UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOSEPH LEARY,
Plaintiff,

v.

ROY MANSTAN, FREDERIC FRESE, WESTHOLME PUBLISHING, LLC,
Defendants.

FREDERIC FRESE, ROY MANSTAN,
Counter Claimants,

v.

JOSEPH LEARY,
Counter Defendant.

No. 3:13-cv-00639 (JAM)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This copyright case involves two non-fiction works about the so-called "Turtle," a Revolutionary War-era submarine built by a farmer from Connecticut named David Bushnell. The life of David Bushnell and his invention of the Turtle has captured the imagination of several writers.[1] Plaintiff Joseph Leary is the author and copyright owner of an unpublished manuscript on this subject, and so are defendants Frederic Frese and Roy Manstan, who wrote a later book published by defendant Westholme Publishing, LLC.

Plaintiff principally contends that defendants' book infringes on his copyright in the unpublished manuscript. I conclude that there is no genuine issue of fact to support this claim. It

[1] The record reflects at least eleven books about David Bushnell and the Turtle, *see* Doc. #41-11 at 43, including an illustrated children's book, *see* June Swanson (ill. Mike Eagle), *David Bushnell and His Turtle: The Story of America's First Submarine* (1991).

is true that the two works are about much of the same basic subject matter, but there is no claim that defendants engaged in verbatim copying or close paraphrasing of plaintiff's work. Copyright law otherwise affords only narrow protection to works of history, and subsequent authors may utilize the same facts, theories, and concepts contained in prior works so long as they do not copy another author's particular original manner of expression. In view of this rigorous standard and my comparison of the two works at issue in this case, I conclude that no reasonable jury could find that defendants' book infringes plaintiff's copyright in the manuscript. Accordingly, I will grant defendants' motion for summary judgment.

BACKGROUND

The Turtle—or the American Turtle, as it is sometimes called—is a fascinating historical curiosity. Well over a century before the advent of modern submarine warfare, David Bushnell built this one-man wooden submersible to conduct underwater attacks on the British naval fleet along American shores. Founding fathers like George Washington and Benjamin Franklin were aware of and supported Bushnell's efforts. Ultimately, the Turtle never accomplished its goal of destroying British ships. But in many ways the project was a success: the Turtle was the first submersible vessel used in a war, its revolutionary screw propeller design is still in use today, and Bushnell discovered how to make gunpowder explode underwater.

The history of David Bushnell and the Turtle submarine has long intrigued plaintiff Joseph Leary. In the 1970s, plaintiff worked with defendant Frederic Frese to build a working replica of the submarine. The replica was launched with much fanfare in 1977, and today it is on display at the Connecticut River Museum in Essex. While working on the 1977 replica, plaintiff researched information about Bushnell and the various techniques that Bushnell used to build the Turtle. Plaintiff's research has continued in the ensuing decades, and over the years plaintiff has

incorporated his discoveries into an ever-evolving (and as–yet–unpublished) manuscript weaving together a biography of Bushnell, historical information about the Turtle, and plaintiff's experiences building the replica.

At some point in the intervening decades, plaintiff gave Frese a copy of a version of his manuscript, which was then titled *The Famous Water Machine from Connecticut*.[2] That version began with the following dedication: "This work is inspired by and dedicated to Frederic Frese . . . without whom I would know absolutely nothing about David Bushnell or submarines." Doc. #53-6 at 3. In 2002, plaintiff applied for and was granted federal copyright registration with respect to a subsequent version of the manuscript, which had by then been retitled *David Bushnell and the American Turtle*. Plaintiff continues to work on the manuscript, and he intends to publish it once it is completed.

The 1977 replica of the Turtle would not turn out to be the only replica of Bushnell's submarine.[3] Over two decades later, in the early 2000s, the National Maritime Historical Society became interested in building another replica of the Turtle. The Society asked plaintiff to participate in the project, and plaintiff, in turn, asked Frese to join. Defendant Roy Manstan, an engineer from the Naval Undersea Warfare Center, was also brought in to assist with the building of another Turtle replica. The replica was to be built as part of a student education project at a high school in Old Saybrook, Connecticut.

Plaintiff's involvement with the second Turtle replica project was short-lived. Through a

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[2] The manuscript that was allegedly given to Frese is dated 1996, *see* Doc. #53-6 at 4, but other evidence indicates that plaintiff actually gave the manuscript to Frese several years later, *see* Doc. #41-11 at 29–30.

[3] Others have also built "Turtle" replicas. *See* Randy Kennedy, *An Artist and His Sub Surrender in Brooklyn*, N.Y. Times, Aug. 4, 2007, available at http://www.nytimes.com/2007/08/04/arts/design/04voya.html?_r=0 (last accessed June 29, 2015), and Judy Campbell, *Turtle Lives Again as Replica Surfaces at Academy*, America's Navy (Apr. 14, 2003), http://www.navy.mil/submit/display.asp?story_id=6852.

series of events that are not entirely clear, plaintiff was allegedly "effectively . . . remove[d] . . . from the project." Doc. #41-11 at 98.

The project successfully went forward, however, and Manstan and Frese worked with high school students and others to build another Turtle replica. Frese and Manstan then wrote a book about the Turtle submarine, Bushnell, and their own experiences building a Turtle replica. Their book—titled *Turtle: David Bushnell's Revolutionary Vessel*—was published by defendant Westholme Publishing, LLC, in 2010. Sometime after it was published, plaintiff found defendants' book online and he purchased a copy of it. After reading the book, plaintiff "felt betrayed" because he believed that he "recognized [his] writing" in defendants' book. Doc. #41-11 at 109.

Thereafter, plaintiff initiated this lawsuit. In his complaint, plaintiff contends that defendants' book infringes on his copyright in the unpublished manuscript and he also claims that defendants' conduct violates the Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. § 42-110a *et seq.* Defendants have moved for summary judgment.

DISCUSSION

The principles governing a motion for summary judgment are well established. Summary judgment may be granted only "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) (*per curiam*). "A genuine dispute of material fact 'exists for summary judgment purposes where the evidence, viewed in the light most favorable to the nonmoving party, is such that a reasonable jury could decide in that party's favor.'" *Zann Kwan v. Andalex Grp. LLC*, 737 F.3d 834, 843 (2d Cir. 2013) (quoting *Guilbert v. Gardner*, 480 F.3d 140, 145 (2d Cir. 2007)). The evidence adduced at the summary judgment

stage must be viewed in the light most favorable to the non-moving party and with all ambiguities and reasonable inferences drawn against the moving party. *See, e.g.*, *Tolan*, 134 S. Ct. at 1866; *Caronia v. Philip Morris USA, Inc.*, 715 F.3d 417, 427 (2d Cir. 2013). All in all, "a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan*, 134 S. Ct. at 1866 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

To prevail on a copyright infringement claim, "two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Tel. Serv. Co. Inc.*, 499 U.S. 340, 361 (1991). There is no dispute in this case that plaintiff owns a valid copyright in his unpublished manuscript. To satisfy the second element, plaintiff "must also show copying by defendants. . . . Copying may be inferred where a plaintiff [1] establishes that the defendant had access to the copyrighted work and [2] that substantial similarities exist as to protectible material in the two works." *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 48 (2d Cir. 1986). For purposes of this motion only, defendants have conceded they had access to plaintiff's manuscript.[4] *See* Doc. #41-1 at 5. This leaves just one question: whether a triable issue of fact remains that the two works are substantially similar.

The substantial similarity inquiry often involves questions of fact. Nevertheless, a district court may "resolve [the substantial similarity] question as a matter of law [when] . . . the similarity between two works concerns only non-copyrightable elements of the plaintiff's work, or because no reasonable jury, properly instructed, could find that the two works are substantially

[4] It appears to be undisputed that defendants had access to at least one version of plaintiff's manuscript, but there is no indication as to how they might have obtained access to the copyrighted 2002 version. I need not concern myself with this factual ambiguity in view of defendants' concession regarding access to the manuscript.

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