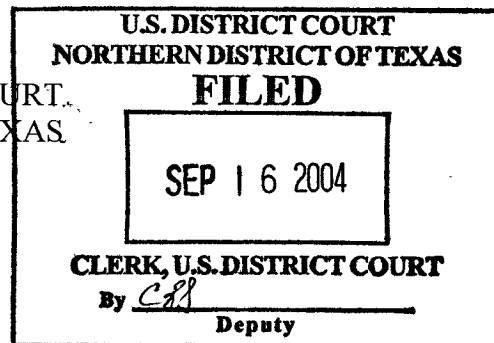


ORIGINAL
PIN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISIONINTERNATIONAL DEVELOPMENT
CORPORATION,

Plaintiff,

v.

INTP, INC.,

Defendant.

CASE NO. 3:04-CV-854 P

**PLAINTIFF INTERNATIONAL DEVELOPMENT CORPORATION'S RESPONSE IN
OPPOSITION TO DEFENDANT INTP, INC.'S MOTION TO DISMISS, STAY OR
TRANSFER**

Plaintiff International Development Corporation ("IDC") respectfully submits this response in opposition to the Motion to Dismiss, Stay or Transfer filed by Defendant INTP, Inc. ("INTP").

I. BACKGROUND

IDC is a manufacturer and distributor in the home lighting business headquartered in Southlake, Texas. Among the range of products it markets and sells to retailers and wholesalers, IDC markets certain signage products having the general shape of rocks ("rock-shaped signs"). IDC has, for some time now, enjoyed a valuable and mutually-beneficial relationship with Kmart Corporation ("Kmart"). IDC has marketed and sold a variety of products to Kmart, which have included IDC's rock-shaped signs.

On or about April 12, 2004, both IDC and its customer Kmart received a letter from INTP, Inc. alleging that IDC's sale of its rock-shaped signs to Kmart constituted infringement of INTP's alleged "copyright" in its own rock-shaped sign product, and ordering Kmart to conduct

further business with IDC under threat of a lawsuit. Investigation revealed that INTP did not, in fact, hold a copyright on its rock-shaped sign product, although it did appear to hold a copyright registration on a catalog, which was registered as a “literary work.”

As a result of INTP’s tortious letter to IDC’s valued customer, Kmart, and the baseless nature of the allegations made therein, IDC filed this civil action in the United States District Court for the Northern District of Texas against INTP for false and misleading representations, tortious interference with existing contract, tortious interference with prospective contract, tortious interference with a business relationship and for a declaratory judgment of non-infringement of copyright.

Nearly two months after receiving a courtesy copy of IDC’s filed complaint, INTP filed a duplicative action in the Southern District of Florida, alleging, *inter alia*, copyright and trade dress infringement by IDC, Kmart Corporation and Westinghouse Electric Corporation. Attached as Exhibit A is a copy of INTP’s Complaint filed in the Florida Court. INTP has now moved this Court to dismiss, stay or transfer the action in this Court based on the theory that IDC’s lawsuit was merely an “anticipatory declaratory judgment action” and therefore INTP has the exclusive right to determine the forum in which this dispute is to be settled. For the reasons elaborated in more detailed below, IDC asks this Court to deny INTP’s motion.

II. ARGUMENT AND AUTHORITIES

A. This Action Should Proceed in this Court Pursuant to the “First to File Rule”

It is well-accepted that the forum in which an action is first filed is given priority over subsequent actions, unless there is a strong showing of balance of convenience in favor of the second forum or there are special circumstances which justify giving the priority to the second action. *See Cadle Company v. Whataburger of Alice, Inc.*, 174 F.3d 599, 606 (5th Cir. 1999).

These principles are consistent with the doctrine of federal comity, which requires the federal district courts to refrain from interfering with each others' affairs in order to avoid duplication of judicial resources and conflicting decisions. *See Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952).

At the outset, it should be noted that INTP's claims of copyright infringement are baseless, as INTP holds neither valid copyright nor trade dress rights in the design of its useful articles. It is well-established that useful articles are not proper subject for copyright protection. *See Norris Industries, Inc. v. International Tel. & Tel. Corp.*, 696 F.2d 918 (11th Cir. 1983) ("wire-spoked automobile wheel cover was a "useful article" within meaning of copyright law, and thus not eligible to be copyrighted"); *Galiano v. Harrah's Operating Co.*, 71 U.S.P.Q.2d 1265 (E.D. La. 2004) (costumes are "useful articles" not entitled to copyright protection). Further, there is nothing creative or distinctive about the rock shape of INTP's product, and the rock shape does not enjoy "secondary meaning" in the marketplace. *See WalMart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205 (2000) ("trade dress" is not an enforceable right in the absence of a showing of strong secondary meaning). Finally, to the extent that there is any similarity between the two products, it is only so much as necessarily occurs owing to the shared idea of a rock shape, which cannot be protected by copyright. *See* 17 U.S.C. § 102(b) (copyright protection cannot extend to "ideas" or "concepts").

Without respect to the absence of merits of INTP's claims, the present action was already pending at the time of filing of the Florida lawsuit by INTP. The "first to file" rule presumes that the IDC tortious interference and declaratory judgment action has priority over INTP's copyright claim in the Florida lawsuit, since IDC's suit was filed first and the two cases involve the same central facts and issues. *See Cadle Company*, 174 F.3d at 606. Although INTP's

claims in the Southern District of Florida involve a trade dress aspect in addition to a copyright aspect, the facts underlying INTP's claim for trade dress infringement are the same as those underlying its claim of copyright infringement. Accordingly, this case should proceed in the Northern District of Texas in the absence of special circumstances.

B. There are no "Compelling Circumstances" Necessitating a Transfer

Although the "first-to-file" rule establishes a presumption in favor of proceeding before the court in which the earlier case was filed, a court may, under compelling circumstances, transfer a cause of action to another court. This is, however, only appropriate where compelling circumstances exist and the balance of interests clearly weighs in favor of a transfer. The Court must determine whether the requested transfer will better serve the interests of justice and promote the convenience of the parties and witnesses.

1. The Southern District of Florida Cannot Adjudicate All the Matters, as it Lacks Personal Jurisdiction over IDC

INTP asserts that the claims raised in this case can be fully litigated in the Southern District of Florida. At least with respect to IDC, INTP's assertion is completely incorrect, as the Southern District of Florida does not have personal jurisdiction over IDC. Accordingly, IDC has moved the Florida Court to dismiss the action against IDC, which motion is currently pending. A copy of IDC's Motion to Dismiss filed in the Southern District of Florida is attached hereto as Exhibit B.

On the other hand, INTP has, by its answer, consented to the jurisdiction of this Court. Accordingly, there are no pending issues of personal jurisdiction interfering with the adjudication of all issues by this Court.

2. This is a Tortious Interference Action, Not an "Anticipatory Declaratory Judgment Action"

INTP characterizes the present action as an “anticipatory declaratory judgment action.” As noted in INTP’s motion, the courts of the Fifth Circuit have, in certain cases, held that an earlier-filed “anticipatory declaratory judgment action” may be dismissed or transferred in favor of a later-filed case relating to the same issues. *See, e.g., PAJ, Inc. v. Yurman Design, Inc.*, 1999 WL 68651 (N.D. Tex. Feb. 9, 1999). INTP’s reliance on these cases is improper, as the present action cannot reasonably be characterized as “anticipatory” or a “declaratory judgment action.” In fact, IDC asserts five separate causes of action, namely, false and misleading representations, tortious interference with existing contract, tortious interference with prospective contract, tortious interference with business relationship, and declaratory judgment of non-infringement of copyright. IDC’s cause of action arises out of INTP’s affirmative acts of tortious interference with IDC’s valuable business relations with its customer, Kmart. INTP was sued in this Court because of its affirmative tortious acts of interference, not because the parties were engaged in some form of “race to the courthouse”. It is not accurate, therefore, to characterize the present suit either as “anticipatory” or a “declaratory judgment action,” and the cases relating to such actions are inapplicable to adjudication of the present motion.

3. The Bulk of IDC’s Claims Arise Under Texas Law

Of the five causes of action asserted by IDC in this action, three of them arise under Texas law. As INTP tortiously interfered with Texas contracts, Texas law will apply to these causes of action without respect to whether this case is litigated in the Northern District of Texas or the Southern District of Florida. Although the Southern District of Florida may be called upon to apply the law of the State of Texas when necessary, judicial economy is better served by a Court sitting in Texas applying Texas law, a body of law with which it is already familiar.

C. The Northern District of Texas is the Proper Forum for this Case, as the Balance of

Interests favors Litigation in this Court**1. INTP's Claims in the Florida Case Could Have Been Brought in Texas**

There need be no dispute that all of INTP's claims could have been brought in the Northern District of Texas. IDC's offices are in Southlake, Texas. The claims made by INTP in the Florida litigation arise out of IDC's activities in Texas. The other defendants to the Florida litigation are not thought to be particularly any more amenable to suit in Florida than in Texas.

2. The Balance of Interests Weighs in Favor of the Northern District of Texas

INTP seeks to litigate its causes of action in Florida despite the fact that the only connection between INTP's causes of action and the State of Florida is the presence of INTP in that state. IDC is not subject to personal jurisdiction in Florida. None of the other parties against which INTP seeks to assert its claims is headquartered in Florida. The activities giving rise to all parties' claims arose outside of the State of Florida.

In contrast to the dearth of connections between this dispute and the Southern District of Florida, there is a wealth of connections between this dispute and the Northern District of Texas. IDC, the principal party against which INTP asserts its claims, is headquartered in Southlake, Texas, and the individuals having personal knowledge of the circumstances surrounding IDC's contracts with Kmart are located in Southlake, Texas and Troy, Michigan. The individuals having knowledge of the creation of the product accused by INTP are located in Southlake, Texas. Accordingly, there is no reasoned argument for dismissal or transfer of this case based upon convenience or judicial efficiency. Avoidance of the parties' and witnesses' inconvenience and expense in this respect, as well as preserving judicial economy and resources, mandates that in the interest of justice this action should proceed in the Northern District of Texas.

III. CONCLUSION

For all the reasons set forth above, IDC respectfully requests that INTP's pending motion be denied.

Respectfully submitted,

Date: 9-16-2004



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ATTORNEYS FOR PLAINTIFF
INTERNATIONAL DEVELOPMENT
CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on Connis O. Brown, III, Esq. Brown Robert, LLP 101 NE Third Avenue, Second Floor, Fort Lauderdale, FL 33301 and Rocky Schwartz, Whitaker Chalk Swindle & Sawyer, 301 Commerce Street Suite 3500 Fort Worth, TX 76102 via First Class Mail this 16th day of September, 2004.


Ken Emanuelson

Ex
A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

DIVISION

CASE NO.

INTP, INC., a Florida corporation,

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC
CORPORATION, a Delaware corporation,
KMART CORPORATION, a Delaware
corporation, and INTERNATIONAL
DEVELOPMENT CORPORATION,
a Texas corporation.

Defendants.
_____ /

COMPLAINT

The Plaintiff INTP, INC., a Florida corporation ("INTP"), by and through its undersigned counsel, hereby alleges the following for its Complaint against Defendants WESTINGHOUSE ELECTRIC CORPORATION, a Delaware corporation ("Westinghouse"), KMART CORPORATION, a Delaware corporation ("Kmart") and INTERNATIONAL DEVELOPMENT CORPORATION, a Texas corporation ("IDC"). Allegations made on belief are premised on the belief that the same are likely to have evidentiary support after a reasonable opportunity for further investigation and discovery.

THE PARTIES

1. INTP is a Florida corporation with its principal place of business at 4700 West Prospect Road, Fort Lauderdale, Florida 33309.
2. Westinghouse is a Delaware corporation with its principal place of business at 1515 Broadway New York, New York 10036.
3. Kmart is a Delaware corporation with its principal place of business at 3100 West Big Beaver Road, Troy, MI 48084.
4. IDC is a Texas corporation with its principal place of business at 2890 Market Loop,

04-61714
CIV-MARRA

MAJESTRATH KIDCH
SEPT 16 2004

Southlake, Texas 76092.

JURISDICTION AND VENUE

5. This is an action in law and equity for copyright infringement arising under the Copyright Act, 17 U.S.C. Section 101, *et seq.*, and for trademark and trade dress infringement under the Lanham Act, 15 U.S.C. § 1051, *et seq.*, false designation of origin unfair trade practices under the Florida Unfair Trade Practices Act, Fla. Stat. § 495, and unfair competition under the common law of Florida, as hereinafter more fully set forth.

6. This Court has jurisdiction pursuant to 28 U.S.C. § 1338(a) (based on the exclusive jurisdiction of the district courts in copyright cases), 15 U.S.C. § 1121 (actions arising under the Federal Trademark Act), 28 U.S.C. 1338(a) (pendent unfair competition claims) and 28 U.S.C. § 1332(a) (diversity of citizenship). The amount in question herein, excluding interest and costs, exceeds \$75,000.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b) and (c) because the Defendants reside in Southern District of Florida for venue purposes given their substantial contacts with the district.

8. Venue is also proper in this district based upon 28 U.S.C. Section 1400(a), because venue for copyrights actions may lie in the district in which the defendant or his agent resides or may be found, and the Defendants reside in the Southern District of Florida for venue purposes.

FACTUAL BACKGROUND

9. INTP is engaged in the business of designing, manufacturing, and selling consumer products.

10. In December 2001, INTP hired Hong Kong Star Industries Ltd. to design and manufacture on its behalf an original three-dimensional rock sculpture (the "Rock Sculpture") which was intended to create a particular visual appearance for the purpose of presenting INTP goods to the public with distinctive dress, design and combination of features.

11. The Rock Sculpture was created so that a house number display might be attached to it.

12. The Rock Sculpture is conceptually separate from the house number display attached to it.

13. The Rock Sculpture was a work for hire as defined by 17 U.S.C. § 101.

14. The Rock Sculpture is a wholly original three dimensional work and is copyrightable under the laws of the United States.

15. INTP registered the Rock Sculpture with the United States Copyright Office on June 18, 2002, complying in all respects with the registration and deposit requirements of the Act. A copy of the registration application is attached hereto as Exhibit 1.

16. The Rock Sculpture is a registered work with the United States Copyright Office under registration number TX 5-547-208 (the "Registered Copyright.")

17. On or about June 15, 2004 INTP, through its counsel, filed a form CA (the "Form CA") with the United States Copyright Office. A copy of the Form CA is attached hereto as Exhibit 2.

18. The Form CA amplifies registration number TX 5-547-208 by setting forth that "entire work" includes, among other things, the original three-dimensional Rock Sculpture depicted in the photographs filed with registration number TX 5-547-208.

19. The Registered Copyright on the Rock Sculpture is the property of INTP, the sole owner of the Registered Copyright.

20. The Rock Sculpture was first published in a photograph in a catalog on or about February 28, 2002.

21. The Rock Sculpture was first used to identify INTP as the source of a product in a photograph in a catalog on or about February 28, 2002.

22. The Rock Sculpture is INTP's trade dress (the "Trade Dress") which INTP uses to

identify it as the source of its solar-powered lighted house number displays (the "INTP Displays") and is protectable under the laws of the United States and the State of Florida.

23. The Trade Dress is the property of INTP, the sole owner of the Trade Dress.

24. Consumers and distributors identify INTP as the source of the INTP Displays on account of the Trade Dress.

25. The INTP Display is sold in cardboard packages which clearly indicate and notice the existence of the Registered Copyright.

26. President of INTP, Mr. Herbert Hilton, and his wife, Lin Hilton, have a utility patent pending on certain features of the INTP Display. The utility patent application was published on July 3, 2003 with publication number 20030121541.

27. The subject matter of the pending utility patent application is separate and distinct from the subject matter of INTP's Trade Dress and Registered Copyright. The features which are the subject of the claims in the pending utility patent application are not part of INTP's Trade Dress or Registered Copyright.

28. This action does not assert any patent rights. The Hiltons' patent has not yet issued.

29. Prior to Defendants entering the market with their infringing product, INTP used the Trade Dress in commerce all across the United States, including but not limited to the South Florida Area, with numerous retail distributors carrying the product and generating substantial revenue.

30. The Rock Sculpture Trade Dress is inherently distinctive, but it has also acquired secondary meaning which is evidenced, in part, by the multiple infringers now copying the Rock Sculpture and Trade Dress.

31. INTP has expended substantial resources in designing, promoting, manufacturing and selling the INTP Displays and built a valuable business based on demand for its distinctively-styled, high quality house number displays. INTP has become identified in the minds of the public as the provider of the same.

32. From at least April 2002 through October 2002, INTP was in regular contact with Kmart soliciting Kmart as a distributor of the INTP Displays.

33. INTP supplied Kmart with pictures and at least one sample of the INTP Display.

34. After discussions with INTP, in August 2002, Kmart stated in a letter that it had no interest in adding INTP products to its line of merchandise.

35. In a October 2002 email, Kmart stated that it preferred to work directly with factories and was looking at other solar items.

36. In response to Kmart's 2002 email, Mr. Steve Marks, an employee and agent of INTP, reminded Kmart in an email that the unique features of the INTP Display are subject to the copyright asserted herein.

37. It is believed that after seeing the INTP Display, Kmart solicited IDC to copy the INTP Display and make a knock-off.

38. It is believed that IDC had access to the INTP Display through Kmart prior to making its own solar address rock.

39. IDC copied the INTP Display and caused to be manufactured and offered for sale to the public its own house number display (the "Infringing Display") which is not only substantially similar, but is strikingly similar to the INTP Display. A picture of the Infringing Display is attached hereto as Exhibit 3. It was offered in the same look and feel as the INTP Display.

40. Defendant Westinghouse has participated in and contributed to the Kmart's and IDC's copyright and trade dress infringement of the INTP Display by allowing its marks to be confusingly used in combination with the Trade Dress of INTP.

41. At some date in or about March 2004, Kmart began selling the Infringing Display knowing that it was a copy of INTP's product.

42. The Defendants Kmart and IDC wilfully and unlawfully plagiarized the INTP Display in order to capitalize on INTP's good will.

43. Defendant Westinghouse has capitalized on and benefitted from the illicit use of INTP's Registered Copyright and Trade Dress.

44. Defendants, and each of them, have infringed on INTP's copyright and trade dress and engaged in unfair competition.

45. It is believed that Defendants have been selling the Infringing Display in great number all across the United States.

46. It is believed that the sales in Florida of the Infringing Display are not isolated, but a pattern of widespread infringement.

47. As a result of the above-described infringement, INTP has suffered damages and been irreparably harmed by Defendants' infringing and unauthorized publication and use of INTP's original three-dimensional sculpture.

48. All conditions precedent to this action have been satisfied or waived.

COUNT I
COPYRIGHT INFRINGEMENT BY IDC

49. INTP hereby incorporates the allegations of paragraphs 1 through 48 above as if separately set forth herein.

50. Defendant IDC unlawfully and willfully copied all or part of INTP's copyrighted Rock Sculpture, in violation of INTP's Registered Copyright in the three-dimensional design of the Rock Sculpture.

51. IDC designed, manufactured and sold products which infringe INTP's copyright.

52. Prior to copying the INTP Display, Defendant IDC had access to the INTP Display, and therefore access to the Rock Sculpture which is copyright protected.

53. IDC knew or should have known that the Rock Sculpture of INTP was copyrighted.

54. The Infringing Display depicted in Exhibit 3 attached to this Complaint infringes INTP's copyright on the Rock Sculpture.

55. The Infringing Display made by IDC is not only substantially similar, but strikingly

similar to the Rock Sculpture and exudes the same “look and feel” as INTP’s copyrighted material.

56. INTP has lost substantial revenue from IDC’s unlawful and willful copying of INTP’s copyrighted material.

57. The Infringing Display made by IDC dilutes the market and serves to destroy the distinctiveness of INTP’s copyrighted works.

58. IDC’s copying of the Rock Sculpture and the use of the Rock Sculpture on the Infringing Display destroys the public’s identification of the INTP Display with INTP as INTP’s exclusive property, thereby confusing the public and causing INTP to suffer irreparable damages and lost profits.

59. INTP’s sale of its own works and derivative works is prejudiced by IDC’s copyright infringements.

WHEREFORE INTP demands: (1) that IDC, their agents and servants be enjoined during the pendency of this action and permanently from infringing in any manner INTP’s copyright of the Rock Sculpture as depicted in Exhibit 1; (2) that IDC be required to pay to INTP such damages as INTP has sustained as a result of IDC’s copyright infringement and to account for all gains, profits and advantages derived by IDC by the infringements, or such damages as to the Court shall appear proper within the provisions of the copyright statutes; (3) that IDC be required to deliver up to be impounded during the pendency of this action all unauthorized copies of or materials bearing pictures of the copyrighted Rock Sculpture in its possession or under its control and to deliver up for destruction all infringing copies and all digital media data, photographic negatives, product designs, and other matter used for making such infringing copies; (4) that IDC pay to INTP the cost of this action and reasonable attorneys’ fees to be set by the Court; (5) that if INTP elects to pursue statutory damages before trial, that IDC be required to pay all statutory damages provided by the pertinent provisions of the Copyright Act; and (6) that Plaintiff have such other and further relief as is just and appropriate.

COUNT II

COPYRIGHT INFRINGEMENT BY KMART

60. INTP hereby incorporates the allegations of paragraphs 1 through 48 above as if separately set forth herein.

61. Defendant Kmart unlawfully and willfully sold copies of all or part of INTP's copyrighted Rock Sculpture, in violation the Registered Copyright in the three-dimensional design of the Rock Sculpture.

62. Kmart sold products which infringed INTP's copyright.

63. Kmart had access to the INTP Display, and therefore access to the Rock Sculpture which is copyright protected.

64. Kmart knew or should have known that the Rock Sculpture of INTP was copyrighted.

65. The Infringing Display depicted in Exhibit 3 attached to this Complaint infringes INTP's copyright on the Rock Sculpture.

66. The Infringing Display sold by Kmart is not only substantially similar, but strikingly similar to the Rock Sculpture and exudes the same "look and feel" as INTP's copyrighted material.

67. INTP has lost substantial revenue from Kmart unlawful and willful copying of INTP's copyrighted material.

68. The Infringing Display sold by Kmart dilutes the market and serves to destroy the distinctiveness of INTP's copyrighted works.

69. Kmart's copying of the Rock Sculpture and the use of the Rock Sculpture on the Infringing Display destroys the public's identification of the INTP Display with INTP as INTP's exclusive property, thereby confusing the public and causing INTP to suffer irreparable damages and lost profits.

70. INTP's sale of its own works and derivative works is prejudiced by Kmart's copyright infringements.

71. Kmart induced infringement by IDC and Westinghouse.

WHEREFORE INTP demands: (1) that Kmart, their agents and servants be enjoined during the pendency of this action and permanently from infringing in any manner INTP's copyright of the Rock Sculpture as depicted in Exhibit 1; (2) that Kmart be required to pay to INTP such damages as INTP has sustained as a result of Kmart's copyright infringement and to account for all gains, profits and advantages derived by Kmart by the infringements, or such damages as to the Court shall appear proper within the provisions of the copyright statutes; (3) that Kmart be required to deliver up to be impounded during the pendency of this action all unauthorized copies of or materials bearing pictures of the copyrighted Rock Sculpture in its possession or under its control and to deliver up for destruction all infringing copies and all digital media data, photographic negatives, product designs, and other matter used for making such infringing copies; (4) that Kmart pay to INTP the cost of this action and reasonable attorneys' fees to be set by the Court; (5) that if INTP elects to pursue statutory damages before trial, that Kmart be required to pay all statutory damages provided by the pertinent provisions of the Copyright Act; and (6) that Plaintiff have such other and further relief as is just and appropriate.

COUNT III

COPYRIGHT INFRINGEMENT BY WESTINGHOUSE

72. INTP hereby incorporates the allegations of paragraphs 1 through 48 above as if separately set forth herein.

73. The Infringing Display was marketed as a Westinghouse™ brand product.

74. Defendant Westinghouse marked the packaging of the Infringing Display with its name and trademarks.

75. No less than twenty (20) instances of the Westinghouse trademark appear on each package of each Infringing Display.

76. By allowing its name to be so prominently used on packaging and marketing of the

Infringing Display, Westinghouse has contributed to the unlawful copyright infringements by Defendants IDC and Kmart.

77. Westinghouse derived direct economic benefit from sales of the Infringing Displays and therefore directly benefitted from the illicit use of INTP's copyright.

78. The Infringing Display depicted in Exhibit 3 attached to this Complaint infringes INTP's copyright on the Rock Sculpture.

79. The Infringing Display sold by Westinghouse is not only substantially similar, but strikingly similar to the Rock Sculpture and exudes the same "look and feel" as INTP's copyrighted material.

80. INTP has lost substantial revenue from Westinghouse's unlawful use of INTP's Registered Copyright.

81. The Infringing Display sold by Westinghouse dilutes the market and serves to destroy the distinctiveness of INTP's copyrighted works.

82. Westinghouse's use of the Rock Sculpture on the Infringing Display destroys the public's identification of the INTP Display with INTP as INTP's exclusive property, thereby confusing the public and causing INTP to suffer irreparable damages and lost profits.

83. INTP's sale of its own works and derivative works is prejudiced by Westinghouse copyright infringements.

WHEREFORE INTP demands: (1) that Westinghouse, their agents and servants be enjoined during the pendency of this action and permanently from infringing in any manner INTP's copyright of the Rock Sculpture as depicted in Exhibit 1; (2) that Westinghouse be required to pay to INTP such damages as INTP has sustained as a result of Westinghouse's copyright infringement and to account for all gains, profits and advantages derived by Westinghouse by the infringements, or such damages as to the Court shall appear proper within the provisions of the copyright statutes; (3) that Westinghouse be required to deliver up to be impounded during the pendency of this action all

unauthorized copies of or materials bearing pictures of the copyrighted Rock Sculpture in its possession or under its control and to deliver up for destruction all infringing copies and all digital media data, photographic negatives, product designs, and other matter used for making such infringing copies; (4) that Westinghouse pay to INTP the cost of this action and reasonable attorneys' fees to be set by the Court; (5) that if INTP elects to pursue statutory damages before trial, that Westinghouse be required to pay all statutory damages provided by the pertinent provisions of the Copyright Act; and (6) that Plaintiff have such other and further relief as is just and appropriate.

COUNT IV

TRADE DRESS INFRINGEMENT BY IDC

84. INTP hereby incorporates the allegations of paragraphs 1 through 48 above as if separately set forth herein.

85. When designing and manufacturing the INTP Display, INTP has adopted a particular dress, design and combination of features to produce a particular visual appearance for the purpose of presenting its goods to the public.

86. IDC has attempted to imitate INTP's particular dress, design and combination of features, as they pertain to the INTP Display, in such a way as to mislead the public.

87. The multiplicity of similarities between the INTP Displays and those produced and manufactured by IDC evidence a conscious intent by IDC to imitate and copy INTP.

88. In making the Infringing Display, IDC copied both the Rock Sculpture and the amber color display of the INTP Display, evidencing a conscious intent of IDC to imitate and copy INTP.

89. IDC's actions are intended and/or operate to confuse the public.

90. INTP's sale of its own works and derivative works is prejudiced by IDC's imitation and copying of INTP, all to INTP's irreparable damage.

WHEREFORE INTP demands: (1) that IDC, their agents and servants be enjoined during the pendency of this action and permanently from infringing in any manner INTP's Trade Dress as

depicted in Exhibit 1; (2) that IDC be required to pay to INTP such damages as INTP has sustained as a result of IDC's trade dress infringement and to account for all gains, profits and advantages derived by IDC by the infringements, or such damages as to the Court shall appear proper within the provisions of the Lanham Act; (3) that IDC be required to deliver up to be impounded during the pendency of this action all unauthorized copies of or materials bearing pictures of the INTP's Trade Dress in IDC's possession or under its control and to deliver up for destruction all infringing copies and all digital media data, photographic negatives, product designs, and other matter used for making such infringing copies; (4) that IDC pay to INTP the cost of this action and reasonable attorneys' fees to be set by the Court; and (5) and that Plaintiff have such other and further relief as is just and appropriate.

COUNT V

TRADE DRESS INFRINGEMENT BY KMART

91. INTP hereby incorporates the allegations of paragraphs 1 through 48 above as if separately set forth herein.

92. When designing and manufacturing the INTP Display, INTP has adopted a particular dress, design and combination of features to produce a particular visual appearance for the purpose of presenting its goods to the public.

93. Kmart has sold the Infringing Display which imitates INTP's particular dress, design and combination of features, as they pertain to the INTP Display, in such a way as to mislead the public.

94. The multiplicity of similarities between the INTP Display and the Infringing Display evidence a conscious intent by Kmart to sell an imitation copy of the INTP Display.

95. In requesting the Infringing Display, Kmart sought to copy both the Rock Sculpture and the amber color display of the INTP Display, evidencing a conscious intent of Kmart to imitate and copy INTP.

96. Kmart actions are intended and/or operate to confuse the public.

97. INTP's sale of its own works and derivative works is prejudiced by Kmart imitation and copying of INTP, all to INTP's irreparable damage.

WHEREFORE INTP demands: (1) that Kmart, their agents and servants be enjoined during the pendency of this action and permanently from infringing in any manner INTP's Trade Dress as depicted in Exhibit 1; (2) that Kmart be required to pay to INTP such damages as INTP has sustained as a result of Kmart trade dress infringement and to account for all gains, profits and advantages derived by Kmart by the infringements, or such damages as to the Court shall appear proper within the provisions of the Lanham Act; (3) that Kmart be required to deliver up to be impounded during the pendency of this action all unauthorized copies of or materials bearing pictures of the INTP's Trade Dress in Kmart possession or under its control and to deliver up for destruction all infringing copies and all digital media data, photographic negatives, product designs, and other matter used for making such infringing copies; (4) that Kmart pay to INTP the cost of this action and reasonable attorneys' fees to be set by the Court; and (5) and that Plaintiff have such other and further relief as is just and appropriate.

COUNT VI

TRADE DRESS INFRINGEMENT BY WESTINGHOUSE

98. INTP hereby incorporates the allegations of paragraphs 1 through 48 and 73 through 77 above as if separately set forth herein.

99. When designing and manufacturing the INTP Display, INTP has adopted a particular dress, design and combination of features to produce a particular visual appearance for the purpose of presenting its goods to the public.

100. Westinghouse marketed under its name the Infringing Display which imitates INTP's particular dress, design and combination of features, as they pertain to the INTP Display, in such a way as to mislead the public.

101. The multiplicity of similarities between the INTP Display and the Infringing Display evidence a conscious intent by Westinghouse to sell an imitation copy of the INTP Display.

102. Westinghouse actions are intended and/or operate to confuse the public.

103. INTP's sale of its own works and derivative works is prejudiced by Westinghouse's imitation and copying of INTP, all to INTP's irreparable damage.

WHEREFORE INTP demands: (1) that Westinghouse, their agents and servants be enjoined during the pendency of this action and permanently from infringing in any manner INTP's Trade Dress as depicted in Exhibit 1; (2) that Westinghouse be required to pay to INTP such damages as INTP has sustained as a result of Westinghouse's trade dress infringement and to account for all gains, profits and advantages derived by Westinghouse by the infringements, or such damages as to the Court shall appear proper within the provisions of the Lanham Act; (3) that Westinghouse be required to deliver up to be impounded during the pendency of this action all unauthorized copies of or materials bearing pictures of the INTP's Trade Dress in Westinghouse's possession or under its control and to deliver up for destruction all infringing copies and all digital media data, photographic negatives, product designs, and other matter used for making such infringing copies; (4) that Westinghouse pay to INTP the cost of this action and reasonable attorneys' fees to be set by the Court; and (5) and that Plaintiff have such other and further relief as is just and appropriate.

COUNT VII

UNFAIR COMPETITION BY IDC

104. INTP hereby incorporates the allegations of paragraphs 1 through 48 above as if separately set forth herein.

105. This action for unfair competition is a claim substantially related to IDC's infringement of INTP's copyright and trade dress and pursuant to § 1338(b) of Title 28 of the United States Code, the Court has and should assume pendent jurisdiction of this claim. This Court also has diversity jurisdiction over this claim.

106. IDC, in unlawfully and willfully copying and plagiarizing the INTP Display, created a likelihood of confusion among the public as to the original source of the INTP Display and has contributed to the dilution of the distinctive quality of INTP's work in the marketplace.

107. IDC, by its unauthorized appropriation and use of INTP's copyrighted work and trade dress, has and is engaged in acts of unfair competition, unlawful appropriation, unjust enrichment, wrongful deception of the purchasing public, and unlawful trading on INTP's good will and the public's acceptance of INTP's copyrighted works, all to INTP's irreparable damage.

WHEREFORE INTP demands: (1) that IDC, their agents and servants be enjoined during the pendency of this action and permanently from unfairly competing with INTP by making and selling the Infringing Display; (2) that IDC be required to pay to INTP such damages as INTP has sustained as a result of IDC's unfair competition and to account for all gains, profits and advantages derived by IDC by the violation, or such damages as to the Court shall appear proper within the provisions of Florida law; (3) that IDC pay to INTP the cost of this action and reasonable attorneys' fees to be set by the Court; and (4) and that Plaintiff have such other and further relief as is just and appropriate.

COUNT VIII

UNFAIR COMPETITION BY KMART

108. INTP hereby incorporates the allegations of paragraphs 1 through 48 above as if separately set forth herein.

109. This action for unfair competition is a claim substantially related to Kmart's infringement of INTP's copyright and trade dress and pursuant to § 1338(b) of Title 28 of the United States Code, the Court has and should assume pendent jurisdiction of this claim. This Court also has diversity jurisdiction over this claim.

110. Kmart, in unlawfully and willfully copying and plagiarizing the INTP Display, created a likelihood of confusion among the public as to the original source of the INTP Display and has

contributed to the dilution of the distinctive quality of INTP's work in the marketplace.

111. Kmart, by its unauthorized appropriation and use of INTP's copyrighted work and trade dress, has and is engaged in acts of unfair competition, unlawful appropriation, unjust enrichment, wrongful deception of the purchasing public, and unlawful trading on INTP's good will and the public's acceptance of INTP's copyrighted works, all to INTP's irreparable damage.

WHEREFORE INTP demands: (1) that Kmart, their agents and servants be enjoined during the pendency of this action and permanently from unfairly competing with INTP by making and selling the Infringing Display; (2) that Kmart be required to pay to INTP such damages as INTP has sustained as a result of Kmart unfair competition and to account for all gains, profits and advantages derived by Kmart by the violation, or such damages as to the Court shall appear proper within the provisions of Florida law; (3) that Kmart pay to INTP the cost of this action and reasonable attorneys' fees to be set by the Court; and (4) and that Plaintiff have such other and further relief as is just and appropriate.

COUNT IX

UNFAIR COMPETITION BY WESTINGHOUSE

112. INTP hereby incorporates the allegations of paragraphs 1 through 48 above as if separately set forth herein.

113. This action for unfair competition is a claim substantially related to Westinghouse's infringement of INTP's copyright and trade dress and pursuant to § 1338(b) of Title 28 of the United States Code, the Court has and should assume pendent jurisdiction of this claim. This Court also has diversity jurisdiction over this claim.

114. Westinghouse, in unlawfully marketing the copy of the INTP Display, created a likelihood of confusion among the public as to the original source of the INTP Display and has contributed to the dilution of the distinctive quality of INTP's work in the marketplace.

115. Westinghouse, by its unauthorized appropriation and use of INTP's copyrighted work

and trade dress, has and is engaged in acts of unfair competition, unlawful appropriation, unjust enrichment, wrongful deception of the purchasing public, and unlawful trading on INTP's good will and the public's acceptance of INTP's copyrighted works, all to INTP's irreparable damage.

WHEREFORE INTP demands: (1) that Westinghouse, their agents and servants be enjoined during the pendency of this action and permanently from unfairly competing with INTP by making and selling the Infringing Display; (2) that Westinghouse be required to pay to INTP such damages as INTP has sustained as a result of Westinghouse unfair competition and to account for all gains, profits and advantages derived by Westinghouse by the violation, or such damages as to the Court shall appear proper within the provisions of Florida law; (3) that Westinghouse pay to INTP the cost of this action and reasonable attorneys' fees to be set by the Court; and (4) and that Plaintiff have such other and further relief as is just and appropriate.

JURY TRIAL DEMAND

The Plaintiff, INTP, Inc., hereby demands trial by jury as to all issues so triable.

Dated: June 6, 2004

BROWN ROBERT, LLP

Attorneys for INTP, Inc.

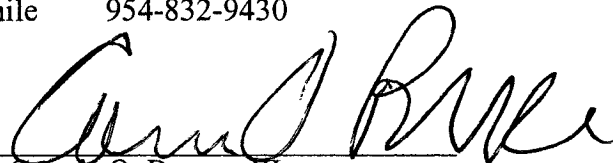
101 N.E. Third Avenue, Second Floor

Fort Lauderdale, FL 33301

Telephone 954-832-9400

Facsimile 954-832-9430

By: _____



Connis O. Brown, III

Florida Bar No. 691690

Seth P. Robert

Florida Bar No. 145696

BROWN ROBERT, LLP

ATTORNEYS AT LAW

Page 18

EXHIBIT 1



OFFICIAL SEAL

This Certificate is issued under the seal of the Copyright Office of the United States of America. It attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

For a Non-dramatic Work, the Copyright Office will not register a work unless it is first published in the United States.

TX 5-547-208



Marybeth Peters

REGISTER OF COPYRIGHTS
United States of America

EFFECTIVE DATE OF REGISTRATION

6 18 02
Month Day Year

DONOTWRITEABOVETHISLINE.IFYOUNEEDMORESPACE,USEASEPARATECONTINUATIONSHEET.

1

TITLE OF THIS WORK

Solar Decorative House Number Displays

PREVIOUS OR ALTERNATIVE TITLES

PUBLICATION AS A CONTRIBUTION

If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work

If published in a periodical or serial, give:

Volume Number

Issue Date On Pages

2

a

NAME OF AUTHOR

INTP, Inc. dba World Source

Year Born

Year Died

Was this contribution to the work made for hire?

☒ Yes
☐ No

AUTHOR'S NATIONALITY OR DOMICILE

Name of Country

OR

Citizen of

Domiciled in

U.S.

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK

Anonymous? ☐ Yes ☒ No

Pseudonymous? ☐ Yes ☒ No

If the answer to either of these questions is "Yes," see detailed instructions.

NOTE

Under the law, the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire," check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.

NATURE OF AUTHORSHIP

Briefly describe nature of material created by this author in which copyright is claimed.

entire work

b

NAME OF AUTHOR

Year Born

Year Died

Was this contribution to the work made for hire?

☐ Yes
☐ No

AUTHOR'S NATIONALITY OR DOMICILE

Name of Country

OR

Citizen of

Domiciled in

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK

Anonymous? ☐ Yes ☒ No

Pseudonymous? ☐ Yes ☒ No

If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP

Briefly describe nature of material created by this author in which copyright is claimed.

c

NAME OF AUTHOR

Year Born

Year Died

Was this contribution to the work made for hire?

☐ Yes
☐ No

AUTHOR'S NATIONALITY OR DOMICILE

Name of Country

OR

Citizen of

Domiciled in

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK

Anonymous? ☐ Yes ☒ No

Pseudonymous? ☐ Yes ☒ No

If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP

Briefly describe nature of material created by this author in which copyright is claimed.

3

a

YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED

02/28/02

This information must be given in full.

b

DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK

Complete this information ONLY if the work has been published.

Month Day Year

03 03 02

U.S.

Nation

4

COPYRIGHT CLAIMANT(S)

Name and address must be given, verify the claimant is the same as the author, if in space 2.
INTP, Inc., dba World Source
5700 W. Prospect Road, Suite 103
Ft. Lauderdale, FL 33309

TRANSFER: If the claimant(s) named here in space 1 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright.

DO NOT WRITE IN THESE SPACES

APPLICATION RECEIVED

JUN 18 2002

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TWO DEPOSITS RECEIVED

JUN 18 2002

FUNDS RECEIVED

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Complete all applicable spaces (numbers 5-8) on the reverse side of this page.
See detailed instructions. Sign the form in line 8.

DONOTWRITEHERE
Page 2 of 2 pages

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CHECKED BY

FORM TX

☐ CORRESPONDENCE
Yes
FOR
COPYRIGHT
OFFICE
USE
ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATIONSHEET.

PREVIOUS REGISTRATION Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?

☐ Yes ☒ No If your answer is "Yes," why is another registration being sought? (Check appropriate box)
a. ☐ This is the first published edition of a work previously registered in unpublished form.b. ☐ This is the first application submitted by this author/owner/copyright claimant.c. ☐ This is a changed version of the work, as shown in this space on this application.

If your answer is "Yes," give Previous Registration Number ▶

Year of Registration ▶

5

DERIVATIVE WORK OR COMPILATION

Preexisting Material Identify any preexisting work or works that this work is based on or incorporates.

a

6

See instructions
before completing
this space

Material Added to This Work Give a brief, general statement of the material that has been added to this work and in which copyright is claimed.

b

DEPOSIT ACCOUNT If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account.

Name ▶

Account Number ▶

a

7

CORRESPONDENCE Give name and address to which correspondence about this application should be sent. Name/Address/Apt./City/State/ZIP

Robert C. Kain, Jr.

Fleit, Kain, Gibbons, Gutman & Bongini, P.L.

b

Ft. Lauderdale, FL 33316-1153

Area code and daytime telephone number ▶ (954) 768-9002

Fax number ▶ (954) 768-0158

Email ▶ rkain@fleitkain.com

CERTIFICATION I, the undersigned, hereby certify that I am the

Check only one ▶

☐ Author☐ Other copyright claimant☐ Owner of exclusive right(s)

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Name of author or other copyright claimant, or owner of exclusive right(s) ▶

INTP, Inc. dba World Source

8

Type or printed name and date ▶ If this application gives dates of publication or release, do not sign and submit before that date.

Robert C. Kain, Jr.

Date ▶ June 17, 2002

Handwritten signature (X) ▶

X

Certificate will be mailed in window envelope to this address:

Name ▶

Robert C. Kain, Jr.

Fleit, Kain, Gibbons, Gutman & Bongini, P.L.

Number/Street/Apt. ▶

750 SE 3rd Ave., Suite 100

City/State/ZIP ▶

Fort Lauderdale, FL 33316-1153

YOU MUST

- Complete all necessary spaces

- Sign your application in space 8

SPECIAL ELEMENTS

IN THIS PACKAGE

1. Application form

2. Notarized affidavit fee check or money order payable to Register of Copyrights

3. Deposit material

MAIL TO

Library of Congress

Copyright Office

10 Independence Avenue, S.E.

Washington, D.C. 20559-6000

9

As of
July 1,
1999,
the
filing
fee for
Form TX
is \$30.

*17 U.S.C. § 506(e): Any person who knowingly makes a false representation of material facts in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than \$2,500.

June 1999—200,000
WEBREV June 1999

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U.S. GOVERNMENT PRINTING OFFICE: 1999-454-879/49

FEE CHANGES

Fees are effective through June 30, 2002. After that date, check the Copyright Office Website at www.loc.gov/copyright or call (202) 707-3000 for current fee information.

Case 3:04-cv-00854 Document 13 Filed 09/16/2004 Page 31 of 74

FORM TX
Non-dramatic Literary Work
REGISTERED STATES COPYRIGHT OFFICE
REGISTRATION NUMBER

TXTXU

EFFECTIVE DATE OF REGISTRATION

Month Day Year

DONOTWRITEABOVETHISLINE.IFYOUNEEDMORESPACE,USEASEPARATECONTINUATIONSHEET.

1

TITLE OF THIS WORK

Solar Decorative House Number Displays

PREVIOUS OR ALTERNATIVE TITLES

PUBLICATION AS A CONTRIBUTION

If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work

If published in a periodical or serial give:

Volume Number

Issue Date On Pages

2

a

NAME OF AUTHOR

INTP, Inc. dba World Source

Year Born

Year Died

Was this contribution to the work a "work made for hire"?

☒ Yes

☐ No

AUTHOR'S NATIONALITY OR DOMICILE

Name of Country

OR

Citizen of

Domiciled in U.S.

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK

Anonymous?

☐ Yes ☒ No

Pseudonymous?

☐ Yes ☒ No

If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP

entire work

Briefly describe nature of material created by this author in which copyright is claimed.

b

NAME OF AUTHOR

INTP, Inc. dba World Source

Year Born

Year Died

Was this contribution to the work a "work made for hire"?

☐ Yes

☐ No

AUTHOR'S NATIONALITY OR DOMICILE

Name of Country

OR

Citizen of

Domiciled in

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Pseudonymous?

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entire work

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c

NAME OF AUTHOR

INTP, Inc. dba World Source

Year Born

Year Died

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☐ Yes

☐ No

AUTHOR'S NATIONALITY OR DOMICILE

Name of Country

OR

Citizen of

Domiciled in

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK

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☐ Yes ☒ No

Pseudonymous?

☐ Yes ☒ No

If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP

entire work

Briefly describe nature of material created by this author in which copyright is claimed.

3

a

YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED

02/28/02

This information must be given in all cases.

Year

DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK

Complete this information ONLY if this work has been published.

Month Day Year

U.S.

Nation

4

COPYRIGHT CLAIMANT(S)

Name and address must be given even if the claimant is the same as the author given in space 2.

INTP, Inc., dba World Source
5700 W. Prospect Road, Suite 103
Ft. Lauderdale, FL 33309

TRANSFER If the claimant(s) named herein is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright.

APPLICATION RECEIVED

ONE DEPOSIT RECEIVED

TWO DEPOSITS RECEIVED

FUNDS RECEIVED

MORE ON BACK

• Complete all applicable spaces (numbers 5-8) on the reverse side of this page.
• See detailed instructions. • Sign the form at line 8.

DONOTWRITEHERE

Page 1 of 1 pages

EXAMINED BY

CHECKED BY

☐ CORRESPONDENCE☐ YesFOR
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PREVIOUSREGISTRATION Hasregistrationforthiswork,orforanearlierversionofthiswork,alreadybeenmadeintheCopyrightOffice?

☐ Yes ☒ No If your answer is "Yes," why is another registration being sought? (Check appropriate box.)a. ☐ This is the first published edition of a work previously registered in unpublished form.b. ☐ This is the first application submitted by this author or copyright claimant.c. ☐ This is a changed version of the work, as shown by space on this application.

If your answer is "Yes," give: Previous Registration Number ▶

Year of Registration ▶

5

DERIVATIVEWORKORCOMPILATION

Preexisting Material Identify any preexisting work or works that this work is based on or incorporates

a

6

Material Added to This Work Give a brief, general statement of the material that has been added to this work and in which copyright is claimed.

b

See instructions
before completing
this space.

DEPOSIT ACCOUNT If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account

Name ▼

Account Number ▼

a

7

CORRESPONDENCE Give name and address to which correspondence about this application should be sent. Name / Address / Apt / City / State / ZIP

b

Robert C. Kain, Jr.

Fleit, Kain, Gibbons, Gutman & Bongini, P.L.

Ft. Lauderdale, FL 33316-1153

Area code and daytime telephone number ▶ (954) 768-9002

Fax number ▶ (954) 768-0158

Email ▶

rkain@fleitekain.com

CERTIFICATION *I, the undersigned, hereby certify that I am the

Check only one ▶

☐ Author☐ Other copyright claimant☐ Owner of exclusive right(s)☒ Authorized agent of INTP, Inc. dba World Source

Name of author or other copyright claimant, owner of exclusive right(s) ▶

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

8

Type or printed name and date ▼ If this application gives a date of publication in space 3, do not sign and submit it before that date.

Robert C. Kain, Jr.

Date ▶ June 17, 2002

Handwritten signature (X) ▼

X

Certificate
will be
mailed in
window
envelope
to this
address:

Name ▼

Robert C. Kain, Jr.

Fleit, Kain, Gibbons, Gutman & Bongini, P.L.

Number Street/Apt ▼

750 SE 3rd Ave, Suite 100

City/State/ZIP ▼

Fort Lauderdale, FL 33316-1153

YOU MUST:

- Complete all necessary steps
- Sign your application in space 8

SEND ALL ELEMENTS
IN THE SAME PACKAGE:

1. Application form
2. Nonrefundable filing fee in check or money order payable to Register of Copyrights
3. Deposit material

MAIL TO:

Library of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000As of
July 1,
1999,
the
filing
fee for
Form TX
is \$30.

*17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than \$2,500.

June 1999—200,000
WEBREV: June 1999

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registration provided for by section 409, or in any written statement filed in connection

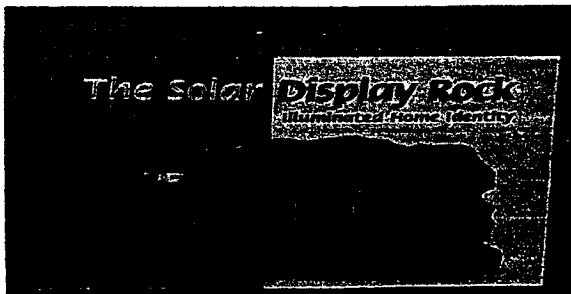
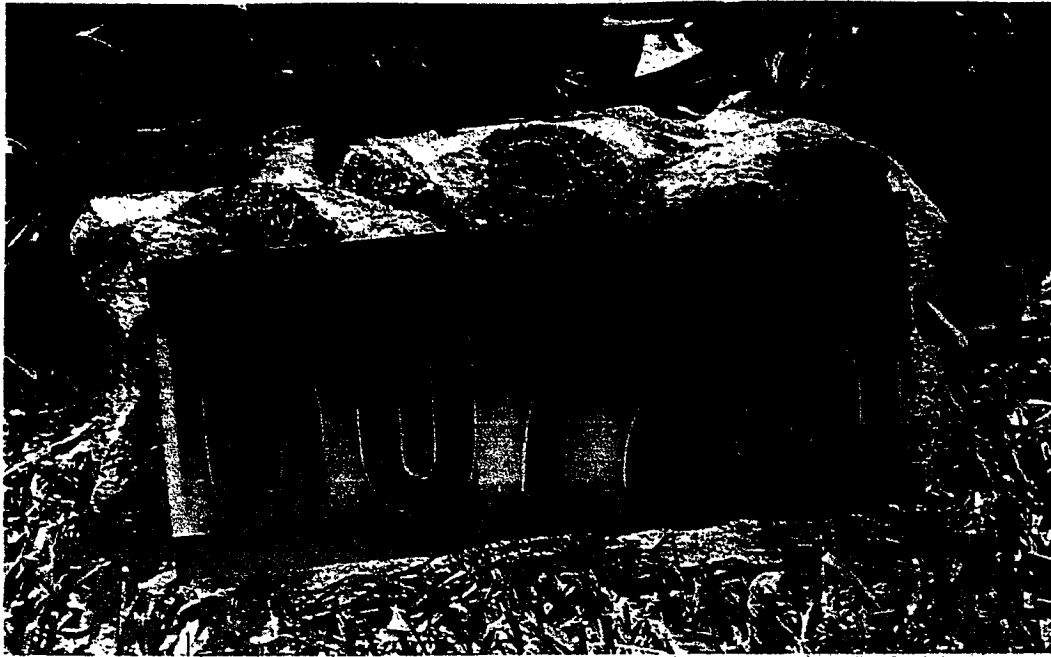
U.S. GOVERNMENT PRINTING OFFICE: 1999-454-879/49

SOLAR DECORATIVE HOUSE NUMBER DISPLAYS



INTP, Inc. / World-Source
4700 W. Prospect Rd., Suite 103
Ft. Lauderdale, FL 33309
954-733-6340 / 954-733-6339 fax
worldsrc@bellsouth.net

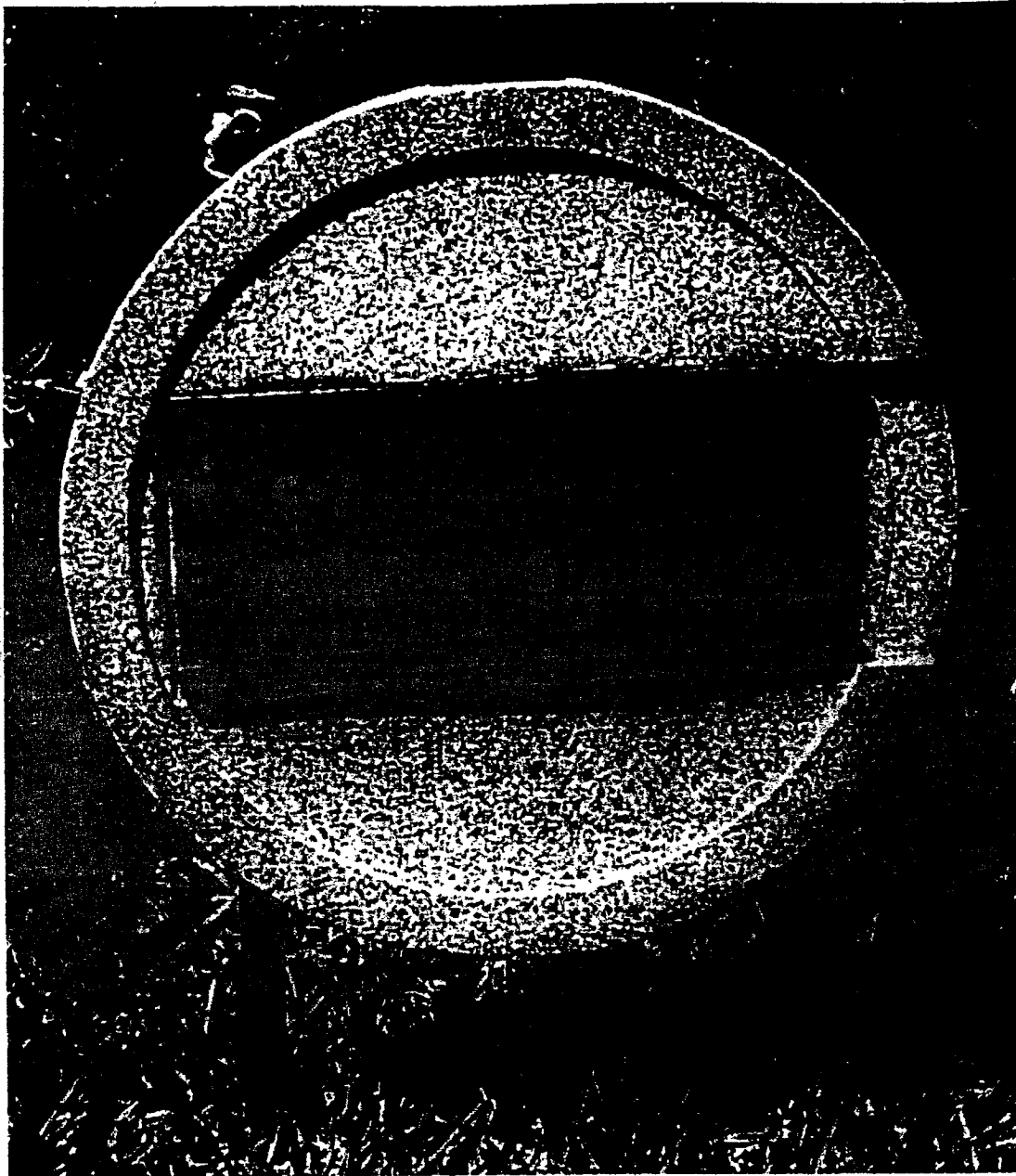
SOLAR ROCK HOUSE NUMBER DISPLAY



L10227AA
FOB HK \$12.50
14.5" L x 8" H x 5" D
40' Container = 2,370 pcs / MP 3

INTP Inc. / World Source
4700 W. Prospect Rd., Suite 103
Ft. Lauderdale, FL 33309
954-733-6340 / 954-733-6339 fax
worldsrc@bellsouth.net

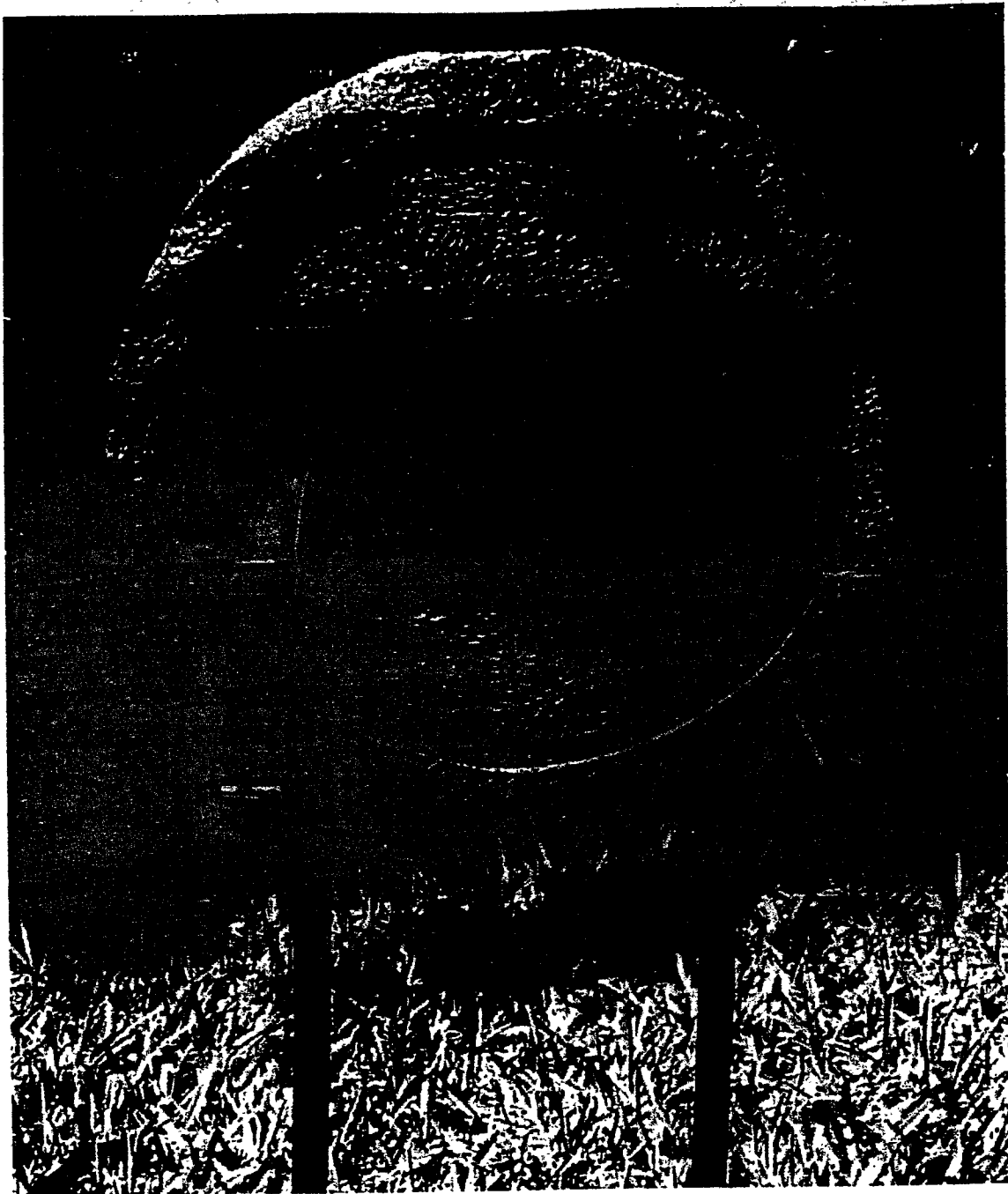
ROUND GRANITE SOLAR HOUSE NUMBER DISPLAY



L020129AA
FOB HK \$17.50
15" ROUND
40' Container = 1,700 pcs / MP 2

INTP Inc. / World Source
4700 W. Prospect Rd., Suite 103
Ft. Lauderdale, FL 33309
954-733-6340 / 954-733-6339 fax
worldsrc@bellsouth.net

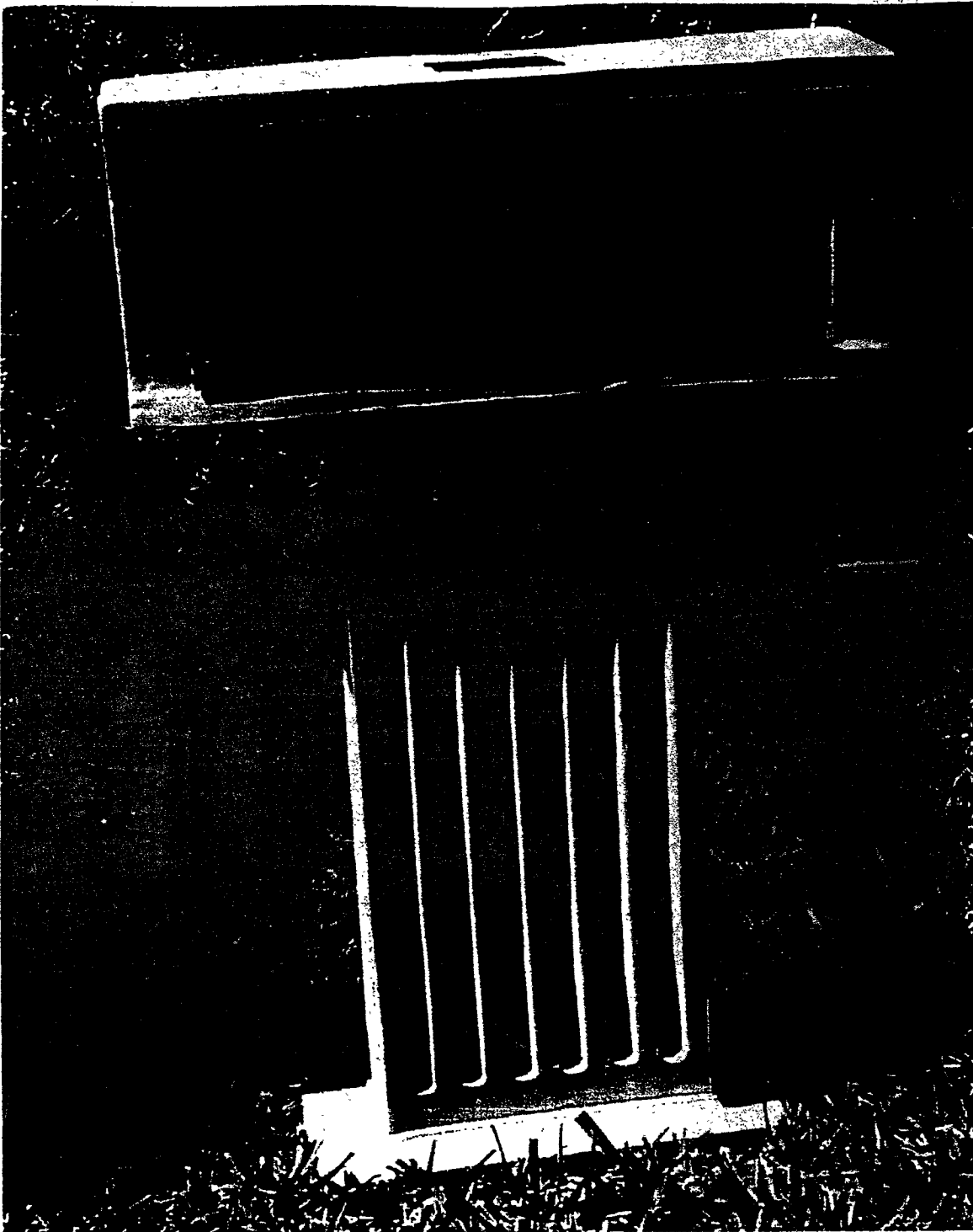
ROUND GRANITE SOLAR HOUSE NUMBER DISPLAY



L020135AA
FOB HK \$ 17.50
15" ROUND
40' Container = 1,700pcs / MP 2

INTP Inc. / World Source
4700 W. Prospect Rd., Suite 103
Ft. Lauderdale, FL 33309
954-733-6340 / 954-733-6339 fax
worldsrc@bellsouth.net

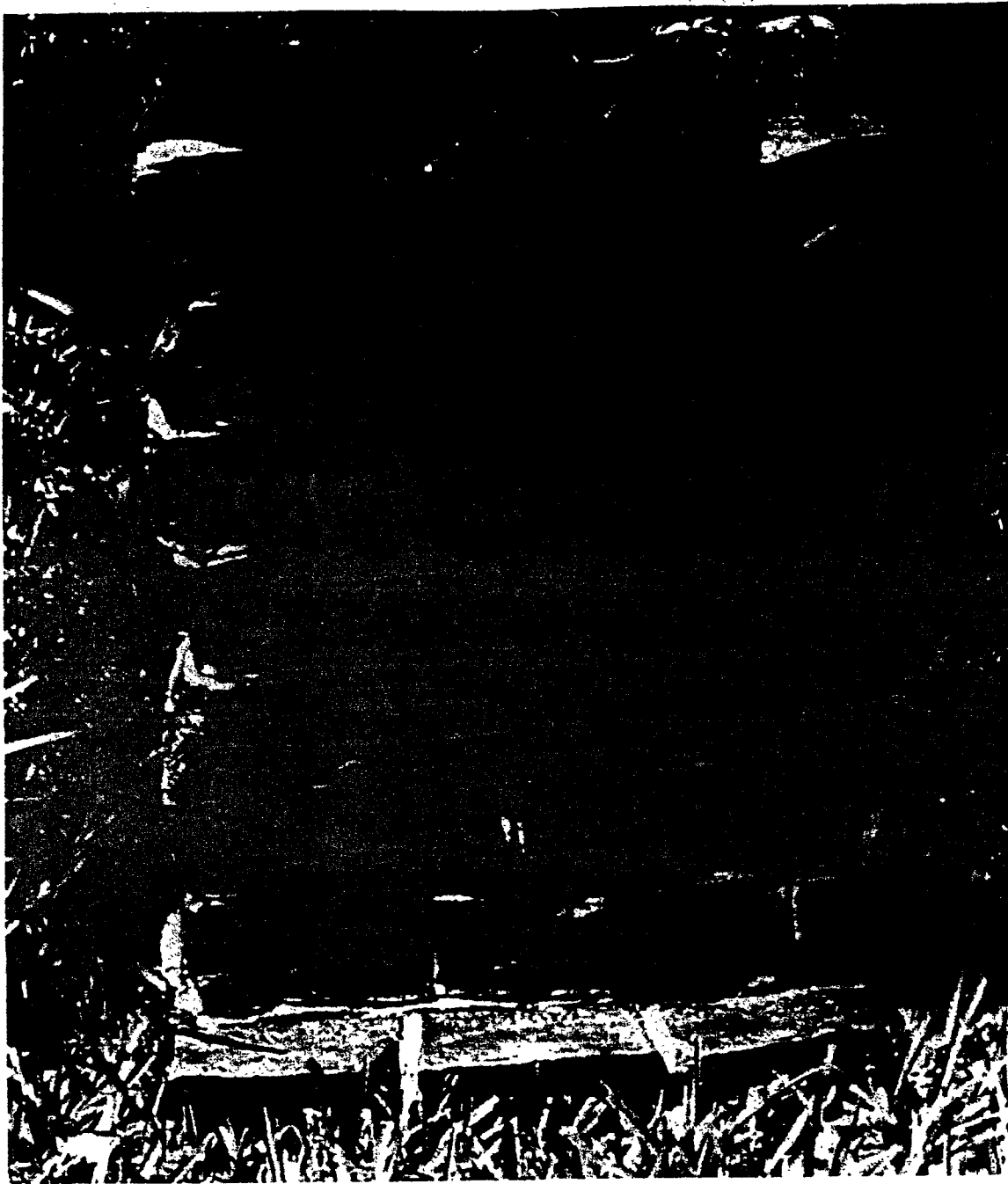
SOLAR ILLUMINATION HOUSE NUMBER DISPLAY



L020131AA
FOB HK \$ 26.00
24" H X 14" L
40' Container = 1,344 / MP 2

INTP Inc. / World Source
4700 W. Prospect Rd., Suite 103
Ft. Lauderdale, FL 33309
954-733-6340 / 954-733-6339 fax
worldsrc@bellsouth.net

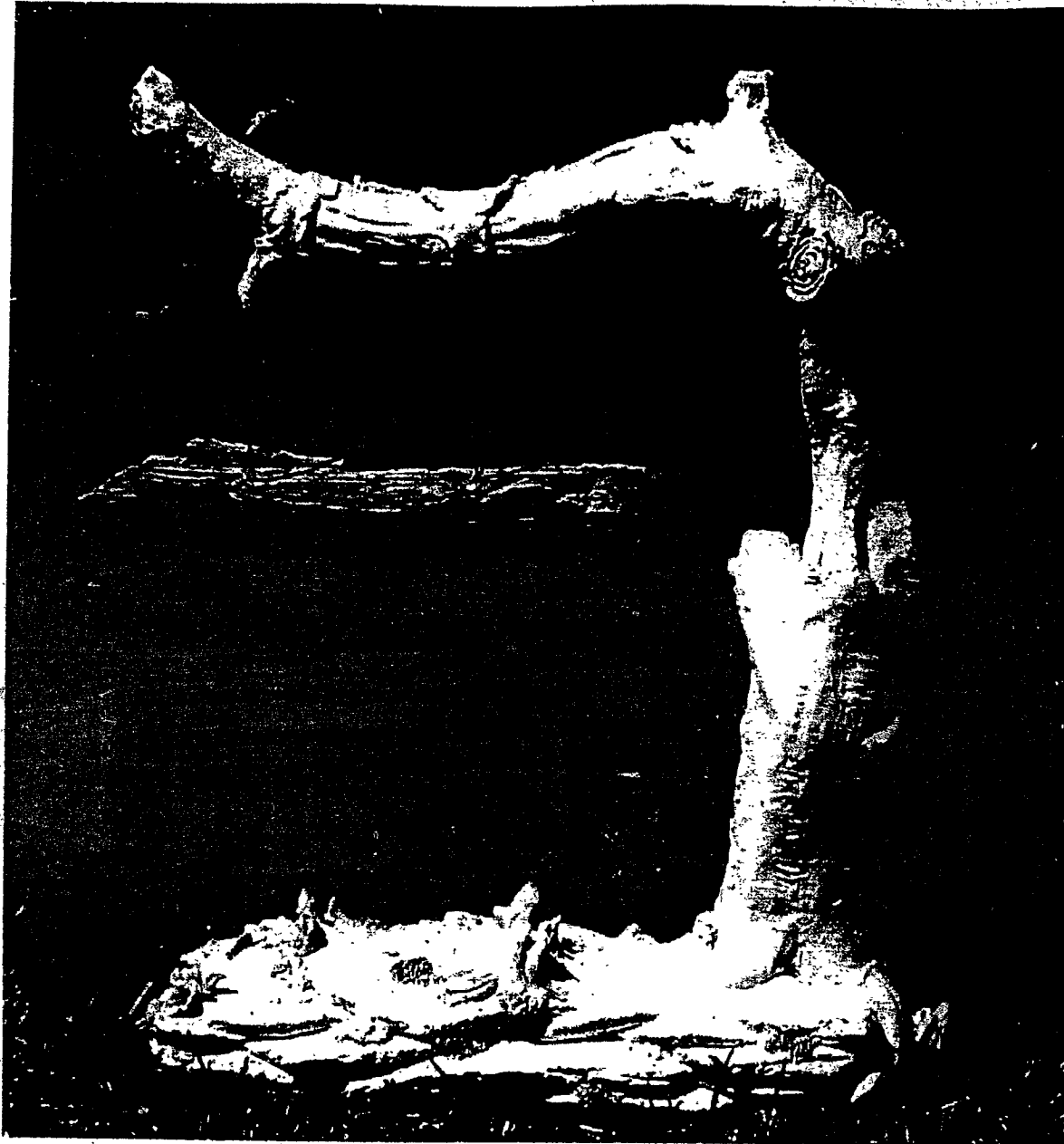
SOLAR BRICK HOUSE NUMBER DISPLAY



L020130AA
FOB HK \$ 24.00
27" H x 26" L
40' Container = 970 pcs / MP 2

INTP Inc. / World Source
4700 W. Prospect Rd., Suite 103
Ft. Lauderdale, FL 33309
954-733-6340 / 954-733-6339 fax
worldsrc@bellsouth.net

SOLAR BRANCH WITH NUMBER BOX HOUSE NUMBER DISPLAY



L020134AA
FOB HK \$ 21.00
20" H x 21" L
40' Container = 628 / MP 1

INTP Inc. / World Source
4900 W. Prospect Rd., Suite 103
Ft. Lauderdale, FL 33309
954-733-6340 / 954-733-6339 fax
worldsrc@bellsouth.net

SOLAR TERRIER HOUSE NUMBER DISPLAY



L020134AA

FOB HK \$19.50 / Delivered \$33.00

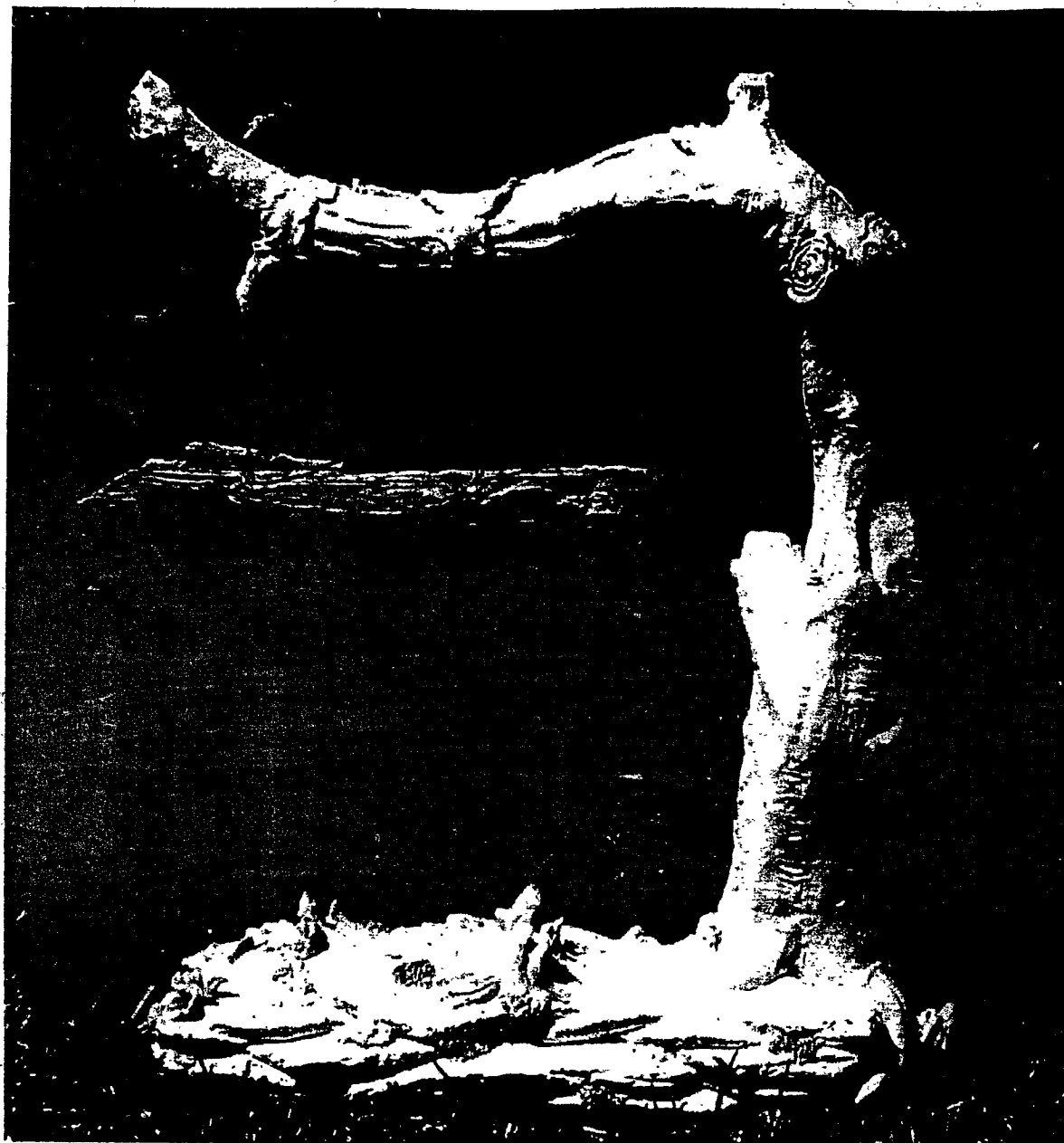
18" H x 14.5" L

40' Container = 685 pcs / MP 1/ Cube 2.99

**INTP Inc. / World Source
4700 W. Prospect Rd., Suite 103
Ft. Lauderdale, FL 33309
954-733-6340 / 954-733-6339 fax
worldsrc@bellsouth.net**

MAPLE LEAF HOUSE NUMBER DISPLAY**L020128AA****FOB HK \$ 17.50****10" H x 14" L****40' Container = 2,562 / MP 3**

INTP Inc. / World Source
4700 W. Prospect Rd., Suite 103
Ft. Lauderdale, FL 33309
954-733-6340 / 954-733-6339 fax
worldsrc@bellsouth.net

SOLAR BRANCH WITH NUMBER BOX HOUSE NUMBER DISPLAY

L020134AA
FOB HK \$ 21.00
20" H x 21" L
40' Container = 628 / MP 1

INTP Inc. / World Source
4900 W. Prospect Rd., Suite 103
Ft. Lauderdale, FL 33309
954-733-6340 / 954-733-6339 fax
worldsrc@bellsouth.net

MAPLE LEAF HOUSE NUMBER DISPLAY**L020128AA****FOB HK \$ 17.50****10" H x 14" L****40' Container = 2,562 / MP 3**

**INTP Inc. / World Source
4700 W. Prospect Rd., Suite 103
Ft. Lauderdale, FL 33309
954-733-6340 / 954-733-6339 fax
worldsrc@bellsouth.net**

EXHIBIT 2

Copyright Office fees are subject to change.
For current fees, check the Copyright Office
website at www.copyright.gov, write the Copy-
right Office, or call (202) 707-3000.

Form CA
For Supplementary Registration
UNITED STATES COPYRIGHT OFFICE
REGISTRATION NUMBER

TX	TXU	PA	PAU	VA	VAU	SR	SRU	RE
----	-----	----	-----	----	-----	----	-----	----

EFFECTIVE DATE OF SUPPLEMENTARY REGISTRATION

Month Day Year

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

Title of Work ▼

Solar Decorative House Number Display

Registration Number of the Basic Registration ▼

TX 5-547-208

Year of Basic Registration ▼

2002

Name(s) of Author(s) ▼

INTP, Inc. dba World Source

Name(s) of Copyright Claimant(s) ▼

INTP, Inc. dba World Source

Location and Nature of Incorrect Information in Basic Registration ▼

Line Number N/A Line Heading or Description

Incorrect Information as It Appears in Basic Registration ▼

Corrected Information ▼

Explanation of Correction ▼

Location and Nature of Information in Basic Registration to be Amplified ▼

Line Number 2a Line Heading or Description Nature of Authorship

Amplified Information and Explanation of Information ▼

The application claimed the "entire work," but should be amplified to specify that the "Nature of Authorship" consists of the original text and pictures contained in the catalog originally deposited, and the original three-dimensional solar rock house number display sculpture identified and depicted in three photos on the second page of the catalog originally deposited.

MORE ON BACK ►

• Complete all applicable spaces (D-G) on the reverse side of this page.
• See detailed instructions. • Sign the form at Space F.

DO NOT WRITE HERE

Page 1 of _____ pages

FUND RECEIVED DATE

EXAMINED BY

CORRESPONDENCE ☐REFERENCE TO THIS REGISTRATION ADDED TO
BASIC REGISTRATION ☐ YES ☐ NOFOR
COPYRIGHT
OFFICE
USE
ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

Continuation of: ☐ Part B or ☐ Part C

Correspondence: Give name and address to which correspondence about this application should be sent.

Phone (954) 832-9400 Fax (954) 832-9430 Email srobert@brownrobert.com

Deposit Account: If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account.
Name _____

Account Number _____

Certification* I, the undersigned, hereby certify that I am the: (Check only one)

☐ author ☐ owner of exclusive right(s)
☐ other copyright claimant ☒ duly authorized agent of INTP, Inc., dba World Source

Name of author or other copyright claimant, or owner of exclusive right(s) ▲

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

Typed or printed name ▼ Herbert Hilton

Date ▼

Handwritten signature (X) ▼

Certificate
will be
mailed in
window
envelope
to this
address:

Name ▼

Brown Robert, LLP

Number/Street/Apt ▼

101 NE Third Ave, 2nd fl

City/State/ZIP ▼

Fort Lauderdale, FL 33301

YOU MUST:

- Complete all necessary spaces
- Sign your application in Space F

SEND ALL ELEMENTS
IN THE SAME PACKAGE:

1. Application form
2. Nonrefundable filing fee in check or money order payable to Register of Copyrights

MAIL TO:

Library of Congress
Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559-6000

Fees are subject to
change. For current
fees, check the
Copyright Office
website at
www.copyright.gov,
write the Copyright
Office, or call
(202) 707-3000.

*17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 409, or in any written statement filed in connection with the application, shall be fined not more than \$2,500.



display


dawn

16072 illuminated house number display

Easy to install

On at dusk / Off at dawn

Plastic construction

 Westinghouse and You can be sure...If It's Westinghouse are trademarks of Westinghouse Electric Corporation and are used under license by IDC Corporation.

Ex
B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

INTP, INC., a Florida corporation,

CASE NO. 04-60784-CIV-MARRA
Magistrate Judge Seltzer

Plaintiff,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a Delaware corporation,

KMART CORPORATION,
a Delaware corporation, and

INTERNATIONAL DEVELOPMENT
CORPORATION, a Texas corporation

Defendants.

**INTERNATIONAL DEVELOPMENT CORPORATION'S MOTION TO DISMISS OR,
IN THE ALTERNATIVE, TO TRANSFER PURSUANT TO 28 U.S.C. § 1404(a)**

Defendant International Development Corporation ("IDC") brings this motion to dismiss or, in the alternative, to transfer this cause to the United States District Court for the Northern District of Texas.

IDC filed suit against INTP, Inc. ("INTP") in the United States District Court for the Northern District of Texas, Dallas Division, on April 22, 2004. As IDC explains herein, the present action, which was filed by INTP on June 16, 2004, is duplicative of the Texas case, and presents overlapping issues and the potential for conflicting outcomes. Further, INTP has filed the present action in a court that lacks personal jurisdiction over IDC. Accordingly, the present action should be dismissed or, in the alternative, transferred to the Northern District of Texas.

I. BACKGROUND

IDC and INTP are competing companies in the home lighting business. INTP and IDC

both market signage products having the general shape of rocks. Upon learning of IDC's sale of certain products to Kmart Corporation ("Kmart"), INTP sent a letter to Kmart and IDC alleging, without a legitimate basis, that IDC's sale of its own rock-shaped sign to Kmart constituted infringement of INTP's alleged "copyright" in its own rock-shaped sign product, and ordering Kmart to conduct no further business with IDC under threat of a lawsuit. Investigation revealed that INTP did not, in fact, hold a copyright on its rock-shaped sign product, although it did appear to hold a copyright registration on a catalog, which was registered as a "literary work." As a result of INTP's letter to IDC's valued customer, Kmart, and the baseless nature of the allegations made therein, IDC filed a civil action in the United States District Court for the Northern District of Texas against INTP for tortious interference with existing contract, tortious interference with prospective contract, tortious interference with a business relationship and for a declaratory judgment of non-infringement of copyright. This litigation is currently pending.

After receiving a courtesy copy of IDC's filed complaint, INTP filed this action, alleging, *inter alia*, copyright and trade dress infringement by IDC, Kmart Corporation and Westinghouse Electric Corporation. IDC moves this Court to transfer the present action to the Northern District of Texas owing to the fact that there is prior pending litigation between the principal parties arising from the same facts, and the balance of equities weighs strongly in favor of transferring the action to that venue.

II. ARGUMENT AND AUTHORITIES

A. This Action Should be Dismissed Pursuant to the "First to File Rule" Because There is Prior Pending Litigation in Another Forum Between the Principal Parties Regarding Overlapping Issues

It is well-accepted that the forum in which an action is first filed is given priority over subsequent actions, unless there is a strong showing of balance of convenience in favor of the second forum or there are special circumstances which justify giving the priority to the second

action. *See Tingley Systems, Inc. v. Bay State HMO Mgmt.*, 833 F. Supp. 882, 887-888 (S.D. Fla. 1993). These principles are consistent with the doctrine of federal comity, which requires the federal district courts to refrain from interfering with each others' affairs in order to avoid duplication of judicial resources and conflicting decisions. *See id.* at 887 (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180 (1952)).

INTP's claims in this action are baseless, as INTP holds neither valid copyright nor trade dress rights in the design of its useful articles. It is well-established that useful articles are not proper subject for copyright protection. *See Norris Industries, Inc. v. International Tel. & Tel. Corp.*, 696 F.2d 918 (11th Cir. 1983) ("wire-spoked automobile wheel cover was a 'useful article' within meaning of copyright law, and thus not eligible to be copyrighted"). Further, there is nothing creative or distinctive about the rock shape of INTP's product, and the rock shape does not enjoy "secondary meaning" in the marketplace. Finally, to the extent that there is any similarity between the two products, it is only so much as necessarily occurs owing to the shared idea of a rock shape.

Without respect to the absence of merits of INTP's claims, there is litigation presently pending between the parties in the Northern District of Texas, litigation was already pending at the time of filing of the present lawsuit by INTP. A copy of the complaint in that action and related papers are attached as Exhibit A to this motion. The "first to file" rule presumes that the IDC tortious interference and declaratory judgment action has priority over INTP's copyright claim in this Court, since IDC's suit was filed first and the two cases involve the same central facts and issues. *Cf. Tingley Systems*, 833 F. Supp. at 887-888 ("it is well accepted that the forum where an action is first filed is given priority over subsequent actions, unless there is a showing of balance of convenience in favor of the second forum or there are special

circumstances..."). Although INTP's claims involve a trade dress aspect in addition to a copyright aspect, the facts underlying INTP's claim for trade dress infringement are the same as those underlying its claim of copyright infringement. Accordingly, this case should be transferred to the Northern District of Texas in the absence of special circumstances.

Although the "first-to-file" rule establishes a presumption in favor of transfer, the Court may retain jurisdiction over the cause of action where special circumstances exist or the balance of interests clearly weighs against a transfer. In deciding whether the requested transfer will be in the interest of justice and for the convenience of the parties and witnesses, the Court must "strike a balance on convenience between those elements which weigh in favor of transferring ... and those which favor allowing the plaintiff's choice of forum to stand undisturbed." *Tingley Systems*, 833 F. Supp. at 885 (quoting *Umbriac v. American Snacks, Inc.*, 388 F.Supp. 265, 269 (E.D. Pa.1975)). While a consideration of any number of factors may be relevant to the question of transfer, ultimately the resolution of the question is for the Court's discretion. See *Tingley Systems*, 833 F. Supp. at 885. As discussed in more detail below the balance of interests would, in fact, favor transfer to the Northern District of Texas even in the absence of the earlier-filed litigation.

B. This Case Should be Dismissed Pursuant to Fed. R. Civ. P. 12(b)(2) Because the Court Lacks Personal Jurisdiction over Defendant IDC

A court may only compel a party to defend a lawsuit if it is subject to personal jurisdiction within the forum. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945). A federal district court has personal jurisdiction over a non-resident defendant only to the limits of the long-arm statute of the forum state as interpreted by the courts of the forum state and the Due Process Clause of the Constitution of the United States as interpreted by the regional circuit. A state long-arm statute furnishes a mechanism for obtaining

personal jurisdiction in federal as well as state courts. See Fed.R.Civ.P. 4(k)(1)(A). In the present action, Plaintiffs have the burden to prove the existence of personal jurisdiction over IDC. See *Jet Charter Service Inc. v. Koeck*, 907 F.2d 1110, 1112 (11th Cir.1990) (11th Cir.).

"A plaintiff seeking to subject a nonresident defendant to jurisdiction of the court must do more than allege facts that show a *possibility* of jurisdiction." *Jet Charter*, 907 F.2d at 1112 (emphasis added), *cert. denied*, 499 U.S. 937, 111 S.Ct. 1390, 113 L.Ed.2d 447 (1991). To determine whether personal jurisdiction exists over a nonresident defendant, federal courts must engage in a two-part analysis. See *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir.1990); *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 855 (11th Cir. 1990). First, the court must determine whether the Florida Long Arm Statute permits the assertion of jurisdiction. Second, the court must determine whether the Defendant has sufficient "minimum contacts" with this jurisdiction to satisfy the Due Process Clause of the Fourteenth Amendment such that "maintenance of the suit does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945); *Madara*, 916 F.2d at 1514.

Although Plaintiffs do not allege any particular provision under the Florida Long Arm Statute as a basis for the court's jurisdiction, it is assumed that they assert jurisdiction pursuant to section 48.193. See Fla.Stat.Ann. § 48.193(1); Fla.Stat.Ann. § 48.193(2).

1. IDC is Not Amenable to Suit under the "Specific Jurisdiction" Prong of Florida's Long Arm Statute

Section 48.193(1) addresses specific jurisdiction, permitting jurisdiction over defendants who engage in certain enumerated acts which give rise to the particular litigation. It provides, in pertinent part:

(1) Any person, whether or not a citizen or a resident of this state, who personally or through an agent does any of the acts enumerated in this subsection thereby submits himself and, if he is a natural person, his

personal representative to the jurisdiction of the courts of this state for any cause of action arising from the doing of any of the following acts:

(a) Operating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state.

(b) Committing a tortious act within this state. . . .

(f) Causing injury to persons or property within this state arising out of an act or omission by the defendant outside this state if, at or about the time of the injury ... (1) [t]he defendant was engaged in solicitation or service activities within this state ... or (2) [p]roducts, material, or things processed, serviced, or manufactured by the defendant anywhere were used ... within this state in the ordinary course of commerce, trade, or use.

Id.

In the present case, IDC is not subject to personal jurisdiction under section 48.193(1). IDC does not have substantial business contact with Florida. IDC is not, and has not been “engaging in, or carrying on a business or business venture in this state,” nor does it have “an office or agency in this state.” *See Declaration of John Browder*, attached hereto as Exhibit B, ¶¶ 2-12.

Similarly, as IDC has not been present in the State of Florida, it cannot be said to have “committed a tortious act” in this state. Even if this Court were to find that IDC has engaged in some form of tortious activity, in order for personal jurisdiction to attach under the “tortious activity” provision of the Florida Long Arm Statute, the Plaintiff must demonstrate that the nonresident defendant committed a substantial aspect of the alleged tort in Florida. *See Cable/Home Communication Corp.*, 902 F.2d at 857.

In the present case, Plaintiff cannot demonstrate that IDC committed the substantial portion of any tort in the State of Florida. Every aspect of the allegedly tortious conduct undertaken by IDC took place outside this jurisdiction. Orders for IDC’s accused products are received in Texas and payment is made to Texas. None of these orders have been received from Florida nor has any payment been received from Florida. *See Declaration of John Browder*, Exhibit B, ¶¶ 12, 13.

Finally, Plaintiff cannot demonstrate that the Court has jurisdiction pursuant to Florida

Long Arm Statute section 48.193(1)(f). Even if Plaintiff could establish that it suffered an injury within this jurisdiction, it cannot show that such injury was caused by an act or omission of IDC done while IDC was soliciting activities in the State of Florida or while products manufactured by IDC were being used within this state in the ordinary course of commerce, trade, or use.

2. IDC is Not Amenable to Suit under the "General Jurisdiction" Prong of Florida's Long Arm Statute

Section 48.193(2) provides that the court may exercise jurisdiction over a defendant who is engaged in "substantial and not isolated activity within the state ... whether or not the claim arises from that activity."

As discussed above, IDC is not engaged in any significant level of activity within the State of Florida.

- IDC is a corporation organized under the laws of the State of Texas with its principal place of business in Southlake, Texas. *Exh. B, ¶ 2.*
- IDC does not now have, nor has it in the past had, any business operations located in the State of Florida. *Exh. B, ¶ 3.*
- IDC does not have any employees located within the State of Florida. *Exh. B, ¶ 5.*
- IDC does not have a registered agent for service of process in the State of Florida. *Exh. B, ¶ 6.*
- IDC has not registered to do business in the State of Florida. *Exh. B, ¶ 7.*
- IDC does not own or lease, nor has it ever owned or leased, real estate in the State of Florida. *Exh. B, ¶ 8.*
- IDC does not pay taxes to the State of Florida, nor to its knowledge is it obligated to do so. *Exh. B, ¶ 9.*

- IDC does not now maintain, nor has it ever maintained, a listing in any telephone directory in the State of Florida. *Exh. B, ¶ 10.*
- IDC does not now maintain, nor has it ever maintained, a bank account in the State of Florida. *Exh. B, ¶ 11.*
- IDC has never sold any of the accused products, or delivered any of the accused products to, the State of Florida. *Exh. B, ¶ 12.*

In *Madara*, the Eleventh Circuit determined that in an unrelated cause of action, the court would not exercise personal jurisdiction over a nonresident defendant whose “presence” within the jurisdiction was based solely on concerts and sales of products within the forum. *See Madara*, 916 F.2d at 1516 n. 7. The court stated that “if a defendant could be sued on an unrelated cause of action because of concerts and record sales, then he likely would be amenable to suit in all the states of the union on any cause of action. We reject without further discussion the possibility that Hall is generally present in Florida for jurisdictional purposes based on these contacts.” *Id.*

Even if the Court were to determine that IDC's attenuated contacts with Florida constituted activity sufficient to give rise to IDC under the Florida Long Arm Statute, the court still could not exercise personal jurisdiction over IDC because the Constitutional prong of the two-part analysis cannot be satisfied under the facts of this case.

3. IDC is Not Amenable to Suit under the Due Process Clause

The Florida Supreme Court has acknowledged that “the mere proof of any one of the several circumstances enumerated in section 48.193 as the basis for obtaining jurisdiction of nonresidents does not automatically satisfy the due process requirement of minimum contacts.” *Cable/Home Communication Corp.*, 902 F.2d at 857. To exercise personal jurisdiction over a

nonresident defendant in conformity with the due process requirements of the federal constitution, the Court must determine that the defendant has established minimum contacts with the forum state such that the exercise of personal jurisdiction would not offend "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316.

Determining minimum contacts requires an examination of the "quality and nature" of the nonresident defendant's activity. See *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283 (1948); *Cable/Home Communication Corp.*, 902 F.2d at 858. The key to any constitutional inquiry into personal jurisdiction is foreseeability. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985); *Sun Bank, N.A. v. E.F. Hutton & Co.*, 926 F.2d 1030, 1034 (11th Cir.1991). The due process clause requires that a Defendant have "fair warning" that a particular activity may subject him to the jurisdiction of the forum. See *Burger King*, 471 U.S. at 472; *Madara*, 916 F.2d at 1516. The "fair warning" requirement is satisfied when a nonresident defendant "purposefully directs" his activities to forum residents and the resulting litigation derives from the alleged injuries that "arise out of or relate to those activities." *Burger King*, 471 U.S. at 472 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984)); *Cable/Home Communication Corp.*, 902 F.2d at 857. To comport with due process foreseeability, the Court must determine that the Defendant "purposefully availed itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson*, 357 U.S. at 253; *Madara*, 916 F.2d at 1516-17; *Sun Bank*, 926 F.2d at 1034. This purposeful availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random, fortuitous, or attenuated contacts." *Burger King*, 471 U.S. at 475.

This cause of action did not arise out of IDC's solicitation of business in Florida. Nor did

this cause of action arise out of IDC purposefully directing its activities towards Florida, or purposefully availing itself of the laws of Florida.

Determining whether “traditional notions of fair play and substantial justice” would permit the Court to exercise jurisdiction constitutes the final step in determining whether the court may exercise personal jurisdiction over a nonresident defendant. *See Burger King*, 471 U.S. at 475. While this determination is based on equitable considerations and conducted separately from the minimum contacts analysis, a particularly weighty finding under one branch of the analysis can compensate for a weaker finding on the other branch. *See Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987); *Burger King*, 471 U.S. at 477-78; *Madara*, 916 F.2d at 1517. It would offend traditional notions of fair play and substantial justice to hale into this jurisdiction a party which could not and did not have fair warning that a sale of products to a customer in Michigan would subject it to the jurisdiction of this Court. Accordingly, it would not comport with traditional notions of fair play and substantial justice to exercise personal jurisdiction over IDC.

C. Alternatively, This Case Should be Transferred Pursuant to 28 U.S.C. § 1404(a)

Even in the absence of the pending earlier-filed litigation, a transfer would be appropriate under 28 U.S.C. § 1404(a). To meet the requirements of § 1404(a), the proposed transferee district, the Northern District of Texas, must be a district in which the INTP claims could have been brought originally, and the balance of interests must weigh in favor of the proposed transfer district. *See Tingley Systems*, 833 F. Supp. at 885 (citing *Wm. A. Smith Contracting Co., Inc. v. Travelers Indemnity Co.*, 467 F.2d 662, 664 (10th Cir. 1972)).

1. INTP's Claims Could Have Been Brought in Texas

The first requirement is clearly met by IDC in that INTP's claims could have been brought in the Northern District of Texas. IDC is a defendant in this action and resides in

Texas. Further, a civil action involving IDC and INTP is presently pending before the U.S. District Court for the Northern District of Texas. The other defendants to the Florida litigation are not thought to be particularly any more amenable to suit in Florida than in Texas.

2. The Balance of Interests Weighs in Favor of Transfer

In regard to the second requirement, that the balance of interests must weigh in favor of the proposed transferee district, IDC submits the following factors as being determinative of its motion to transfer this case to the United States District Court for the Northern District of Texas:

1. IDC's principal claims against INTP for tortious interference arise out of Texas law, such that it would not make sense for the Texas case to be transferred to Florida.
2. This Court lacks personal jurisdiction over IDC under Florida's Long Arm Statute, Fla.Stat. § 48.193 (1991), because IDC does not have sufficient contacts with Florida. Attached as Exhibit B to this Motion is the affidavit of John Browder establishing that IDC does not have substantial contacts with the State of Florida. *See Affidavit of John Browder*, Exh. B, ¶¶ 2-12.
3. By allowing this action to proceed in Florida while a related action proceeded in Texas, duplicative lawsuits would exist which would be a waste of time, energy, and money for both parties and the court system.
4. INTP's principal claims against IDC arise out of federal copyright and trademark law, which can be litigated in any federal forum.
5. International Development Corporation and its employees are located in Texas and the activity related to the purchase and sale of the accused product by IDC did not occur in Florida. *See Affidavit of John Browder*, Exh. B, ¶¶ 2-5, 12-13.
6. It would be very time consuming and expensive to require the IDC personnel to travel

to Florida to testify as witnesses.

7. It would be very disruptive to IDC's business to have IDC's employees to be absent due to travel to Florida.

Given that the pending tortious interference action in Texas involves the same central facts and issues as the instant case, it would be more expeditious to try all claims involving the same parties and issues in the same forum. This would conserve judicial resources, promote judicial economy and avoid the problems related with duplicative actions being filed in different districts.

In addition to weighing considerations regarding the convenience of the parties and witnesses, this Court must weigh the considerations of cost, judicial economy, expeditious discovery and trial process. *See Tingley Systems*, 833 F. Supp. at 888. It is in the interest of justice to permit suits involving the same parties and issues to proceed before a single court and not proceed simultaneously in two forums. *See Tingley Systems*, 833 F. Supp. at 888. Thus, because IDC filed its Texas tortious interference action first, the instant action should be transferred to Texas and consolidated with the pending Texas action, as the two cases involve the same central facts and issues. By transferring this action, the court would benefit both parties, in that:

[T]he two actions could be consolidated before one judge thereby promoting judicial efficiency, pretrial discovery could be conducted in a more orderly manner, witnesses could be saved the time and expense of appearing at trial in more than one court, duplicative litigation involving the filing of records in both courts could be avoided eliminating unnecessary expense and the possibility of inconsistent results could be avoided.


Tingley Systems, 833 F. Supp. at 887 (quoting *Pall Corp. v. Bentley Lab., Inc.*, 523 F.Supp. 450, 453 (D.Del.1981)).

Avoidance of the parties' and witnesses' inconvenience and expense in this respect, as

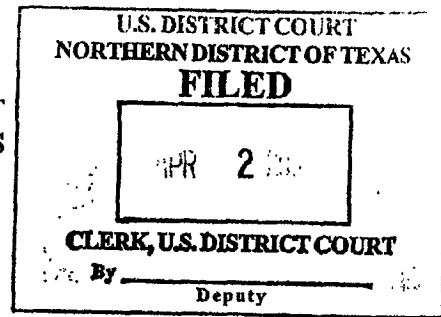
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and accurate copy of the foregoing was furnished by U.S. mail this 25th day of July, 2004, to Connis O. Brown, Esq. and Seth P. Robert, Esq., **BROWN ROBERT, LLP**, 101 N.E. 3rd Avenue, 2nd Floor, Fort Lauderdale, FL 33301.

By: _____


John Gravante

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION



INTERNATIONAL DEVELOPMENT
CORPORATION

Plaintiff,

v.

INTP, Inc.

Defendant.

§
§
§
§
§
§
§
§
§
§

304 CV - 854 P

CIVIL ACTION NO. _____

**COMPLAINT FOR FALSE AND MISLEADING REPRESENTATIONS,
TORTIOUS INTERFERENCE WITH CONTRACTUAL AND BUSINESS
RELATIONSHIPS AND DECLARATORY JUDGMENT OF NON-INFRINGEMENT**

NOW COMES Plaintiff, International Development Corporation ("IDC"), and files this Complaint against Defendant INTP, Inc. ("INTP"), and in support of same alleges the following:

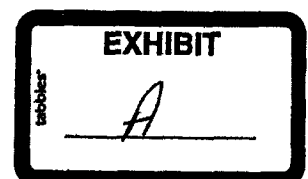
**I.
NATURE OF ACTION**

1. By this action, IDC seeks injunctive relief, compensatory and enhanced damages and an award of reasonable attorneys' fees and court costs by reason of (i) defendant INTP's false and misleading representations, in violation of 15 U.S.C. § 1125(a)(1)(B) and (ii) defendant INTP's tortious interference with existing and prospective contracts and business relationships between IDC and its customers and potential customers. IDC further seeks a declaratory judgment from this court that neither IDC nor its existing or potential customers has infringed any valid copyright owned by INTP.

**COMPLAINT FOR FALSE AND MISLEADING REPRESENTATIONS,
TORTIOUS INTERFERENCE WITH CONTRACTUAL AND BUSINESS
RELATIONSHIPS AND DECLARATORY JUDGMENT OF NON-INFRINGEMENT**

PAGE - 1

DALLAS 1396872v1



**II.
PARTIES**

2. Plaintiff International Development Corporation is a Texas corporation, having its principal place of business in Southlake, Texas, and conducting business throughout the State of Texas and in this judicial district.

3. Upon information and belief, defendant INTP, Inc. is a Florida corporation, having a principal place of business in Fort Lauderdale, Florida. This cause of action arises out of acts of INTP directed at the State of Texas. On information and belief, INTP regularly and systematically conducts business and commits the acts complained of herein in the State of Texas and in this judicial district.

**III.
JURISDICTION AND VENUE**

4. The cause of action for false advertising arises under the Laws of the United States, 15 U.S.C. § 1125; and this Court has subject matter jurisdiction of such actions and claims pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338(a). This court has jurisdiction over IDC's copyright-related declaratory judgment claims under 28 U.S.C. §§ 2201 and 2202 and 17 U.S.C. § 101 et seq. This court has jurisdiction over IDC's state law claims under 28 U.S.C. §§ 1338(b) and 1367 and pursuant to the doctrine of pendent jurisdiction. Venue is based upon the provisions of 28 U.S.C. § 1391(b) and (c). There is diversity of citizenship between the parties and, on information and belief, the amount in controversy exceeds \$75,000, such that this court has diversity jurisdiction over this action pursuant to 28 U.S.C. § 1332.

**IV.
FACTS OF THE CASE**

5. IDC and INTP are in the business of manufacturing and marketing solar-powered lighting products, including solar-powered lighted house numbers, which they market to the trade, including but not limited to retailers.

6. On information and belief, INTP has misrepresented, and is misrepresenting, to one or more customers and potential customers of IDC, during the course of promotion of INTP's products, that certain products being offered for sale by INTP were and are "copyrighted," and that the sale of products by IDC and purchased by one or more of IDC's customers constitutes an infringement of INTP's copyrights, when IDC's products in question were neither copyrighted nor subject to copyright.

7. On information and belief, INTP has misrepresented, and is misrepresenting, to one or more customers of IDC, during the course of promotion of INTP's products, that certain products being offered for sale by INTP were "patented," when such products were not, in fact, patented.

8. INTP has willfully and intentionally threatened IDC and one or more customers and potential customers of IDC with a lawsuit for copyright infringement arising out of the sale of products purchased by such customers from IDC.

9. As a result of INTP's threats, IDC's customers and potential customers have a reasonable apprehension that they will be sued by INTP for copyright infringement if they purchase the products from IDC.

10. At the time of INTP's threats and misrepresentations, IDC had ongoing business relationships with its customers, including existing sales contracts and a high likelihood of

entering into proposed sales contracts.

11. Absent interference by INTP, IDC had a reasonable probability of entering into proposed new sales contracts with existing and prospective customers.

12. The IDC products complained of by INTP do not, in fact, infringe any cognizable right of INTP. The threats made by INTP against IDC's existing and potential customers do not have a reasonable basis in law, and on information and belief were and are willfully and intentionally made with knowledge that they were and are legally baseless, with malice and with the intent to disrupt the existing business relationships, the existing contractual relationships and potential contractual relationships between IDC and IDC's existing and potential customers.

13. INTP knew, or had reason to know, that its threats of litigation would interfere with existing and potential contracts between IDC and IDC's existing and potential customers.

14. IDC has been damaged by the baseless threats and misrepresentations made by INTP to IDC's existing and potential customers.

V.

FALSE AND MISLEADING REPRESENTATIONS

15. Paragraphs 1 through 14 are incorporated herein for the purpose of providing the initial factual allegations for this cause of action.

16. The above misrepresentations of fact made in commercial advertising and promotion of INTP's products constitutes false and misleading description of fact, and false and misleading representation of fact, as to the nature, characteristics, and qualities of INTP's goods, with such misrepresentations being designed to influence, and having the effect of influencing, the purchasing decisions of those to whom these misrepresentations are directed. These misrepresentations constitute a violation of 15 U.S.C. § 1125(a)(1)(B), and unless restrained, will

continue to occur, to the damage of plaintiff IDC.

**VI.
TORTIOUS INTERFERENCE WITH
EXISTING CONTRACT**

17. Paragraphs 1 through 14 are incorporated herein for the purpose of providing the initial factual allegations for this cause of action.

18. INTP's acts constitute tortious interference with IDC's existing contracts with IDC's existing customers, in violation of Texas law.

**VII.
TORTIOUS INTERFERENCE WITH
PROSPECTIVE CONTRACT**

19. Paragraphs 1 through 14 are incorporated herein for the purpose of providing the initial factual allegations for this cause of action.

20. INTP's acts constitute tortious interference with IDC's proposed contracts with IDC's existing and potential customers, in violation of Texas law.

**VIII.
TORTIOUS INTERFERENCE WITH
BUSINESS RELATIONSHIP**

21. Paragraphs 1 through 14 are incorporated herein for the purpose of providing the initial factual allegations for this cause of action.

22. INTP's acts constitute tortious interference with the business relationships between IDC and IDC's customers, in violation of Texas law.

**IX.
DECLARATORY JUDGMENT OF
NON-INFRINGEMENT OF COPYRIGHT**

23. Paragraphs 1 through 14 are incorporated herein for the purpose of providing the

initial factual allegations for this cause of action.

24. In the present case, INTP asserts copyright protection on its products, which are useful articles not constituting proper subject matter for copyright protection. The copyrights asserted by INTP cover only photographs and drawings of INTP's products registered as literary works, and not the design of the products themselves.

25. IDC has not reproduced, performed, displayed, distributed copies of, or prepared derivative works based upon, any validly-copyrighted work of INTP.

26. INTP's threats of litigation, without action, against IDC's existing and potential customers have created a cloud over the business relationships between IDC and its existing and potential customers.

27. The dispute between IDC and INTP represents an actual controversy within the jurisdiction of this Court.

28. IDC seeks a judicial declaration from this Court to confirm its rights and legal status. In this case, there is a real controversy regarding the copyrights alleged by INTP, coupled with a clear manifestation that the declaration sought will be of practical value in resolving the entire controversy between the parties regarding such. Accordingly, IDC is entitled to a declaratory judgment from this court that INTP has no valid copyright on the design of its products and the products of IDC and the acts of IDC and its existing and potential customers complained of do not constitute infringement of any valid copyrights owned by INTP.

WHEREFORE PLAINTIFF PRAYS:

(a) That INTP, and its agents, servants, attorneys, employees, successors, and assigns, and any and all persons, firms, associations, and corporations, wholly or acting by, through or under any of the defendants, or in aid or in conjunction with any of the defendants, and those in privity therewith, during the pendency of this action, and thereafter permanently, be enjoined and restrained from:

(i) engaging in acts of false advertising, including but not limited to making representations that unpatented and uncopyrighted products are patented and/or copyrighted;

(ii) tortiously interfering with existing contracts between IDC and any other party;

(iii) tortiously interfering with potential contracts between IDC and any other party; and

(iv) tortiously interfering with business relationships between IDC and any other party.

(b) That this Court declare that no product of IDC or act of IDC or its existing or potential customers infringes any copyright of INTP;

(c) That judgment be entered against INTP for any and all damages sustained and suffered by IDC, including enhanced damages, by reason of the acts complained of herein. IDC is not informed and is unable to state at this time the exact amount of profits and damages due it.

(d) That plaintiff recover its costs and reasonable attorneys' fees pursuant to 15 U.S.C. § 1117; and

(e) That plaintiff have such other and further relief as the Court may deem just, equitable and proper in the premises.

Date: APRIL 22, 2004

Respectfully submitted,



Kenneth T. Emanuelson
Texas Bar No. 24012591
Kenneth R. Glaser
Texas Bar No. 07999000

GARDERE WYNNE SEWELL LLP
3000 Thanksgiving Tower
1601 Elm Street, Suite 3000
Dallas, Texas 75201-4761
Tel: 214-999-3000
Fax: 214-999-4667

ATTORNEYS FOR PLAINTIFF
INTERNATIONAL DEVELOPMENT
CORPORATION

AD 440 (Rev 1/90) Summons in a Civil Action

United States District Court

NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

SUMMONS IN A CIVIL ACTION

International Development Corporation

v.

INTP, Inc.

CASE NUMBER:

304 CV - 854 P

To: (Name and Address of Defendant)

INTP, Inc. d/b/a World Source
4700 West Prospect Road, Suite 103,
Ft. Lauderdale, FL 33309.

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon
PLAINTIFF'S ATTORNEYS (name and address)

Kenneth T. Emanuelson
Kenneth R. Glaser
Gardere Wynne Sewell LLP
1601 Elm Street, Suite 3000
Dallas, Texas 75201

an answer to the complaint which is herewith served upon you, within 20 (twenty) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CLERK OF COURT

CLERK

APR 22 2004

DATE

BY DEPUTY CLERK

Christopher Ropes Schell

AFFIDAVIT OF SERVICE**UNITED STATES DISTRICT COURT****NORTHERN District of Texas**

Case Number: 3:04-CV-854-P

Plaintiff:

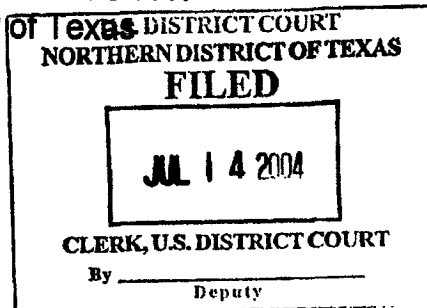
INTERNATIONAL DEVELOPMENT CORPORATION

vs.

Defendant:

INTP, INC.

For:

GARDERE WYNNE SEWELL LLO

Received by JOSEPH RICH C.P.S. on the 28th day of June, 2004 at 10:38 am to be served on INTP INC., D/B/A WORLD SOURCE, C/O CONNIS O. BROWN, ATTORNEY, 101 NE THIRD AVENUE, SECOND FLOOR, FORT LAUDERDALE, FLORIDA 33301. I, CHRIS YEOMAN, being duly sworn, depose and say that on the 29 day of JUNE, 2004 at 11:15A .m., executed service by delivering a true copy of the **SUMMONS IN A CIVIL ACTION, COMPLAINT, CERTIFICATE OF INTERESTED PERSONS AND CIVIL FILING NOTICE** in accordance with state statutes in the manner marked below:

() PUBLIC AGENCY: By serving _____ as _____ of the within-named agency.

() SUBSTITUTE SERVICE: By serving _____ as _____

() CORPORATE SERVICE: By serving _____ as _____

☒ OTHER SERVICE: As described in the Comments below by serving Connis Brown as Attorney for Defendant

() NON SERVICE: For the reason detailed in the Comments below.

COMMENTS: _____

I certify that I have no interest in the above action, am of legal age and have proper authority in the jurisdiction in which this service was made.

Subscribed and Sworn to before me on the 29th day of July, 2004 by the affiant who is personally known to me.

Carol A. Lograsso
NOTARY PUBLIC

PROCESS SERVER # 762
Appointed in accordance
with State Statutes

JOSEPH RICH C.P.S.
129 N.E. Prima Vista Boulevard
Port St. Lucie, FL 34983
(772) 340-0011

Our Job Serial Number: 2004004459



304 CV - 854 P**RETURN OF SERVICE**Service of the Summons and Complaint was made by me¹ DATE

NAME OF SERVER (PRINT)

TITLE

Check one box below to indicate appropriate method of service

- ☐ Served personally upon the defendant. Place where served: _____
- ☐ Left copies thereof at the defendant's house or usual place of abode with a person of suitable age and discretion then residing therein.
Name of person with whom the summons and complaint were left: _____
- ☐ Returned unexecuted: _____
- ☐ Other (specify): _____

STATEMENT OF SERVICE FEES

TRAVEL

SERVICES

TOTAL

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of Service and Statement of Service Fees is true and correct.

Executed on _____

Date

Signature of Server

Address of Server

¹ As to who may serve a summons see Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

INTP, INC., a Florida corporation,

Plaintiff,

CASE NO. 04-60784-CIV-MARRA
Magistrate Judge Seltzer

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
a Delaware corporation, KMART
CORPORATION, a Delaware corporation, and
INTERNATIONAL DEVELOPMENT
CORPORATION, a Texas corporation

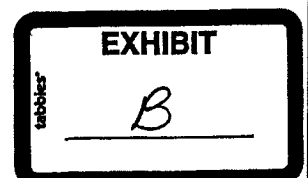
Defendants.

DECLARATION OF JOHN BROWDER

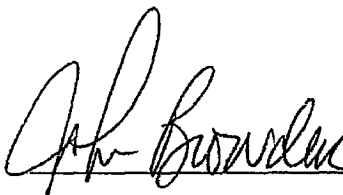
On this day, before me the undersigned authority, personally appeared John Browder, known to me to be the person whose name is subscribed hereto and under oath states:

"My name is John Browder. I am over the age of eighteen (18) years, of sound mind, and am not party to or interested in the above styled and numbered cause. I have personal knowledge of every fact and statement contained in this Declaration and each is true and correct.

1. I am the President of International Development Corporation (IDC).
2. IDC is a corporation organized under the laws of the State of Texas with its principal place of business in Southlake, Texas.
3. IDC does not now have, nor has it in the past had, had any business operations located in the State of Florida.
4. IDC does not maintain any place of business in the State of Florida.
5. IDC does not have any employees located within the State of Florida.
6. IDC does not have a registered agent for service of process in the State of Florida.



7. IDC has not registered to do business in the State of Florida.
8. IDC does not own or lease, nor has it ever owned or leased, real estate in the State of Florida.
9. IDC does not pay taxes to the State of Florida, nor to its knowledge is it obligated to do so.
10. IDC does not now maintain, nor has it ever maintained, a listing in any telephone directory in the State of Florida.
11. IDC does not now maintain, nor has it ever maintained, a bank account in the State of Florida.
12. IDC has never sold any of the products alleged to be infringing, or delivered any such accused products to, the State of Florida.
13. IDC has never received any payments for accused products from any customers located in the State of Florida.


John Browder

THE STATE OF TEXAS
COUNTY OF TARRANT

§
§
§

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned Notary Public, on this _____ day of July, 2004, by John Browder.

NOTARY SEAL