademark infringement claim.

We disagree. We have found, and Fun-Damental has cited, no authority for the proposition that the Copyright Act preempts the defendants' state trademark law claim. Indeed, Fun-

Damental essentially concedes in their reply brief that their argument has no merit. See Fun-Damental Reply at 3 n.1. We will accordingly deny Fun-Damental's motion to dismiss Count III of the counterclaim to the extent it seeks the dismissal of the defendants' state law trademark infringement claim. See Gateway 2000, Inc. v. Cyrix Corp., 942 F. Supp. 985, 993 (D.N.J. 1996); Sears, Roebuck & Co. v. Sears Realty Co., 932 F. Supp. 392, 400 (N.D.N.Y. 1996) ("Congress has not preempted the area of common law trademark."); Storer Cable Communications, 806 F. Supp. at 1540-41.

C. Unfair Competition Claims

Next, Fun-Damental argues that the defendants' state law unfair competition claim should be dismissed because the Copyright Act, specifically § 301(a), preempts it. Defendants, not surprisingly, contend that their unfair competition claim differs qualitatively from a claim for copyright infringement, and, therefore, the Copyright Act does not preempt it.

In Count III, defendants inartfully allege, in essence, that Fun-Damental's actions constitute unfair competition in violation of Pennsylvania common law and California Business & Professions Code § 17200 et seq.<sup>4</sup> Once we parse through the obtuse pleadings, it is clear that the Copyright Act preempts defendants' unfair competition claim.

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4. Cal. Bus. & Prof. Code § 17200 provides, in relevant part, that: "[U]nfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice . . . ."



Defendants argue:

[T]hat Fundamental's [sic] selection of the two note interval performed when the cover of the cookie jar is opened was deliberately selected to copy the music heralding the presence of the great white shark in the motion picture JAWS. (¶ 11 of the Counterclaim) The repeating two-note interval is falsely and misleadingly referred to as shark "sounds" on the packaging of the Shark Cookie Jar. (¶ 12) The musical work has become associated in the minds of the consuming public with a single source, Universal's motion picture JAWS. (¶ 19) The portion of the musical work copied by Fundamental [sic] is inherently distinctive and has acquired secondary meaning because of its widespread promotion and authorized performance and distribution by Universal. (¶ 20)

Defs.' Mem. of Law in Opp. at 3.

Defendants contend that these allegations of unfair competition contain the necessary "extra element" of confusion that saves the claim from preemption.

Defendants seem themselves confused as to the type of unfair competition that they are asserting, that is, unfair competition based on the misappropriation of copyrighted property -- sometimes referred to as "reverse passing off" -- or unfair competition based upon a traditional theory of "passing off." The Copyright Act preempts the former but not the latter.<sup>5</sup>

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5. The Copyright Act also does not preempt a claim of misappropriation of trade secrets, breaches of confidential  
(continued...)

As the Court explained in Fun-Damental, Ltd. v. Gemmy Indus. Corp., 41 U.S.P.Q.2d 1427, 1430 (S.D.N.Y. 1996) (citation omitted), "there are two types of passing off claims. `In reverse passing off, the wrongdoer sells plaintiff's products as its own. It contrasts with passing off, where the wrongdoer sells its products as the plaintiff's.'"

"`[R]everse passing off' . . . occurs when a person removes or obliterates the original trademark, without authorization, before reselling goods produced by someone else." Web Printing Controls Co. v. Oxy-Dry Corp., 906 F.2d 1202, 1203 n.1 (7th Cir. 1990) (internal quotation marks and citation omitted). That is, "[a]n unfair competition claim involving misappropriation usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property." Roy Expert Co. v. Columbia Broadcasting Sys., Inc., 672 F.2d 1095, 1105 (2d Cir.), cert. denied, 459 U.S. 826 (1982); see also Fasa Corp. v. Playmates Toys, Inc., 869 F.

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5. (...continued)  
relationships, or breaches of fiduciary duties. See, e.g., Kregos, at 666; Long v. Quality Computers & Applications, Inc., 860 F. Supp. 191, 197 (M.D. Pa. 1994) ("Courts recognize two distinct types of misappropriation of trade secrets: those based upon the use of plaintiff's work and those based upon the disclosure of material that a defendant has a duty to keep confidential. Typically, claims of the former type are preempted while claims of the latter type are not, because they contain the extra element of violation of a duty."); WEF Basel, A.G. v. Regional Fin. Assocs., Inc., No. 92-1436, 1992 WL 114957, at \*3-4 (E.D. Pa. May 20, 1992). It is clear that the defendants' unfair competition claim here is not based on any of these theories.

Supp. 1334, 1362 (N.D. Ill. 1994); Computer Assocs. Int'l, Inc. v. Computer Automation, Inc., 678 F. Supp. 424, 429 (S.D.N.Y. 1987) (stating that the essence of a claim of unfair competition grounded in "reverse passing off" is "the bad faith misappropriation of the labors and expenditures of another, likely to cause confusion or to deceive purchasers as to the origin of goods" (citation omitted)).

The Copyright Act preempts an unfair competition claim premised on a misappropriation theory, that is, "reverse passing off," because such a claim, which is grounded in the alleged unauthorized copying and use of another's copyrighted expression, fails the extra element test. *See, e.g., Kregos*, 3 F.3d at 666 ("§ 301 preempts unfair competition and misappropriation claims grounded solely in the copying of a plaintiff's protected expression." (citing Computer Assocs. Int'l v. Altai, Inc., 982 F.2d 693, 717 (2d Cir. 1992))); Del Madera Properties, 820 F.2d at 977; Frieman v. Steel, No. 96-7282, 1997 WL 305935, at \*2 (E.D. Pa. May 29, 1997); Gemel Precision Tool Co. v. Pharma Tool Corp., No. 94-53045, 1995 WL 71243, at \*7 (E.D. Pa. Feb. 13, 1995); Xerox Corp. v. Apple Computer, Inc., 734 F. Supp. 1542, 1550-51 n.15 (N.D. Cal. 1990); Lone Wolf McQuade, 1997 WL 181038, at \*11; Patricia Kennedy & Co. v. Zam-Cul Enterprises, Inc., 830 F. Supp. 53, 56 (D. Mass. 1993) (citing numerous cases); 2 Paul Goldstein, Copyright, § 15.16.1.3, at 595-96 (1989) ("Courts have held that section 301 preempts actions for `reverse passing off'

in which the defendant copies the plaintiff's work and passes it off as defendant's.").

"`Passing off' is," by contrast, "the selling of a good of one's own creation under the name or trademark of another." Xerox Corp., 734 F. Supp. at 1550-51 n. 15 (citing Smith v. Montoro, 648 F.2d 602, 604 (9th Cir. 1981); Web Printing Controls Co., 906 F.2d at 1203 n.1 (7th Cir. 1990) ("`Passing off' involves the selling of a good or service of one's own creation under the name or mark of another.").

A state law unfair competition claim that alleges the tort of "passing off" is not preempted because such a claim alleges an extra element of deception or misrepresentation that is not necessary for a cause of action for copyright. See Lone Wolf McQuade, 1997 WL 181038, at \*11; Fun-Damental Too, Ltd., 41 U.S.P.Q.2d at 1430 ("[P]assing off claims are not preempted by the Copyright Act because they involve an element of misrepresentation or deception which is not an element of copyright claims." (citing many cases)); Innovative Networks v. Satellite Airlines, 871 F. Supp. 709, 731 n.21 (S.D.N.Y. 1995); Wilson, 855 F. Supp. at 684 (comparing Tannock v. Review Trading Corp., 1986 WL 15150, at \*5 (D.N.J. May 2, 1986) (common law unfair competition claim preempted because plaintiff did not contend that the "defendant misled customers into believing that the property he produced emanated from or was produced by another" anywhere in the complaint), with Orth-O-Vision, Inc. v. Home Box Office, 474 F. Supp. 672, 684 n.12 (S.D.N.Y. 1979)

("Because the element of deception inherent in `palming off' is not an element of copyright infringement claim, the `passing off' cause of action is not preempted by federal law.") (citation omitted)).<sup>6</sup> But see Tracy v. Skate Key Co., 697 F. Supp. 748, 750-51 (S.D.N.Y. 1988).

Defendants' unfair competition claim here is most akin to a "reverse passing off" claim. In order to illustrate our finding we paraphrase Professor Nimmer: If the defendants claim that Fun-Damental is selling Fun-Damental's products and representing to the public that they are defendants, that is passing off. If, by contrast, Fun-Damental is selling Fun-Damental's products and representing to the public that they are Fun-Damental's, that is not passing off. A claim that the latter activity is actionable because Fun-Damental's product replicates the defendants, even if denominated "passing off", is in fact a disguised copyright infringement claim, and hence preempted. See 1 M. Nimmer et al., Nimmer on Copyright § 1.01[B][1][e], at 1-24 n.110; see also Waldman Publ'g Corp. v. Landoll, Inc., 848 F.

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6. See also 1 M. Nimmer et al., Nimmer on Copyright § 1.01[B][1][e] at 1-24 ("There is no preemption . . . of state law of unfair competition of the `passing off' variety."); Paul Goldstein, Copyright § 15.16.1.3, at 594-95 (1989) ("Courts have uniformly upheld state law passing off actions against claims of preemption on the ground that the requirement of consumer confusion constitutes an `extra element' distinguishing the rights granted by state law from any of the exclusive rights granted by section 106 of the Act."); 1 Neil Boorstyn, Boorstyn on Copyright § 1.07[1], at 1-25 (2d ed. 1996) ("[S]tate law claims based on deceptive or fraudulent conduct, such as passing off one's goods or services as those of another, and likelihood of customer confusion, survive preemption because these elements are not part of a copyright infringement claim.").

Supp. 498, 500-01 (S.D.N.Y.) ("Where a plaintiff claims that defendant has copied plaintiffs' product and sold it under defendant's name, that claim of reverse passing off is preempted by the Copyright Act."), vacated in part on other grounds, 43 F.3d 775 (2d Cir. 1994); Motown Record Corp. v. George A. Hormel & Co., 657 F. Supp. 1236 (C.D. Cal. 1987) (allegation that defendants had used the image and music of the musical group, the Supremes, without authorization stated a claim of unfair competition grounded in the misappropriation of copyrighted property and not a claim for passing off).

Defendants' claim is grounded in Fun-Damental's allegedly unauthorized copying and use of the Jaws theme music. See Smith v. Weinstein, 578 F. Supp. 1297, 1307 (S.D.N.Y.) (Court must look beyond the label attached to a claim in order to insure that the party cannot obtain relief under state law "equivalent to that which he has failed to obtain under copyright law"), aff'd, 738 F.2d 419 (2d Cir. 1984). Such alleged misappropriation -- or, "reverse passing off" -- is exactly what the Copyright Act is meant exclusively to protect against. See 17 U.S.C. § 106(1)-(3) (Act protects, inter alia, the rights to reproduce the copyrighted work, to prepare derivative works, and distribute the copyrighted work). The mere allegation that the public-at-large is being misled or confused as to the origin of the music theme at issue here does not change our analysis. See Fasa Corp., 869 F. Supp. at 1363 (holding that "[t]he fact that the defendants were selling the allegedly infringing works under

their own names -- and, hence, implicitly misrepresenting the origin of the works or causing confusion in the consuming public -- [does] not alter the analysis" that a state law claim "ultimately rest[ing] on the mere act of unauthorized copying" is preempted). Accordingly, § 301 of the Act preempts the defendants' unfair competition claim -- that is, its "reverse passing off" claim -- under either Pennsylvania or California law. See Xerox Corp., 734 F. Supp. at 1550 (Cal. Bus. & Prof. Code § 17200 codifies the tort of "passing off").

D. Pennsylvania State Law Dilution Claim

Finally, Fun-Damental contends that the Copyright Act preempts defendants' claim under Pennsylvania's "anti-dilution" statute, 54 Pa. Cons. Stat. § 1124.<sup>7</sup> This is an issue of first impression in our Circuit.

"An antidilution plaintiff must show that its mark has become synonymous with its products in the minds of a significant portion of consumers and that the mark evokes favorable images of

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7. The statute reads as follows:

Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark registered under this chapter, or a mark valid at common law, or a trade name valid at common law, shall be a ground for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.

plaintiff or its products." Moore Push-Pin Co. v. Moore Bus. Forms, Inc., 678 F. Supp. 113, 118 (E.D. Pa. 1987); see also Nugget Distribs. Coop. of Am., Inc. v. Mr. Nugget, Inc., 776 F. Supp. 1012, 1024 (E.D. Pa. 1991) ("To prevail on a claim under this section, the plaintiff must establish, inter alia, that its mark has a `distinctive quality.' This requirement is satisfied if the mark has a secondary meaning in the infringer's market.").

Courts that have addressed the issue have generally held that an anti-dilution claim is distinct from -- and, hence, not preempted by -- the Copyright Act, as "dilution occurs when . . . the uniqueness of the plaintiff's marks as the designation for its products is diminished by the defendant's unauthorized use of these marks. . . ." The Pillsbury Co. v. Milky Way Prods., Inc., 215 U.S.P.Q. 124, 135 (N.D. Ga. 1981); see, e.g., Pebble Beach Co. v. Tour 18 I, Ltd., No. 93-3875, 1996 WL 511928, at \*39 (S.D. Texas Sept. 10, 1996); Waldman Publ'g Corp., 1994 WL 116088, at \*1 ("Defendant's argument that the Copyright Act preempts plaintiffs' state law claim, brought under New York General Business Law § 368-D prohibiting the dilution of a trade dress, is directly contradicted by Second Circuit authority." (citing Warner Bros. v. American Broad. Co., 720 F.2d 231, 248 (2d Cir. 1983))); Original Appalachian Artworks v. Topps Chewing Gum, 642 F. Supp. 1031, 1039 (N.D. Ga. 1986). Cf. Moore Push-Pin Co., 678 F. Supp. at 117 ("assuming" Lanham Act does not preempt § 1124). We find these authorities persuasive, and, thus, we



will not dismiss defendants' claim under § 1124 as a result of preemption under the Copyright Act.

We shall, nevertheless, dismiss defendants' Pennsylvania anti-dilution claim, because, as Fun-Damental correctly asserts, defendants do not allege anywhere in their counterclaim that the trademark whose dilution they seek to prevent is registered in Pennsylvania, see Fun-Damental's Reply at 3, or that the trademark for the Jaws theme music was in use in the Commonwealth prior to Fun-Damental's alleged misuse of it. See Castle Oil Corp. v. Castle Energy Corp., No. 90-6544, 1992 WL 394932, at \*16 (E.D. Pa. Dec. 29, 1992) ("In order to establish a claim under this statute, plaintiff must show either that the mark at issue is registered in Pennsylvania or that the mark was in use in Pennsylvania prior to the defendant's use.").

An appropriate Order follows.

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

FUNDAMENTAL TOO, LTD. : CIVIL ACTION  
: :  
v. : :  
: :  
UNIVERSAL MUSIC GROUP, INC., :  
MCA, INC., and :  
DUCHESS MUSIC CORPORATION : NO. 97-1595

ORDER

AND NOW, this 8th day of July, 1997, upon consideration of plaintiffs' "motion to dismiss certain counts of defendants' counterclaim," defendants' response thereto, and plaintiff's reply, and in accordance with the accompanying Memorandum, it is hereby ORDERED that:

1. The motion is GRANTED IN PART and DENIED IN PART in accordance with the following paragraphs;

2. Plaintiff's motion is GRANTED with regard to defendants' counterclaim for unfair competition under Pennsylvania and California law;

3. Plaintiff's motion is GRANTED to the extent it seeks to dismiss defendants' counterclaim under 54 Pa. Cons. Stat. § 1124;

4. Plaintiff's motion is DENIED to the extent it seeks to dismiss defendants' state law claim for trademark infringement.

BY THE COURT:

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Stewart Dalzell, J.