

Perfect 10, Inc. v. Talisman Communications Inc.

2000 WL 364813

C.D.Cal.,2000.

March 27, 2000. (Approx. 3 pages)

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United States District Court, C.D. California.

PERFECT 10, INC., a California corporation, Plaintiff,

v.

TALISMAN COMMUNICATIONS INC., a Canadian Corporation; and Does 1-10,
Defendants.

No. CV99-10450 RAP MCX.

March 27, 2000.

STATEMENT OF UNDISPUTED FACTS, CONCLUSIONS OF LAW AND ORDER TO ENTER
DEFAULT

JUDGEMENT AGAINST DEFENDANT TALISMAN COMMUNICATIONS INC.

PAEZ, J.

*1 On February 14, 2000, Plaintiff's Application for Default Judgment by the Court Against Talisman Communications Inc. came before the Court for hearing. Jeffrey N. Mausner and Daniel McIntyre of Berman, Mausner & Resser appeared for the Plaintiff, Perfect 10, Inc. There was no appearance for Defendant, Talisman Communications Inc. After considering the papers filed by the Plaintiff and the arguments presented at the hearing, the Court grants Plaintiff's Application for Default Judgment by the Court Against Talisman Communications Inc., in the amount of \$312,810.00, and makes the following findings of fact and conclusions of law:

I. UNDISPUTED FACTS.

A. Facts Relating to Plaintiff Perfect 10, Its Copyrights and **Right of Publicity**.

1. Perfect 10, Inc. ("Perfect 10") is the producer, publisher and distributor of Perfect 10 (R) products and services, including Perfect 10 (R) Magazine and an Internet website at <www.perfect10.com>. Perfect 10 is engaged in the design, layout, filming, production, marketing and promotion of its products including the magazine, its website, photographs, video productions, and other arts, and is the copyright owner of these works. Some of these copyrighted works appear within the published magazine Perfect 10 (R).
2. Perfect 10 is, and at all times has been the owner of all rights, title and interest to each of the copyrights in the Fall, Winter, and Spring 1998 issues of Perfect 10 (R) Magazine. Prior to Defendant's infringements, Perfect 10 registered the copyrights for the Fall, Winter, and Spring 1998 issues of Perfect 10 (R) Magazine. Each of Perfect 10's copyrights has an effective date of registration in 1998, well prior to Defendant's infringement in September 1999. The copyrights for the Winter and Fall 1998 issues were applied for within three months after the first publication of the works.
3. The Fall, Winter, and Spring 1998 issues of Perfect 10 (R) Magazine all contain a copyright notice which states: "Copyright Copr. 1998 by Perfect 10, Inc., a California Corporation. All rights reserved. No part of this book may be reproduced, stored in a retrieval system or transmitted in any form by any electronic, mechanical, photocopying, recording means or otherwise without prior written permission of the publisher."

4. Each of Perfect 10's copyrighted works consists of material wholly original with Perfect 10 and each is copyrightable subject matter under the laws of the United States. Perfect 10 is the owner of valid copyrights for the photographs and other material contained in the Fall, Winter, and Spring 1998 issues of Perfect 10 (R) Magazine.

5. Perfect 10 hired Violetta Kolek, Ashley Degenford, Vanessa Norris, and Adele Stephens to model for the photographs in issue in this lawsuit. Those models assigned and transferred their **rights of publicity**, as to their likenesses and names, to Perfect 10.

B. Facts Relating to Talisman Communications and Its Infringement of Perfect 10's Copyrights and Violation of Perfect 10's **Right of Publicity**.

*2 6. Defendant Talisman Communications Inc. ("Talisman") operates a website located at the Internet address <supersex.com>. Talisman is the registrant and owner of the Internet domain name <supersex.com>, as registered through Network Solutions, Inc.

7. In or about September 1999, Talisman copied Perfect 10's copyrighted works, and published those works on its website at <supersex.com>, without authorization or permission from Perfect 10. The copyrighted photographs which Talisman copied and posted on its website appear in the Spring 1998, Winter 1998, and Fall 1998 issues of Perfect 10 (R) Magazine.

8. Talisman copied six of Perfect 10's copyrighted photographs (of four models), covered by three separate United States copyright registrations, and publicly displayed those photographs on its website at <supersex.com>. Although photographs of four models were infringed by Talisman, two of the models, Violetta Kolek and Adele Stephens, appeared in the same issue of Perfect 10 Magazine, so three separate copyrights for the magazine were infringed.

9. Photographs of three of the models, as posted on Defendant's website, contain the model's names. The photograph of Ashley Degenford, as posted on Defendant's website, states "Model of the Year Ashley Degenford."

10. Talisman knew or should have known that these photographs belonged to someone else at the time that it posted them on its website. Talisman's infringement of Perfect 10's copyrights was willful.

11. Users of the <supersex.com> website had the ability to obtain the above mentioned copyrighted works owned by Perfect 10. Talisman's customers could copy the above mentioned copyrighted works owned by Perfect 10 from Talisman's website, without the permission or authorization of Perfect 10.

12. The appropriation of the model's likenesses and names by Talisman was for the purpose of advertising and soliciting purchases of Talisman's goods and services, specifically the further sale of photographs and other works on Talisman's Internet website, and for the purpose of selling the appropriated photographs through paid subscriptions to restricted areas of Talisman's website. Defendant did this for profit since it solicits and receives money from persons accessing said website, in exchange for viewing photographs and other works on the <supersex.com> website, including the copyrighted works of Perfect 10.

13. The models, Plaintiff's assignors, are readily identifiable in the photographs, in that any person viewing the photographs with the naked eye can reasonably determine that the persons depicted in the photographs are Plaintiff's assignors.

14. All of the Defendant's acts were performed without the permission, license or consent of Perfect 10.

C. Facts Relating to Service of the Summons and Complaint.

15. Defendant Talisman was properly served with the summons and complaint in this action.

16. Talisman and its attorneys were aware of the proceedings against Talisman in this Court, as demonstrated by correspondence between Talisman's attorneys and Perfect 10's attorney, Jeffrey Mausner.

*3 17. Talisman failed to respond to the summons and complaint, and default was entered against Talisman.

To the extent that any Conclusions of Law set forth below are deemed to be Findings of Fact, they are incorporated herein.

II. CONCLUSIONS OF LAW.

A. Effect of Default.

18. Due to the entry of default against Talisman, liability is assumed. "The general rule of law is

that upon default the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true." [TeleVideo Systems, Inc. v. Heidenthal, 826 F.2d 915, 917-918 \(9th Cir.1987\)](#).

B. Copyright Infringement.

19. "In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate ." Section 410(c) of the Copyright Act, [17 U.S.C. § 410\(c\)](#).

20. Perfect 10 owned a valid, registered copyright covering each of the six photographs copied and posted on the Internet by Talisman. Each of Perfect 10's copyrighted works consists of material wholly original with Perfect 10 and each is copyrightable subject matter under the laws of the United States.

21. By reproducing, copying, publicly displaying, and distributing Perfect 10's copyrighted works without authorization from Perfect 10, in violation of Sections 106 and 501 of the Copyright Act, Talisman has infringed Perfect 10's registered copyrights. Moreover, Talisman has knowingly induced, caused, materially contributed, and provided the means for its customers to infringe Perfect 10's copyrights, by providing a means for others to copy the aforementioned copyrighted works without authorization.

22. Talisman's infringement of Perfect 10's copyrights was willful.

C. Violation of [California Civil Code § 3344](#).

23. The models depicted in the photographs, Violetta Kolek, Ashley Degenford, Vanessa Norris, and Adele Stephens, assigned and transferred their **rights** of **publicity**, as to their likenesses and names, to Perfect 10.

24. By posting the pictures of these models on its website, along with the names of the models in the case of Violetta Kolek, Ashley Degenford, and Vanessa Norris, Talisman has violated the models' **Rights** of **Publicity**, both statutory ([California Civil Code § 3344](#)) and common law, which has been assigned to Plaintiff Perfect 10.

25. Defendant's conduct involved the appropriation of photographs of Plaintiff's assignors, and Plaintiff's assignors are readily identifiable in the photographs, in that any person viewing the photographs with the naked eye can reasonably determine that the persons depicted in the photographs are Plaintiff's assignors. Defendant also appropriated the names of the models, which rights have been assigned to Perfect 10. The appropriation by Defendant was for the purpose of advertising and soliciting purchases of Defendant's goods and services, specifically the further sale of photographs and other works on Defendant's Internet website, and for the purpose of selling the appropriated photographs through paid subscriptions to restricted areas of Defendant's website. All of the Defendant's acts were performed without the permission, license or consent of Perfect 10.

D. Statutory Damages, Attorneys Fees, and Costs.

1. Copyright Infringement.

*4 26. Pursuant to § 504(a) of the Copyright Act, [17 U.S.C. § 504\(a\)](#), an infringer of copyright is liable for either actual damages and profits of the infringer, or statutory damages, at plaintiff's election. Plaintiff elected to seek statutory damages. Plaintiff requested statutory damages in the Complaint. (Complaint ¶ 4 of the Prayer for Relief.)

27. Because each of Perfect 10's copyrights has an effective date of registration in 1998, well prior to Talisman's infringement in September 1999, and because the copyrights for the Winter and Fall 1998 issues were applied for within three months after the first publication of the work, statutory damages and attorneys fees are available, pursuant to Section 412 of the Copyright Act, [17 U.S.C. § 412](#).

28. [Section 504\(c\)](#) of the Copyright Act, [17 U.S.C. § 504\(c\)](#), provides that plaintiff may elect statutory damages "in a sum not less than \$500 or more than \$20,000 as the court considers just," for each copyright infringed. Moreover, "[i]n a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court at its discretion may increase the award of statutory damages to a sum of not more than \$100,000" for each copyright infringed.

29. It is undisputed, and evidence introduced by Plaintiff supports the finding, that Talisman willfully infringed Perfect 10's copyrights.

30. The Court determined that the maximum amount of statutory damages available under [Section 504\(c\)](#) of the Copyright Act, \$100,000 per copyright infringed, should be awarded, based upon the following considerations:

a. The egregious and willful nature of the infringement. Because of the clear copyright notice in Perfect 10 (R) Magazine, the names of the models and other information appearing on some of the photographs, and the other factors noted above, it is clear that Talisman must have known that it was infringing Perfect 10's copyrights when it posted the photographs on the Internet.

b. The damage caused to Perfect 10 by the infringement. While it would be difficult to quantify Perfect 10's damages resulting from the infringement, it is clear that Perfect 10 has been severely damaged. The photographs have been distributed worldwide, in a form that is easy to download and easy to copy. A virtually unlimited number of copies can be made of the copyrighted photographs, as a result of Talisman's infringement.

31. This Court therefore awards the full amount of statutory damages provided for under [§ 504\(c\)](#), \$100,000 per copyright infringed, for a total of \$300,000 on Plaintiff's claim for copyright infringement and contributory infringement.

2. **Right of Publicity.**

32. Pursuant to [California Civil Code § 3344\(a\)](#), for defendant's violation of Plaintiff's **Right of Publicity**, Plaintiff is entitled to the greater of either actual damages and profits of the infringer, or statutory damages of \$750 for each model's rights violated.

*5 33. Plaintiff elected statutory damages which, according to [§ 3344\(g\)](#), are "cumulative and shall be in addition to any others provided for by law."

34. This Court therefore awards the full amount of statutory damages provided for under [§ 3344\(g\)](#), for a total of \$3,000 on Plaintiff's claim for violation of [California Civil Code § 3344](#).

35. The Court does not award punitive damages against Talisman under [California Civil Code § 3344](#), as requested by the Plaintiff.

3. Attorneys' Fees and Costs.

36. Section 505 of the Copyright Act, [17 U.S.C. § 505](#), provides that in a copyright infringement action, the court in its discretion may award a reasonable attorney's fee to the prevailing party as part of the costs. In [Fogerty v. Fantasy, Inc., 510 U.S. 517 \(1994\)](#), the Supreme Court endorsed the following non-exclusive factors in making this determination: frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance consideration of compensation and deterrence. [510 U.S. at 535, note 19](#). A primary consideration in determining whether to award attorney's fees is the Copyright Act's primary objective, to encourage the production of original literary, artistic, and musical expression for the good of the public. [Id at 524; Fantasy, Inc. v. Fogerty, 94 F.3d 553, 557-558 \(9th Cir.1996\)](#).

37. The Court finds that Plaintiff is entitled to attorney's fees, as a result of the following factors:

a. The willful nature of Talisman's infringement.

b. The worldwide extent of the infringement and Perfect 10's resulting damages.

c. Talisman's failure to in any way to take responsibility for its infringement.

Awarding attorney's fees in this case will promote the protection of copyright and advance considerations of compensation and deterrence, by encouraging infringement actions for such willful violations. 38. Plaintiff is also entitled to an award of attorney's fees and costs pursuant to [Section 3344 of the California Civil Code](#).

39. The amount of attorney's fees is set forth in the attorney's fees schedule of Central District Local Rule 14.12.3. For a judgment of \$303,000, attorney's fees would be \$9,660. Costs are \$150 for filing the Complaint.

III. ORDER.

As a result of the above findings of fact and conclusions of law, the allegations contained in the complaint, the materials submitted in connection with the default hearing, and the statements and arguments of counsel at the default hearing, and for good cause appearing,

IT IS HEREBY ORDERED THAT Plaintiff Perfect 10, Inc. is entitled to judgment against Defendant Talisman Communications Inc. in the sum of \$312,810.00 (Three hundred twelve thousand eight hundred ten dollars), which amount consists of \$300,000 in statutory damages

for Talisman's Copyright Infringement and Contributory Infringement, \$3,000 for Talisman's violation of Plaintiff's **Right of Publicity** under [Civil Code § 3344](#), \$9,660 in attorney's fees, and costs of \$150, which Judgment is filed concurrently with this Order.

*6 Plaintiff may file a motion for an award of attorney's fees and costs for post-judgment collection efforts.

JUDGMENT

In the above-entitled cause, Plaintiff Perfect 10, Inc., having requested that the court enter Default Judgment against Defendant Talisman Communications Inc., and such Default Judgment having been entered by the court,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that Plaintiff Perfect 10, Inc. has judgment against defendant Talisman Communications Inc. in the sum of \$312,810.00 (three hundred twelve thousand eight hundred ten dollars), consisting of the following: \$300,000.00 in statutory damages for its claims for Copyright Infringement and Contributory Infringement, as provided for under [§ 504\(c\)](#) of the Copyright Act; plus \$3,000.00, in statutory damages for violation of the **Right of Publicity** as provided for under [California Civil Code § 3344\(a\)](#); plus \$9,660.00 in attorney's fees as set forth in the attorney's fees schedule of Central District Local Rule 14.12.3; and costs in the amount of \$150.00.

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