

STATE OF INDIANA)
) SS:
COUNTY OF JOHNSON)

IN THE JOHNSON SUPERIOR COURT NO. 1
CAUSE NO. 41D01-1608-PL-000072

CHILLY PANDA MEDIA, LLC,)
An Indiana Limited Liability Company,)
Plaintiff and Counterclaim Defendant,)

- V -)

BRITT INTERACTIVE, LLC, An Indiana Limited)
Liability Company, TOWNEPOST NETWORK, INC.)
An Indiana Corporation, and TOM BRITT,)
Defendants, Counterclaim Plaintiffs and Third Party Plaintiffs,)

- V -)

DANN VELDKAMP AND JODY VELDKAMP,)
Third Party Defendants.)

FINDINGS OF FACT, CONCLUSION THEREON AND PRELIMINARY INJUNCTION

The above cause of action came before the Court for hearing on dates of November 18, 2016, November 22, 2016 and November 23, 2016 on the Emergency Motion For Preliminary Injunction filed by Chilly Panda Media, LLC on August 22, 2016 and on the Motion For Preliminary Injunction filed by Britt Interactive, LLC, Townepost Network, Inc. And Tom Britt. A Motion For Temporary Restraining Order filed by Chilly Panda Media, LLC was withdrawn.

Chilly Panda Media, LLC appeared by members Dann Veldkamp and Jody Veldkamp and by counsel, Matthew Cree and P. Adam Davis. Britt Interactive, LLC, Townepost Network, Inc. And Tom Britt, appeared by Tom Britt, as member, officer and individual respectively, and by counsel, Jonathan D. Mattingly and Josh F. Brown.

Parties and witnesses were sworn. Evidence was presented.

Parties were provided with opportunity to file proposed Findings of Fact and Conclusion Thereon and post-hearing briefs.

After consideration of the evidence submitted, the arguments of counsel and the written post trial proposed findings of fact and conclusions submitted by the parties, the Court now enters the following Findings of Fact, Conclusions and Preliminary Injunction. To the extent that any finding of fact should be construed as a conclusion, or vice versa, they shall be so construed.

FINDINGS OF FACT

1. Tom Britt, hereinafter referred to as Mr. Britt, founded Britt Interactive, LLC, hereinafter referred to as Britt Interactive, in 2003.
2. Britt Interactive began publishing a monthly magazine called “Geist Community Newsletter” and a website for the magazine called “atGeist.com”.
3. Mr. Britt determined that a market existed for hyper-local publications. He determined that Britt Interactive could use independent licensees to publish hyper-local publications within specific localities of the Indianapolis metropolitan area while offering economies of scale through a centralized publisher and distributor.
4. Britt Interactive started to sell licenses to third parties where the licensees would produce monthly hyper-local magazines in designated areas in the Indianapolis metropolitan area. Each licensee was part of a larger network of publications. The licensees operated under a licensing agreement. The hyper-local magazine would target a defined area within the Indianapolis metropolitan area. The content was to appeal to the community that the magazine targeted. The publication was distributed free to the consumer. Revenue was derived from advertising.
5. The licensee developed the content of the publication. Britt Interactive provided software to assist in the sale of advertising, published the magazine, distributed the magazine, provided financial software and received and disbursed funds. Britt Interactive would also develop an insert common to all publications.

6. Britt Interactive used an identifiable publication name common to all of the hyper-local magazines. Initially, each magazine was identified by the community name followed by the word Community Newsletter. Subsequently, each magazine was identified by the community name followed by the word Community Magazine. The name of each publication was displayed in the same font, size and color.

7. On or about October 29, 2012, Britt Interactive entered into a License Agreement with Chilly Panda for a hyper-local magazine to target Center Grove. The defined area under the License Agreement was the Center Grove School Corporation limits, which consists of White River Township in Johnson County. This agreement is termed the Center Grove License Agreement.

8. On or about April 2, 2014, Britt Interactive entered into a second License Agreement with Chilly Panda for a hyper-local magazine to target Greenwood. The defined area under the License Agreement was the City of Greenwood corporate limits and zip codes 46142 and 46143. The agreement also included zip code 46184 for Whiteland, Indiana. This agreement is termed the Greenwood License Agreement. The distribution area in the Greenwood License Agreement also included a substantial portion of the area subject to the Center Grove License Agreement.

9. Except for the differentiation of the name and publication area, the terms of the Center Grove License Agreement and Greenwood License Agreement are identical. The Center Grove License Agreement and Greenwood License Agreement are collectively termed "License Agreements".

10. Chilly Panda is owned and operated by Dann Veldkamp and Jody Veldkamp.

11. In parts relevant, the Center Grove License Agreement provides:

"1. Grant of License. Britt owns the name, Center Grove Community Newsletter, and domain, "atCenterGrove.com". In accordance with this Agreement, Britt grants Chilly Panda an exclusive license to use both the name, "Center Grove Community Newsletter," and the domain, "atCenterGrove.com," . . . "

...

5.1 Britt's obligations include:

- a. Print newsletter production and oversight;
- b. Ad design - both print and online - and associated processes oversight;
- c. Weblog support and updates;
- d. Online advertising design and management;
- e. New product development and implementation;
- f. Accounting functions: invoicing, accounts payable, accounts receivable, income statements, bank deposits, etc.;
- g. CRM software support;
- h. On-going training and consultation monthly to ensure financial success; and
- i. Print vendor negotiations and pricing.

5.2 Chilly Panda's obligations include:

- a. Sales (print, online, video and other products and services);
- b. Editorial oversight, development and costs;
- c. Printing, production, and mailing costs associated with the newsletter; and
- d. All office supplies, utilities, mileage, and other business related costs.

5.3 In exchange, Chilly Panda will own and retain:

- a. All print sales generated through the Center Grove Community Newsletter;
- b. All online sales or revenue sharing generated through atCenterGrove.com;
- c. Customer information for Center Grove Community Newsletter;
- d. Customer information for atCenterGrove.com;
- e. Accounts receivable from advertising sales;
- f. Partnership agreements with area organizations;
- g. Final digital files created for newsletters; and
- h. Content (stories, videos, advertisements) created for Chilly Panda, Center Grove Community Newsletter and at CenterGrove.com from April 1, 2012 to termination of this Agreement.

5.4 Britt will continue to own:

- a. The "atCenterGrove.com" domain;
- b. The name, "Center Grove Community Newsletter";
- c. All business processes, customer information, and intellectual property associated with "atCenterGrove.com and the Center Grove Community Newsletter prior to April 1, 2012; and
- d. All weblog programming, design, and source code for atCenterGrove.com."

Exhibit A.

12. The License Agreement did not identify a term of the agreement. Britt Interactive could terminate the agreement at any time. The agreement did not include a provision for Chilly

Panda to terminate the agreement except in the event of the default of Britt Interactive. Par. 6, Exhibit A.

13. The License Agreement provided that in the event that Britt Interactive “choose to transform this license to a franchise”, Britt Interactive would provide Chilly Panda the first opportunity to purchase the franchise for One Dollar (\$1.00).

14. The wording of the Greenwood License Agreement was the same with the exception that Greenwood Community Newsletter was substituted for Center Grove Community Newsletter and “atGreenwood.com” was substituted for “atCenterGrove.com” Exhibit B.

15. In 2014, Mr. Britt caused Towne Post Network, Inc., hereinafter referred to as Towne Post, to be incorporated. All intellectual property and license agreements were assigned to Towne Post from Britt Interactive.

16. Britt Interactive and Towne Post communicated the change of ownership to the Licensees and informed them that the billing information would be changing to Towne Post Network for both the customers and the Licensees.

17. Towne Post caused a logo to be registered with the U.S. Patent and Trademark Office on February 16, 2016 under Registration No. 4900328. The logo consisted of two street signs. The top sign had the words “Towne Post”. The bottom sign had the word “Network”. The top sign was at right angle to the bottom sign as would be encountered with a sign situated at intersecting streets.

18. All of the hyper-local publications began to include the name “Towne Post Network, Inc.” and the Towne Post logo on the front cover.

19. Since January, 2015, the Licensees, including Chilly Panda, have been paying management fees, page layout fees, shared printing costs, and all other required fees or costs to TownePost. These fees cover Towne Posts’s expenses for providing various administrative,

design, printing, web and business process functions for its Licensees, including access to the cloud based system used to manage magazine sales, production and design.

20. For the past three years, Britt Interactive and then Towne Post have used MagazineManager.com. In June, 2016, Towne Post went to MagHub.com. All network data was fully integrated on July 1, 2016. Towne Post transferred all customer data, invoices, accounts receivable, and contracts into MagHub and provided each Licensee with access to its network on the Maghub system. Towne Post is responsible for paying all MagHub fees and costs.

21. Orders are created online and then emailed directly to the clients for approval. Approval is typically received from an e-mail confirmation or digital signature. Once an order is approved by the client, it is invoiced on or around the fifteen (15th) of each month prior to the issue date.

22. TownePost is responsible for issuing all customer invoices for ads and services sold in all network publications by any Licensee, including Chilly Panda. Customers receive one invoice for the applicable time period without regard of whether advertising was placed in more than one magazine. Towne Post is responsible for the invoicing, and it maintains control over the invoicing. All invoices are e-mailed to the customer billing contact from Jeanne Britt, the Finance Manager of Towne Post. Ms. Britt is the only one who has the authority and capability of invoicing Towne Post customers through Maghub.

23. Customers pay their invoices to “TownePost Network, Inc.” Payment can be made on-line.

24. All account receivables collected on behalf of the Licensees are distributed to the Licensees each week with detail of their weekly transfer.

25. At the end of the month's cycle, Towne Post sends a monthly bill to the Licensees for their share of printing costs, commissions payable to sales people, credit card fees, writer payments, production fees and management fees. These fees are paid directly to Towne Post.

26. A Licensee may request a copy of the accounting records kept by Towne Post in a QuickBooks software program. This file is made available weekly with their weekly reporting and contains invoice data, receivables and payables, and all other customers data for each licensee.

27. On or about July 21, 2015, Towne Post informed the Licensees by their online portal that the names and logos of the publications would change from "newsletter" to "magazine". Licensees were given the option to use "Community Magazine" or just "Magazine" in each territory. Chilly Panda chose to use the names "Center Grove Community Magazine" and "Greenwood Community Magazine".

28. The August, 2015 publication was the first publication to use the new name. The design of the name was created by a TownePost employee.

29. In May, 2016, Towne Post began offering franchises for sale rather than licenses.

30. Towne Post informed the Licensees that it was converting to a franchise model on or about July 11, 2016, and the Licensees could exercise the option granted to them under the License Agreement.

31. The Veldkamps decided not to go along with the conversion to the franchise model.

32. On or about May 26, 2016 and after the disclosure of the conversion to the franchise model, Chilly Panda applied for state trademarks for the names "Center Grove Community Magazine" and "Greenwood Community Magazine". Along with their application, Chilly Panda submitted specimens to show that the mark was being used in commerce. The specimens

submitted by Chilly Panda were copies of magazine covers that identifying the magazine as “A Towne Post Network Publication.”

33. On or about August 11, 2016, Mr. Dann Veldkamp sent an email to all of his writers, photographers and sales contacts informing them not to use this atCenterGrove.com and atGreenwood.com email addresses and to use a new email address of Dann@chillypandamedia.com.

34. The next day at approximately 2:55 p.m., Mr. Jody Veldkamp contacted Miranda Gray, who worked for Towne Post and who also worked with Chilly Panda, and asked that she download contracts from MagHub and send them to him as an Adobe PDF file.

35. Mr. Jody Veldkamp emailed Ms. Gray an altered insertion order for an advertiser, The Barn At Bayhorse Inn. The insertion order removed the Towne Post Network logo and added a line of copy to the bottom of the agreement that stated: All charges incurred through this contract are due and payable to the publishers of the magazine in which the advertising or other services appear. Specific payment information will be provided on the invoice.

36. Mr. Jody Veldkamp informed Ms. Gray that if the customers inquired about the changes to “tell them that your accountant told you to do this”. He indicated to Ms. Gray that Chilly Panda intended to send it’s own invoices prior to the Towne Post invoices. To this end, Chilly Panda creates an email list entitled “Jody Clients Mailing List” and an email template entitled “Invoicing Alert Email” in MagHub. Mr. Jody Veldkamp informed Ms. Gray that the “magazine will print with or without Towne Post and that billing would continue through Chilly Panda.

37. Ms. Gray resigned her association with Chilly Panda on August 14, 2016.

38. Effective August 15, 2016, Towne Post restricted Chilly Panda’s access to MagHub and terminated Chilly Panda’s License Agreements.

39. In a letter from attorney Josh Brown dated August 15, 2016, Chilly Panda was instructed to cease and desist from using Towne Post's marks and to return any and all materials containing Towne Post's proprietary marks.

40. Since terminating the Licensing Agreements, Towne Post has sent Chilly Panda checks for amounts owed to it, but the checks had not been cashed as of the hearing for preliminary injunction.

41. On or about August 15, 2016, Mr. Jody Veldkamp emailed customers advising them that he would be personally handling the advertisement copy for the September issue.

42. On or about August 16, 2016, Mr. Jody Veldkamp sent a new advertising agreement to customers requesting that the customers not pay the September invoice to Towne Post.

43. On or about August 19, 2016, Towne Post emailed customers to inform them that Chilly Panda's License Agreement had been terminated, but Towne Post would be publishing the September, 2016 issue as scheduled.

44. The next day, Mr. Jody Veldkamp sent an e-mail to customers which contained an agreement that purported to release the customers from the previous Towne Post advertising agreement they had signed for the September issue. The e-mail further suggested that the advertises discontinue the relationship with Towne Post.

45. On or about August 21, 2016, Mr. Jody Veldkamp issued an email to customers which included the following statement:

“If a September issue is published that doesn't list us as publishers and our company Chilly Panda, LLC as owners it is not the magazine you agreed to advertise in. It will be lacking local content and be an inferior quality product. No one is as committed to serving our clients and community with local magazines as we are.”

46. Over the next two days, three customers, D Ray Decor, Malcolm Ramsey and Hearing Massage Therapy, pulled advertisements from the September, 2016 issue.

47. Multiple customers have pulled their advertisements from Towne Post's publications which has resulted in Towne Post's loss of thousands of dollars in revenue each month.

48. On or about August 22, 2016, Mr. Dann Veldkamp sent a copy of Chilly Panda's Complaint to Towne Post's printer.

49. Chilly Panda removed Mr. Britt an an administrator on the Center Grove Community Magazine Facebook page.

50. On August 29, 2016, Mr. Jody Veldkamp sent an email to advertisers informing them that he and Mr. Dann Veldkamp would be publishing the "Original Center Grove and Greenwood Community Magazine" in October. The subject line of the email also stated: "The Real Center Grove & Greenwood Community Magazines Return in October."

51. On October 28, 2016, Mr. Jody Veldkamp posted an article on centergrovecommunitymagazine.com entitled, "Why Are You Seeing Two Center Grove Community Magazines?" The article included statements from Mr. Jody Veldkamp and Mr. Dann Veldkamp as follows:

A Statement from Jody Veldkamp

As often as I have told this tale, I don't think I've ever told it the same way twice. So here is an attempt to tell 28,000 households the same tale. I hope I tell it well.

When my brother Dann and I decided to start a magazine I remember being asked: "Are you crazy? Print is dead." The print is dead folks were mistaken. As we expected the area was hungry for local stories of the people, places and events of their community.

In September you saw a magazine published without a sense of community. You can take the name of the magazine, for which we hold an Indiana trademark, and publish it, but the result? Just another magazine. The September issue lacked the local focus and features you are used to. Community residents asked us what happened to their local

magazine? The answer is you are reading it. “The Northside Publisher” may still be claiming to put out a local magazine but if you don’t live here, if you aren’t involved in the community, and you are not using local writers and photographers how local are you? You can find a local face to front for you, but where is the community commitment?

When you look back at the stories we have covered it is amazing the level of personal involvement of myself, Dann, our writers and photographers. I have gone from attending the Greenwood Freedom Festival to being part of the group that plans it. I don’t just wonder about the future of Johnson County I am involved in Aspire Johnson County, working to make our community even better. I know from experience the impact the Johnson County Community Foundation, Chamber of Commerce, Rotary, Sertoma and other organizations have on our community. Charities, churches, schools, small businesses, and many individuals have all been part of the stories we tell and have become people we know.

That commitment to community is what makes your community magazine special. It is not something you can just call yourself, it is something you live. You don’t say you are part of a community, you become part of a community.

To each member of this community who has been part of this magazine and showed your support, we say thank you. We are honored and humbled by the community we serve and call home. For a while, you may continue to see another magazine using the name. But the heart and soul of your community runs through this one, it is **the original**.

A Statement from Dann Veldkamp

Did you notice something missing from the last couple of issues of your Community Magazine? There were significantly fewer local stories, your favorite columnists were missing and you probably didn’t recognize the writers and photographers as your friends and neighbors. There is a reason for this. The last two issues were not locally produced.

For nearly five years, my brother Jody and I, who have lived in the community for decades, have published the magazine with the assistance of a service provider in Geist. In August, we were having some contract discussions. In the middle of the discussion, the provider simply shut off our access to the layout staff, printer and the systems needed to produce the magazine. At the same time, he simply claimed he owned the magazine and took it over, lock, stock and barrel. As the results show, you can’t produce a local community publication from an office in Geist!

With these issues of the original Center Grove Community Magazine and Center Grove Community Magazine, Jody and I are back at the helm. You can’t tell this is “the original” with a quick glance through the magazine. Kate in the Middle is back as is the hand-crafted word search puzzle. In addition, you will see the writers and photographers you are familiar with.

Longtime contributor Jessica Plumm has a wonderful story about Tom's Barbershop. Located in downtown Greenwood, this shop has been open for 60 years and is now in the second generation of family ownership. It's businesses like these that really enhance our sense of community.

This month, Alaina Sullivan introduces you to Charles Horsman, a local artist who won the Art Uncorked award this year from the GreaterGreenwood Arts Council. In addition to the profile of Horsman, we feature a photo review of the three events associated with Art Uncorked.

And, don't miss Kris Parker's story on the opening of The Barn at Bay Horse In. This new event venue is the largest in the county and is already taking reservations for special events for people from Noblesville to Louisville.

It look us a few weeks to get back on our feet, but we are back, and we will continue to prove you with the best in stories about the local people, places and events that interest you. See you in December!

52. The article also included copies of the state trademark registration for Greenwood Community Magazine and Center Grove Community Magazine.

53. Chilly Panda published magazines for October/November, 2016. The magazines were identified as "The Original Center Grove Community Magazine" and "The Original Greenwood Community Magazine". The font, size and color differed from the standard format developed by Towe Post. The statements by Mr. Jody Veldkamp and Mr. Dann Veldkamp were included.

54. The October/November 2016 publication "The Original Greenwood Community Magazine" included a page with the front cover of the October/November 2016 magazine as well as three prior front covers of the Greenwood Community Newsletter/Greenwood Community Magazine that had been published by Towne Post. The identification "Towne Post Network" was removed, however, the website of atGreenwood.com was left on. At t he bottom of this page, the statement "Published by Chilly Panda Media' is present with a link to Chilly Panda's website.

CONCLUSIONS

1. By it's request for preliminary injunction, Plaintiff requested the following relief:

- A. Enjoin Defendants from publishing the content of Chilly Panda “in any print or media form, including the publication of the September issues of the Center Grove Community Magazine and the Greenwood Community Magazine;
- B. Enjoin Defendants from contacting “Chilly Panda Media LLC’s advertisers and otherwise interfering with its business and contractual relationships;
- C. “Restoring Chilly Panda Media LLC with access to the MagHub customer relationship management system so that it may extract and retain its customer information”; and
- D. For damages and attorney fees.

2. By their request for preliminary injunction, Defendants requested that the Court grant “an injunction against Chilly Panda and all other persons or entities acting in concert or participation with them to enjoin Chilly Panda from infringing TownePost Network’s Licensed Marks and common law marks in violation and contravention of the Lanham Act and Indiana Trademark Act, enjoin Chilly Panda from communicating about the marks in an unlawful and fraudulent manner, award Defendants’ compensatory damages, costs, and attorney fees in accordance with 11 U.S.C. Sec. 1117”.

3. The standard for a preliminary injunction is that “the moving party must demonstrate by a preponderance of the evidence: (1) a reasonable likelihood of success at trial; (2) the remedies at law are inadequate; (3) the threatened injury to the movant outweighs the potential harm to the nonmoving party from the granting of an injunction; and (4) the public interest would not be disserved by granting the requested injunction. (Citations omitted).” *Central Indiana Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 727 (Ind. 2008).

4. The Court begins with the reasonable likelihood of success at trial. The main issue present in the case is the ownership and right to use the name “Center Grove Community Magazine” and “Greenwood Community Magazine”.

5. The names “Center Grove Community Magazine” and “Greenwood Community Magazine” were not registered either federally or with the state. However, that is not the end of the inquiry inasmuch as a trade name or a mark may enjoy protection at common law.

6. Indiana has recognized that “(t)rade names are acquired by adoption and user. They belong to the one who first uses them and gives them a value. *Hartzler v. Goshen, etc., Ladder Co.* (1914), 55 Ind. App. 455, 104 N.E. 34.” *Johnson v. Glassley*, 118 Ind. App. 704 (1949).

7. In 1914, the Indiana Court of Appeals provided the following treatment on unfair business competition:

“The subject of unfair business competition has not been much considered by our courts. Indeed, we believe that there is but one case reported in this State, that of *Computing Cheese Cutter Co. V. Dunn* (1909), 45 Ind. App. 20, 88 N.E. 93, which deals exclusively with the question, though there are some older trade-mark cases. We therefore feel justified in referring at some length to the general principles of the law of unfair competition as deduced from cases in other jurisdiction, and collected in text-books, and we find that in the following excerpts from the article in *Cyc.* on trade-marks, trade-names, and unfair competition, the rules applicable to the present case are stated in language probably more concise and accurate than our own would be.

Unfair competition consists of passing off or attempting to pass off, upon the public, the goods or business of one person as and for the goods or business of another. It consists essentially in the conduct of a trade or business in such a manner that there is either an express or implied representation to that effect. And it may be stated broadly that any conduct, the natural and probable tendency and effect of which is to deceive the public so as to pass off the goods or business of one person as and for that of another, constitutes actionable unfair competition. The definition is comprehensive enough to reach every possible means of effecting the result. 38 *Cyc.* 756.

Relief against unfair competition is properly afforded upon the ground that one who has built up a good will and reputation for his goods or business is entitled to all the benefits therefrom. Such good will is property, and like other property is protected against invasion. The deception of the public injures the proprietor of the business by diverting his customers and depriving him of sales which he otherwise would have made. 38 *Cyc.* 760.

Trade names are names which are used in trade to designate a particular business of certain individuals considered somewhat as an entity, or the place at which a business is located, or of a class of goods, but which are not technical trade-marks either because not applied or affixed to goods sent into the market, or because not capable of exclusive appropriation by any one as trade-marks. Such trade-names may, or may not, be exclusive.

Exclusive trade-names are protected very much upon the same principles as trade-marks, and the same rules that govern trade-marks are applied in determining what may be an exclusive trade-name. Nonexclusive trade-names are names that are *publici juris* in their

primary sense, but which in a secondary sense have come to be understood as indicating the goods or business of a particular trader. Trade-names are acquired by adoption and user, and belong to the one who first used them and gave them a value. 38 Cyc. 764.

In order to make out a case of unfair competition, it is not necessary to show that any person has been actually deceived by defendant's conduct and led to purchase his goods in the belief that they are the goods of plaintiff or to deal with defendant thinking that he was dealing with the plaintiff. It is sufficient to show that such deception will be the natural and probable result of defendant's acts. But either actual or probable deception and confusion must be shown, for if there is no probability of deception, there is no unfair competition. Actual instances of deception, however, afford the strongest possible proof of the deceptive tendency of defendant's act, and the presence or absence of such proof is often referred to as a reason for granting or withholding relief. As in the case of the infringement of another's trade-mark, the true test of unfair competition is whether the acts of defendant are such as are calculated to deceive the ordinary buyer making his purchases under the ordinary conditions which prevail in the particular trade to which the controversy relates. This has been said to include the incautious, unwary, or ignorant purchaser, but not careless purchasers who make no examination. 38 Cyc. 773.

Unfair competition is always a question of fact. The question is to be determined in every case is whether or not, as a matter of fact, the name or mark used by defendant has previously come to indicate and designate plaintiff's goods, or, to state it another way, whether defendant, as a matter of fact, is by his conduct passing off his goods as plaintiff's goods, or his business as plaintiff's business. 38 Cyc. 779.

Unfair competition involves trading upon another's reputation and good-will, and the injury is the same regardless of the intent with which it is done. Accordingly, the better view is that an actual fraudulent intent need not be shown where the necessary and probable tendency of defendant's conduct is to deceive the public, and pass off his goods or business as and for that of plaintiff, especially where only preventive relief against continuance of the wrong is sought or granted. 38 Cyc. 784.

A dealer coming into a field already occupied by a rival of established reputation must do nothing which will unnecessarily create or increase confusion between his goods or business of his rival. Owing to the nature of the goods dealt in or the common use of terms which are *publici juris*, some confusion may be inevitable. But anything done which unnecessarily increases this confusion and damage to the established trader constitutes unfair competition. The unnecessary imitation or adoption of a confusing name, label, or dress of goods constitutes unfair competition. 38 Cyc. 794.

Even descriptive and generic names may not be used in such a manner as to pass off the goods or business of one man as and for that of another. Where such words or names, by long use have become identified in the minds of the public with the goods or business of a particular trader, it is unfair competition for a subsequent trader to use them in connection with similar goods or business in such a manner as to deceive the public and pass off his goods or business for that of his rival. Accordingly the right to use generic

names and descriptive terms if regulated by the courts in accordance with certain general rules already stated. Thus, such terms may not be used in such a manner as to cause unnecessary deception of the public and damage to the complainant. It is unnecessary for the subsequent trader to use such terms in such a manner as to give his goods the same short name, or trade-name, in the market as that of the prior trader's goods, for it is easy to use such terms in some other honestly descriptive way without injury to any right of either party. 378 Cyc. 800.”

Hartzler v. Goshen Churn & Ladder Co., 55 Ind. App. 455, 463-467, 104 N.E. 34, 37-38 (1914).

8. Here, the License Agreement recognized that Britt Interactive, and subsequently its assignee Towne Post, owned the names “Center Grove Community Newsletter” and “Greenwood Community Newsletter”. Beginning with August, 2015, the names were changed to Center Grove Community Magazine and Greenwood Community Magazine. The change of names was not subsequently reflected by an amendment to the Licensing Agreement.

The Court notes the following:

- A. The change of name came at the directive of Towne Post;
- B. All hyper-local magazines that were operating as licensees of Towne Post changed the name of the respective magazines in accordance with the directive of Towne Post;
- C. Plaintiffs continued to operate under the License Agreements notwithstanding the change of name;
- D. Magazines were developed and published for a year under the names of Center Grove Community Magazine and Greenwood Community Magazine in a format identical to the Center Grove Community Newsletter and Greenwood Community Newsletter;
- E. The Plaintiffs recognized the magazines identified as Community Magazine as being the same as the magazines identified as Community Newsletter. Specifically, both magazines were identified as being the same as “The Original Greenwood Community Magazine”. Exhibit 7.
- F. The publications identified as Community Magazines were distributed in distribution stands for the Newsletter. The public identified the publications as being the same.

9. Magazines bearing the name “(Locality) Community Magazine” were recognized by the parties and by the public as being the trade name used by magazines published under license from Towne Post.

10. The Court concludes that the trade name “Center Grove Community Magazine” and “Greenwood Community Magazine” were owned by Towne Post.

11. The Court notes that Plaintiff did seek and receive state trademark recognition of the names “Center Grove Community Magazine” and “Greenwood Community Magazine”. With the application, Plaintiff was required to represent that “(A) the applicant is the owner of the mark; (B) the mark is in use; and © to the knowledge of the person verifying the application, another person: (i) has not registered the mark, either federally or in Indiana; or (ii) does not have the right to use the mark either in the identical form or in such near resemblance to the form as to be likely, if applied to the goods or services of the other person, to cause deception, confusion, or mistake.” Indiana Code 24-2-1-4(a)(4).

12. With the application for state trademark, Plaintiff submitted marks of magazines published under the License Agreements.

13. Inasmuch as the applicants were not the owners of the mark, the state trademark cannot serve as the source of rights that did not previously exist.

14. There is evidence of market confusion based upon two publications attempting to operate under the same name. This is recognized by the Plaintiff adopting the word “Original” in the trade name so as to differentiate the magazine from the magazine published by Towne Post.

15. The Court turns to the request of Towne Post for an injunction as to use of the federally trademarked logo for Towne Post.

16. Plaintiffs have scrupulously avoided use of the term “Towne Post Publication” in their publications. Plaintiffs have also scrupulously avoided use of the federally trademarked logo for Towne Post in the publications.

17. From the evidence submitted, the Court does not find that Chilly Panda has used the federally registered trademark logo of Towne Post or has threatened to do so.

18. Plaintiff has requested that the Court enjoin Defendants “from publishing and/or distributing the content of Chilly Panda Media, LLC in any print or media form, including the publication of the September issues of the Center Grove Community Magazine and the Greenwood Community Magazine”.

19. The Court has concluded that Towne Post owns the names Center Grove Community Magazine and Greenwood Community Magazine. Under the License Agreements, Chilly Panda owns the content, which is defined to include stories, videos and advertisements, created for Chilly Panda.

20. However, the Court does not find that Towne Post has used Chilly Panda’s content after the termination of the advertising agreement or has threatened to do so.

21. The License Agreement has terminated. Both parties are free to publish magazines. Plaintiff simply cannot do so using a trade name owned by Towne Post or a trade name confusingly similar. Both parties are free to develop their own stories and their own content. Both parties are free to contact advertisers. The parties did not enter into a non-competition agreement. The Court notes that the concept of a hyper-local publication is hardly unique to Towne Post. There have been prior efforts made to develop a magazine for the Greenwood and/or Center Grove communities. Towne Post brings the additional factor of multiple hyper-local magazines within the Indianapolis metropolitan area. However, a competitor is free to seek to establish magazines within the individual markets or collectively within the Indianapolis metropolitan area so long as the competitor does not run afoul of Towne Post’s trade name.

22. Plaintiffs request that the Court enjoin Defendants “from contacting “Chilly Panda Media LLC’s advertisers and otherwise interfering with its business and contractual relationships”.

23. Under the License Agreements, Chilly Panda had the obligation for sales. Chilly Panda owned the advertisements and the sales. Towne Post had an obligation not to interfere with advertising obtained by Chilly Panda while operating under the License Agreement. However, at the conclusion of the License Agreements, Towne Post was not prohibited from contacting advertisers so long as that action did not interfere with advertising contracts during the term of the License Agreements. The evidence presented at hearing was that advertising was solicited and received for an upcoming publication. Based upon the timing of the end of the License Agreements, an issue may be present as to the September, 2016 issue. However, inasmuch as the parties did not have a non-competition agreement, both parties were free prospectively to solicit advertising. Inasmuch as the relief requested is prospective, Plaintiffs are not afforded relief.

24. Plaintiffs further request that the Court restore “Chilly Panda Media LLC with access to the MagHub customer relationship management system so that it may extract and retain its customer information”.

25. MagHub is cloud based program that facilitates publication. Under the License Agreements, Britt Interactive, and subsequently Towne Post, was to provide such a program. Towne Post provided access to MagHub. As typical with programs, Towne Post would receive a license to use the program in exchange for compensation paid to MagHub. However, the License Agreement established that the content and information would be owned by Chilly Panda.

26. Hence, Chilly Panda does own the information stored on MagHub and has a right of access to that information. However, Chilly Panda does not have a right to use MagHub on an ongoing basis under Towne Post’s license.

27. Plaintiff further seeks damages and attorney fees. The issue before the Court is for preliminary injunction whereby relief is sought in equity. The issue is premature for consideration on preliminary injunction.

28. Defendants/Counterclaimants request that the Court “enjoin Chilly Panda from communicating about the marks in an unlawful and fraudulent manner”.

29. Apart from the use of the trade name and marks, Defendants/Counterclaimants do not identify any language used as would be subject to prohibition in consideration of the First Amendment.

30. Defendants/Counterclaimants seek a preliminary injunction against communicating with advertisers based upon tortious interference with contracts and tortious interference with business relationship.

31. Under the License Agreements, sales were the obligation of Chilly Panda. Chilly Panda owned the content including the advertisements. Chilly Panda had the right to sales revenue. Towne Post supplied web design and management.

32. Based upon sales being the obligation of Chilly Panda, advertising contracts would be contractual rights of Chilly Panda.

33. The representations made by the parties in the past are relevant as to damages. There is no covenant not to compete. The parties are free to solicit sales from advertisers prospectively.

34. Defendants/Counterclaimants likewise request damages and attorney fees in their request for preliminary injunction. The issue before the Court is for preliminary injunction whereby relief is sought in equity. The issue is premature for consideration on preliminary injunction.

35. Confusion exists in the marketplace due to two publications using the same name. Both parties seek relief in equity. The remedies at law are inadequate.

36. Both parties allege harm. Revenue has been decreased as a result of the confusion. Both parties will sustain harm unless confusion is eliminated from the marketplace.

37. Reduction of confusion and elimination of unfair trade practices would serve the public interest. The public interest would not be disserved by granting relief in equity.

38. The Court turns to the issue of bond. Trial Rule 65 C requires “security by the applicant, in such amount as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.”

39. The names Center Grove Community Magazine and Greenwood Community Magazine have been recognized to have value by usage sufficient to gain protection as a trade name or mark. Testimony has been provided that the confusion in the market has caused a drop in advertising revenue. Insofar as Chilly Panda is deprived of the use of the trade names by preliminary injunction, it is likely to sustain diminished advertising. However, neither party submitted financial data as would enable the court to assess possible damages for being wrongfully enjoined. Reference was made to “thousands” without further specification.

40. The Court establishes the requisite bond under Trial Rule 65 C at Twenty-Five Thousand Dollars (\$25,000.00) for issuance of injunction requested by Towne Post.

41. As to the preliminary injunction in favor of Chilly Panda obtaining customer information,

the Court does not find assertion of an ownership interest by Towne Post in the customer information or evidence of any damages. The requisite bond is established at a minimal amount for costs of One Thousand Dollars (\$1,000.00).

IT IS THEREFORE ORDERED BY THE COURT AS FOLLOWS:

A. A Preliminary Injunction is entered by the terms of which:

1. Chilly Panda and the Veldcamps are enjoined from using the marks, Center Grove Community Newsletter, Center Grove Community Magazine, Greenwood Community Newsletter, Greenwood Community Magazine, atCenterGrove.com or atGreenwood.com, in any manner, including, without limitation, deleting all social media accounts that reference the marks; and ceasing to use forms, advertising and promotional material, displays, stationary, websites, domain names, e-mail addresses, URLs, metatags and other identifiers and any other articles or things that display the marks;

2. Chilly Panda and the Veldcamps are enjoined from using marks that are the same as or confusingly similar to Towne Post's trade names including the names The Original Center Grove Community Magazine and The Original Greenwood Community Magazine; and

3. Chilly Panda and the Veldcamps are enjoined from representing to the public or holding themselves out as the owner of the names Center Grove Community Magazine and Greenwood Community Magazine;

upon security being posted in the amount of Twenty-Five Thousand Dollars (\$25,000.00) by Britt Interactive, LLC, Towne Post Network, Inc. And Tom Britt with the Clerk of Johnson County in cash or by security approved by the Court in accordance with Trial Rule 65 C:

B. A Preliminary Injunction is entered by the terms of which Townepost Network, Inc., Britt Interactive, LLC and Tom Britt shall provide Chilly Panda with customer information and all information as may have been maintained by Chilly Panda in the MagHub customer relationship system as of the date of termination of the Licensing Agreements, but this provision does not provide any right to on going access to or use of the MagHub customer relationship system, upon security being posted in the amount of One Thousand Dollars (\$1,000.00) by Chilly Panda Media, LLC with the Clerk of Johnson County in cash or by security approved by the Court in accordance with Trial Rule 65 C.

IT IS FURTHER ORDERED BY THE COURT, That in all other respects the respective Motions for Preliminary Injunction are denied.

All of which is Ordered this 16th day of January, 2017 at 6:30 P.M.



KEVIN M. BARTON, JUDGE
JOHNSON SUPERIOR COURT NO. 1

Distribution:

Matthew M. Cree
Law Office of Matthew M. Cree
P.O. Box 7805
Greenwood, IN 46142

P. Adam Davis
Davis & Sarbinoff, LLC
1 South Rangeline Road, Suite 400
Carmel, IN 46032

Jonathan D. Mattingly
Mattingly Burke Cohen & Biederman, LLP
5255 Winthrop Avenue, Suite 100
Indianapolis, IN 46220

Josh F. Brown
Law Office of Josh F. Brown, LLC
12821 East New Market Street, Suite 250
Carmel, IN 46032