

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MISSOURI**

OSMENT MODELS, INC. AND O CO.	)	
	)	
	)	
Plaintiffs,	)	
	)	Case No. <b>2:09-cv-04189</b>
vs.	)	
	)	
MIKE'S TRAIN HOUSE, INC.	)	
	)	
	)	
Defendant.	)	

**COMPLAINT FOR COPYRIGHT INFRINGEMENT, FALSE ADVERTISING,  
AND UNFAIR COMPETITION**

Plaintiffs Osment Models, Inc. and O CO. for their Complaint against Defendant state as follows:

**The Parties**

1. Plaintiff O CO. is a Kansas corporation having its principal place of business in Linn Creek, Missouri. O CO. is a holding company that owns certain copyrights and other intellectual property utilized by its related entities.

2. Plaintiff Osment Models, Inc. (hereinafter "Osment"), is a Missouri corporation having its principal place of business in Linn Creek, Missouri. Osment is in the business of developing, manufacturing, and selling products for the model railroad industry including, without limitation, miniature model buildings, miniature model building kits, and accessories for use in conjunction with model railroad sets and displays. Osment sells these products under the brand names DPM DESIGN PRESERVATION MODELS<sup>®</sup> and/or WOODLAND SCENICS<sup>®</sup>.

3. Upon information and belief, defendant Mike's Train House, Inc. is a Maryland corporation having its principal place of business in Columbia, Maryland. Mike's Train House, Inc. (hereinafter "MTH") is in the business of selling products for the model railroad industry including, without limitation, miniature model buildings and accessories for use in conjunction with model railroad sets and displays. MTH sells these products under the brand name MTH ELECTRIC TRAINS.<sup>®</sup>

### **Jurisdiction and Venue**

4. This is an action for copyright infringement arising under the Copyright laws of the United States, namely 17 U.S.C. § 101 et seq., for false advertising arising under the Lanham Act, namely 15 U.S.C. § 1125 (a), and for unfair competition under the common law of the state of Missouri.

5. This Court has original and exclusive subject matter jurisdiction over the copyright infringement and false advertising claims under 28 U.S.C. §§ 1331 and 1338(a).

6. This Court has jurisdiction over the common law unfair competition claim under 28 U.S.C. § 1338 (b).

7. Upon information and belief, MTH does business in interstate commerce throughout the United States, including within this judicial district and is subject to the personal jurisdiction of this Court.

8. Upon information and belief, MTH has offered infringing products for sale in this judicial district, has purposely directed activities at residents of this judicial district, and/or has caused events to occur in this judicial district that are the subject of this litigation.

9. Jurisdiction and venue are proper in this judicial district pursuant to 28 U.S.C. §§ 1391 (b) and (c) and 1400.

### **Background Facts**

10. Osment has (on its own and via its predecessor in interest Design Preservation Models, Inc.) been developing, manufacturing and selling miniature model buildings and kits for use in conjunction with model railroad sets and displays for over thirty-five years.

11. Osment expends considerable time, money, and effort in the development of these miniature model buildings and kits in order to assure that, among other things, the building designs have strong customer appeal, the kits are user friendly, and the manufactured product is of high quality.

12. Over the years, Osment has developed a strong and favorable reputation in the model building and model railroad industries for its unique and distinctive designs and the quality of its products, including its miniature model buildings and kits.

13. Osment is a recognized leader in the industry of supplying miniature model buildings, miniature model building kits, and other miniature model railroad accessories to model railroad enthusiasts throughout the world.

14. Plaintiff O CO. is the owner of a number of copyright registrations for miniature model building designs originally developed by Osment and its predecessor in interest Design Preservation Models, Inc. Osment is the exclusive authorized manufacturer of products incorporating these designs.

15. The Register of Copyrights issued certificates of registration for each of the following works that are relevant to the instant Complaint (collectively the "Registered Works") and are owned through assignment by O CO.:

<b>Exhibit</b>	<b>Registration No.</b>	<b>Title</b>
1	VA 1-640-773	Fill 'Er Up & Fix 'Er (HO Scale)
2	VA 1-640-772	Dansbury Depot (HO Scale)
3	VA 1-012-512	Townhouse #1
4	VA 1-012-515	Townhouse #2
5	VA 1-012-505	Townhouse #3

16. Each of the Registered Works contains copyrightable subject matter under the Copyright Act, 17 U.S.C. § 101 *et seq.*, and constitutes an original work of authorship.

17. Each of the copyright registrations for the Registered Works is valid and enforceable, and O CO. owns all right, title, and interest in and to the copyright in each of the Registered Works via assignment.

18. Each of the Registered Works has been incorporated into model buildings and kits manufactured and sold by Osment throughout the United States and the world under the DPM DESIGN PRESERVATION MODELS<sup>®</sup> and/or WOODLAND SCENICS<sup>®</sup> brand names.

19. To date, the Registered Works have been offered for sale by Osment as "HO" and "N" scale products. Osment also plans and has been working toward expanding these designs for use on "G" and "O" scale products.

20. In 2008, Plaintiffs learned that Defendant MTH was marketing miniature buildings in its catalogs and on its website that were substantially similar, if not virtually identical, copies of the Registered Works in "O" scale. Upon examination of the products, catalogs, and website of MTH, Plaintiffs determined that the products offered by Defendant had been copied from Plaintiffs' copyrighted works and that Defendant's catalog and online catalog photos depicting Defendant's products had been copied and/or derived from Plaintiffs' copyrighted works.

**COUNT I  
COPYRIGHT INFRINGEMENT**

21. Plaintiffs adopt and incorporate by reference paragraphs 1 through 20 as if fully set forth herein.

22. Defendant MTH violated Plaintiffs' exclusive rights in its copyrighted works by copying and selling copies of Plaintiffs' miniature model buildings and/or creating and selling derivative works based upon Plaintiffs' copyrighted works. The following Exhibits are representative of Defendant's infringing use of Plaintiffs' copyrighted works in its products or in advertisements for the products:

<b>Exhibit</b>	<b>Plaintiffs' Registration No.</b>	<b>Infringing MTH Product No.</b>	<b>Infringing MTH Product Title</b>	<b>Infringing MTH Product UPC</b>
6	VA 1-012-515 (Townhouse #2)	30-9078	3-Story Town House Gray with White Trim	6 58081 05327 1
7	VA 1-012-505 (Townhouse #3)	30-9079	3-Story Town House Tan with Dark Tan Trim	6 58081 05328 8
8	VA 1-012-512 (Townhouse #1)	30-9080	3-Story Town House Maroon with Tan Trim	6 58081 05329 5

<b>Exhibit</b>	<b>Plaintiffs' Registration No.</b>	<b>Infringing MTH Product No.</b>	<b>Infringing MTH Product Title</b>	<b>Infringing MTH Product UPC</b>
9	VA 1-012-505 (Townhouse #3)	30-9155	3-Story Town House on Fire Red/White	6 58081 09952 1
10	VA 1-012-505 (Townhouse #3)	30-90238	3-Story Town House Dark Green and Black	6 58081 23774 9
11	VA 1-012-505 (Townhouse #3)	30-90239	3-Story Town House Light Blue and Maroon	6 58081 23775 6
12	VA 1-012-505 (Townhouse #3)	30-90240	3-Story Town House Blue and Yellow	6 58081 23776 3
13	VA 1-640-773 (Fill 'Er Up & Fix 'Er)	30-90300	Country Gas Station Shell	Unknown
14	VA 1-640-773 (Fill 'Er Up & Fix 'Er)	30-90301	Country Gas Station Esso	Unknown
15	VA 1-640-773 (Fill 'Er Up & Fix 'Er)	30-90311	Country Gas Station Gulf	Unknown
16	VA 1-640-772 (Dansbury Depot)	30-90302	Country Passenger Depot Tan/Green	6 58081 26042 6
17	VA 1-640-772 (Dansbury Depot)	30-90303	Country Passenger Depot Maroon/Cream	6 58081 26043 3

23. Plaintiffs have been damaged by Defendant's acts of copyright infringement and will continue to be damaged unless Defendant is enjoined by this Court.

24. Defendant's infringing activity, as set forth in paragraphs 20 through 23, has been done knowingly and willfully.

## **COUNT II COPYRIGHT INFRINGEMENT**

25. Plaintiffs adopt and incorporate by reference paragraphs 1 through 24 as if fully set forth herein.

26. Defendant MTH violated Plaintiffs' exclusive rights in its copyrighted works by copying Plaintiffs' miniature buildings in photographs and visual depictions used in Defendant's printed and online catalogs that advertise Defendant's miniature buildings. The following Exhibits are representative of Defendant's use of Plaintiffs' copyrighted works in its catalogs:

<b>Exhibit</b>	<b>Plaintiffs' Registration No.</b>	<b>Infringing MTH Product Catalog No(s).</b>	<b>Infringing MTH Product Listing Location</b>
18	VA 1-012-515 (Townhouse #2)	30-9078	MTH 2002 Catalog, volume 2, page 153
19	VA 1-012-515 (Townhouse #2)	30-9078	MTH 2003 Catalog, volume 1, page 161
20	VA 1-012-515 (Townhouse #2)	30-9078	MTH 2003 Catalog, volume 2, page 150
21	VA 1-012-515 (Townhouse #2)	30-9078	MTH 2003 RTR Catalog, page 28
22	VA 1-012-515 (Townhouse #2)	30-9078	MTH 2004 Catalog, volume 1, page 168
23	VA 1-012-515 (Townhouse #2)	30-9078	MTH 2004 Catalog, volume 2, page 161
24	VA 1-012-515 (Townhouse #2)	30-9078	MTH 2005 RTR Catalog, page 53
25	VA 1-012-515 (Townhouse #2)	30-9078	MTH 2005 Catalog, volume 1, page 158
26	VA 1-012-505 (Townhouse #3)	30-9079	MTH 2002 Catalog, volume 2, page 153
27	VA 1-012-505 (Townhouse #3)	30-9079	MTH 2003 Catalog, volume 1, page 161
28	VA 1-012-505 (Townhouse #3)	30-9079	MTH 2003 Catalog, volume 2, page 150
29	VA 1-012-505 (Townhouse #3)	30-9079	MTH 2003 RTR Catalog, page 28
30	VA 1-012-505 (Townhouse #3)	30-9079	MTH 2004 Catalog, volume 1, page 168
31	VA 1-012-505 (Townhouse #3)	30-9079	MTH 2004 Catalog, volume 2, page 161

<b>Exhibit</b>	<b>Plaintiffs' Registration No.</b>	<b>Infringing MTH Product Catalog No(s).</b>	<b>Infringing MTH Product Listing Location</b>
32	VA 1-012-505 (Townhouse #3)	30-9079	MTH 2005 RTR Catalog, page 53
33	VA 1-012-505 (Townhouse #3)	30-9079	MTH 2005 Catalog, volume 1, page 158
34	VA 1-012-505 (Townhouse #3)	30-9079	MTH 2006 RTR Catalog, page 51
35	VA 1-012-512 (Townhouse #1)	30-9080	MTH 2002 Catalog, volume 2, page 153
36	VA 1-012-512 (Townhouse #1)	30-9080	MTH 2003 Catalog, volume 1, page 161
37	VA 1-012-512 (Townhouse #1)	30-9080	MTH 2003 Catalog, volume 2, page 150
38	VA 1-012-512 (Townhouse #1)	30-9080	MTH 2003 RTR Catalog, page 28
39	VA 1-012-512 (Townhouse #1)	30-9080	MTH 2004 Catalog, volume 1, page 168
40	VA 1-012-512 (Townhouse #1)	30-9080	MTH 2004 Catalog, volume 2, page 161
41	VA 1-012-512 (Townhouse #1)	30-9080	MTH 2005 RTR Catalog, page 53
42	VA 1-012-512 (Townhouse #1)	30-9080	MTH 2005 Catalog, volume 1, page 158
43	VA 1-012-505 (Townhouse #3)	30-9155	MTH 2005 Catalog, volume 2, page 173
44	VA 1-012-505 (Townhouse #3)	30-9155	MTH 2006 RTR Catalog, page 60
45	VA 1-012-505 (Townhouse #3)	30-9155	MTH 2007 RTR Catalog, page 47
46	VA 1-012-505 (Townhouse #3)	30-90238, 30-90239, 30-90240	MTH 2007 RTR Catalog, page 54
47	VA 1-012-505 (Townhouse #3)	30-90238, 30-90239, 30-90240	MTH 2008 RTR Catalog, page 70

<b>Exhibit</b>	<b>Plaintiffs' Registration No.</b>	<b>Infringing MTH Product Catalog No(s).</b>	<b>Infringing MTH Product Listing Location</b>
48	VA 1-012-505 (Townhouse #3)	30-90238, 30-90239, 30-90240	MTH 2009 RTR Catalog, page 64
49	VA 1-640-773 (Fill 'Er Up & Fix 'Er)	30-90300, 30-90301	MTH 2008 Catalog, volume 2, page 171
50	VA 1-640-773 (Fill 'Er Up & Fix 'Er)	30-90300, 30-90301 30-90311	MTH 2009 RTR Catalog, page 71
51	VA 1-640-772 (Dansbury Depot)	30-90302, 30-90303	MTH 2008 Catalog, volume 2, page 173
52	VA 1-640-772 (Dansbury Depot)	30-90302, 30-90303	MTH 2009 RTR Catalog, page 67

27. Plaintiffs have been damaged by Defendant's acts of copyright infringement and will continue to be damaged unless Defendant is enjoined by this Court.

28. Defendant's infringing activity, as set forth in paragraphs 24 through 27, has been done knowingly and willfully.

### **COUNT III COPYRIGHT INFRINGEMENT**

29. Plaintiffs adopt and incorporate by reference paragraphs 1 through 28 as if fully set forth herein.

30. Defendant MTH violated Plaintiffs' exclusive rights in its copyrighted works by creating derivative works from Plaintiffs' miniature buildings. Based on information and belief, Defendant altered Plaintiffs' miniature model buildings and took photographs (or had photographs taken) of those altered buildings and/or altered photographs of Plaintiffs' miniature

model buildings, and used those photographs in Defendant's printed and online catalogs in advertising Defendant's competitive miniature buildings. The following Exhibits are representative of Defendant's use of Plaintiffs' copyrighted works:

<b>Exhibit</b>	<b>Plaintiffs' Registration No.</b>	<b>Infringing/Altered Photograph Identifier</b>	<b>Infringing/Altered Photograph Location</b>
53	VA 1-640-773 (Fill 'Er Up & Fix 'Er)	30-90300 - Shell Country Gas Station	MTH 2008 Catalog, volume 2, page 171
54	VA 1-640-773 (Fill 'Er Up & Fix 'Er)	30-90300 - Shell Country Gas Station	MTH 2009 Catalog, volume 1, page 141
55	VA 1-640-772 (Dansbury Depot)	30-90302 - Country Passenger Depot Tan/Green	MTH 2008 Catalog, volume 2, page 173
56	VA 1-640-772 (Dansbury Depot)	30-90302 - Country Passenger Depot Tan/Green	MTH 2009 RTR Catalog, page 67
57	VA 1-640-772 (Dansbury Depot)	30-90302 - Country Passenger Depot Tan/Green	MTH 2009 Catalog, volume 1, page 140
58	VA 1-640-772 (Dansbury Depot)	30-90303 - Country Passenger Depot Maroon/Cream	MTH 2008 Catalog, volume 2, page 173
59	VA 1-640-772 (Dansbury Depot)	30-90303 - Country Passenger Depot Maroon/Cream	MTH 2009 RTR Catalog, page 67
60	VA 1-640-772 (Dansbury Depot)	30-90303 - Country Passenger Depot Maroon/Cream	MTH 2009 Catalog, volume 1, page 140

31. Plaintiffs have been damaged by Defendant's acts of copyright infringement and will continue to be damaged unless Defendant is enjoined by this Court.

32. Defendant's infringing activity, as set forth in paragraphs 28 through 31, has been done knowingly and willfully.

**COUNT IV  
FALSE ADVERTISING**

33. Plaintiffs incorporate paragraphs 1 through 32 as though fully set forth herein.

34. Defendant's use of photographs, both altered and unaltered, of Plaintiffs' miniature buildings in advertising and promotional materials designed to sell Defendant's products constitutes a false or misleading description of fact or a false and misleading representation of fact that misrepresents the nature, characteristics, qualities, or geographic origin of Defendant's competitive miniature buildings.

35. Plaintiffs have been damaged by Defendant's acts of false advertising and will continue to be damaged unless Defendant is enjoined by this Court.

36. Defendant's acts of false advertising, as set forth in paragraphs 32 through 34, have been done knowingly and willfully.

**COUNT V  
COMMON LAW UNFAIR COMPETITION**

37. Plaintiffs incorporate paragraphs 1 through 36 as though fully set forth herein.

38. Defendant's acts, as outlined in the preceding paragraphs, demonstrate a deliberate plan to use wrongful and dishonest means to compete with Plaintiffs.

39. Defendant's acts of unfair competition have harmed Plaintiffs and will continue to harm Plaintiffs unless enjoined by this Court.

40. Defendants' acts of unfair competition have been willful and deliberate.

WHEREFORE, Plaintiffs O CO. and Osment Models, Inc. pray that this Court enter an order or decree granting the following relief:

A. An award equal to Plaintiffs' lost profits on its copyrighted miniature buildings and miniature building kit sales, including, without limitation, lost profits on Osment's existing lines of "HO" and "N" scale products, as well as lost profits on potential sales for "G" and "O" scale products intended to be released in the future.

B. An award equal to Defendant MTH's profits on infringing miniature building sales.

C. Alternatively and at the Plaintiffs' election, an award of statutory damages for copyright infringement pursuant to 17 U.S.C. § 504 (c), such award being equal to the maximum amount allowed under the statute for willful infringement.

D. An award equal to Plaintiffs' lost profits on sales of additional merchandise that it would have made to the purchasers of the infringing products who otherwise would have purchased Plaintiffs' miniature buildings and kits based upon Plaintiffs' historical sales revenue and profit margins.

E. That Defendant be required to implement a corrective advertising campaign, including, without limitation, (1) sending a letter, in a form and manner approved by Plaintiffs, to each of Defendant's advertisers, including hobby magazines, newsletters, and other trade publications, informing them that the advertisements and other depictions of the Plaintiffs' copyrighted designs or derivatives thereof and/or of the accused products infringe Plaintiffs' copyrights and indicating that the advertiser should not utilize any such advertisements and other depictions in print or on-line; (2) sending a letter, in a form and manner approved by Plaintiffs,

to each of Defendant's distributors and retailers informing them that the catalogs and other promotional materials depicting Plaintiffs' copyrighted designs or derivatives thereof infringe Plaintiffs' copyrights, indicating that the distributors and retailers should not utilize the catalogs and other promotional materials in print or on-line, and requesting that they return the catalogs and other promotional materials to Defendant's location at Defendants expense; (3) sending a letter, in a form and manner approved by Plaintiffs, to each of Defendant's distributors, retailers and customers to whom they have sold products that infringe or have sold products as a result of their false advertising, informing them that the products received are not what were advertised and/or infringe Plaintiffs' copyrights as applicable, indicating that Defendant shall refund to them the cost of these products, and requesting them to return these products to Defendant's location at Defendant's expense.

F. That any damages attributable to Defendant's acts of false advertising be trebled as a result of Defendant's willful misrepresentation of fact in accordance with 15 U.S.C. § 1117.

G. That Plaintiffs be awarded their reasonable attorneys fees in accordance with 17 U.S.C. § 505 and/or 15 U.S.C. § 1117, as applicable.

H. That Defendant be permanently enjoined from any further infringement of Plaintiffs' copyrights, use of false advertising, and unfair competition.

I. An order requiring Defendant to (1) deliver to Plaintiffs any inventory of miniature buildings and miniature building kits and any artwork, drawings, photographs, molds, and other tooling or depictions thereof in all scales containing infringing works presently in their possession or hereafter acquired through vendor, distributor, retailer, and/or customer returns and (2) provide to Plaintiffs an itemized accounting of all of the foregoing.

J. An order requiring Defendant to destroy all catalogs or other promotional materials of every kind or variety containing Plaintiffs' copyrighted works and any derivative works thereof, including removing all online web pages, catalogs, and the like.

K. An award of Plaintiffs' costs and all other and further relief as Plaintiffs may show they are entitled to receive or which the Court may determine to be just and equitable under the circumstances.

### **Jury Demand**

Plaintiffs O CO. and Osment Models, Inc. hereby demand a trial by jury on all issues that are triable as a right to a jury.

Respectfully submitted,

*s/ J. David Wharton*

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