In the United States Court of Federal Claims

No. 23-639
Filed: September 6, 2024†
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RENEE COMET,

***Plaintiff*,**

v.

THE UNITED STATES,

***Defendant*.**

Faith D. Beckworth, *Joel B. Rothman*, and *Layla Nguyen*, SRIPLAW, P.A., Atlanta, Georgia, for Plaintiff. [1]

Hayley A. Dunn, Trial Attorney, Commercial Litigation Branch, Civil Division, *Scott Bolden,* Director, and *Brian M. Boynton*, Principal Deputy Assistant Attorney General, United States Department of Justice, for Defendant.

MEMORANDUM OPINION AND ORDER

TAPP, Judge.

The United States moves for summary judgment, primarily arguing that the statute of limitations bars Plaintiff Renee Comet's ("Ms. Comet") copyright claims. (Defendant's Motion for Summary Judgment ("Def.'s Mot. for Summ. J."), ECF No. 27). The United States further argues that if jurisdiction exists, and if the Court ultimately determines liability against the United States, Ms. Comet's damages must be statutorily capped at $750. (*Id.*). Ms. Comet argues that issues of fact exist concerning whether infringement has occurred within three years of the

† This Opinion was originally filed under seal on September 6, 2024, (ECF No. 37). The Court provided parties the opportunity to review this Opinion for any proprietary, confidential, or other protected information and submit proposed redactions. In a Joint Status Report filed September 19, (ECF No. 40), the parties proposed redactions which the Court accepts. The sealed and public versions of this Opinion differ only to the extent of those redactions, the publication date, and this footnote.

[1] Faith D. Beckworth was counsel of record at the time of briefing. On August 28, Layla Nguyen was substituted as counsel of record. (ECF No. 36). Because Ms. Beckworth was counsel of record during briefing, her name appears first in the introduction.

Complaint, necessarily precluding summary judgment. (Plaintiff's Response to the Motion for Summary Judgment ("Pl.'s Resp."), ECF No. 29). Ms. Comet also asserts that 17 U.S.C. § 405(c) does not limit her recovery. (*Id.*). Ultimately, the Court agrees that a genuine issue of material fact exists as to Ms. Comet's reproduction rights under the Copyright Act but finds no genuine issues as to her rights to display and distribute. Furthermore, the Court finds partial summary judgment on the issue of statutory damages to be premature. Accordingly, the United States' Motion for Summary Judgment is denied.

I. Background

Ms. Comet asserts that she is a renowned photographer specializing in still life photography for advertising, packaging, digital content, cookbooks, and recipe videos. (Compl. at 1, ECF No. 1). Her style of photography involves the use of "exquisite lighting techniques, minimalist propping, and refreshingly uncomplicated backgrounds" that Ms. Comet asserts are "highly desirable" to her customer base. (*Id.*). Ms. Comet also claims her clientele consists of several high-profile companies and government agencies, including Food Network, Marriot International, the United States Postal Service, and the Internal Revenue Service. (*Id.* at 2–3). Several federal agencies allegedly used Ms. Comet's published photograph; this case involves use of her work by the United States Department of Agriculture ("USDA"). (*Id.*; *see generally* Def's. Mot. for Summ. J.).

The Almond Board of California ("ABC") is a representative of the United States government established to promote the research and marketing of almonds grown in the state of California. (Handling of Almonds Grown in California, 15 Fed. Reg. 4993–5007 (Aug. 4, 1950) (codified at 7 C.F.R. Part 981)). ABC sought a photographer to capture images of almonds that would highlight almond usage in certain recipes. (Def.'s Mot. for Summ. J. Ex. 15 (Deposition ("Dep.") of M. Mautz, ABC, Dec. 14, 2023) at 44:3–22, 102:25–103:20, ECF No. 27-15). Ms. Comet submitted a cost estimate of $[redacted] to photograph almonds for ABC. (Def.'s Mot. for Summ. J. Ex. 5 (Renée Comet Photography Estimate to Porter Novelli on behalf of ABC, March 23, 2010), ECF No. 27-5). ABC selected Ms. Comet for the photoshoot and paid $[redacted] towards the total cost prior to the shoot. (Def.'s Mot. for Summ. J. Ex. 15 (Dep. of M. Mautz, ABC, Dec. 14, 2023) at 103:16–105:6, ECF No. 27-15; *see also* Ex. 16 (Dep. of R. Comet, Plaintiff, Nov. 9, 2023) at 171:14–16, ECF No. 27-16). Ms. Comet submitted an updated invoice for $[redacted], minus ABC's deposit of $[redacted], and ultimately delivered 100 photographs to ABC, including the photo subject to this controversy. (Def.'s Mot. for Summ. J. Ex. 6 ("Invoice") at A75, ECF No. 27-6; *see also* Ex. 16 (Dep. of R. Comet, Plaintiff, Nov. 9, 2023) at 170:11–16, ECF No. 27-16).

A. USDA's Use of the Work

In February 2012, the USDA published an article titled "Infrared Heating: Hot Idea for Keeping Almonds Safe to Eat" ("February 2012 Article") in USDA's online magazine. (Def.'s Mot. for Summ. J. at 3). ABC gave the USDA permission to include one of Ms. Comet's photos ("the Work") in the article. (*Id.*). It is undisputed that no later than January 13, 2015, the USDA uploaded the Work onto its server and web content management system, Umbraco, and

published the February 2012 Article with the Work on its website.[2] (*Id.* at 4; Pl.'s Resp. at 5 ("On January 13, 2015, the Work was "published" again.")). The USDA later removed the Work from its February 2012 Article on December 20, 2021. (*Id.*).

(COMPL. AT 4).

In March 2018, the USDA would again use the Work in an AgResearch Magazine article entitled "Going Nuts Over Calories" ("March 2018 Article"). (*Id.* at 4). It is undisputed that no later than March 2018, the USDA uploaded the Work onto its server and web content management system, Umbraco, and published the March 2018 Article with the Work on its website.[3] The USDA removed the Work from the March 2018 Article on December 20, 2021. (*Id.*).

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[2] *See Infrared Heating: Hot Idea for Keeping Almonds Safe To Eat*, United States Department of Agriculture AgResearch Magazine, https://agresearchmag.ars.usda.gov/2012/feb/almonds (last visited Sept. 6, 2024). (Def.'s Mot. for Summ. J. at 3). The United States asserts the reason for the three-year gap between 2012 and 2015 is not that the USDA first published these in 2015. Rather, the United States confirms that in "approximately 2014" USDA transitioned from its old content management system, SitePublisher 2.5, to Umbraco, the current content management system. During the transition all old data from SitePublisher 2.5 was lost and is currently unavailable, though the United States agrees that "it is likely that the USDA first uploaded the Work onto the server and published on the website in the February 2012 Article prior to November 20, 2014." (*Id.* Ex. 19 (Def.'s Am. Obj. and Resp. Pl.'s First Set of Interrog.), at 15, ECF No. 27-19); *see also Id.* Ex. 7 (Screenshot of Umbraco Audit Trail for February 2012 AgResearch Magazine Article, Infrared Heating: Hot Idea for Keeping Almonds Safe to Eat, at A78, ECF No. 27-7).

[3] *See Going Nuts Over Calories*, United States Department of Agriculture AgResearch Magazine, https://agresearchmag.ars.usda.gov/2018/mar/calories/ (last visited Sept. 8, 2024).

The USDA utilized the image again on the USDA-ARS's Image Gallery ("Image Gallery webpage") which indexes USDA images. (*Id.* at 4–5). It is undisputed that no later than March 2018, the USDA uploaded the Work onto its server and web content management system, Umbraco, and published the Work on one of its websites.[4] The United States alleges that on December 10, 2020, the Image Gallery webpage received an archive tag, but this did not republish the webpage, cause the Work to be reuploaded to the server, nor did it impact the page being publicly available. (*Id.* at 5). On October 19, 2021, the USDA unpublished the webpage in Umbraco, and made it unavailable for public viewing at that time. (*Id.*).

B. The Start of Litigation

Ms. Comet purports to have discovered the use of her work on USDA's website around July 15, 2020. (Compl. at 5). On May 3, 2023, Comet initiated legal action alleging that USDA infringed on her exclusive rights to reproduce, display, and distribute the Work. (*Id.* at 8). Ms. Comet alleges that these three instances where the USDA "upload[ed] the Work to its server," as evidenced by the webpages, constitute infringements of the right to reproduction. (*Id.* at 6 (citing 17 U.S.C. § 106(1))). Ms. Comet also alleges that by making the Work available for download for free to third parties, USDA infringed on Ms. Comet's distribution rights. (*Id.* at 7 (citing 17 U.S.C. § 106(3))). Additionally, Ms. Comet alleges that by displaying the Work, USDA violated Comet's right to display. (*Id.* (citing 17 U.S.C. § 106(5))). Plaintiff seeks to recover actual damages or statutory damages. (*Id.* (citing 17 U.S.C. § 504(c)(1))).

II. Analysis

The United States argues that it is entitled to summary judgment because Ms. Comet's "claims are entirely barred by the statute of limitations set forth in 28 U.S.C. § 1498(b)." (Def.'s Mot. for Summ. J. at 9–25). In addition, the United States maintains that even if jurisdiction exists, and should the Court find the United States liable, "statutory damages must be limited to $750 as a matter of law." (*Id.* at 25–30). The Court ultimately finds that genuine issues of material fact exist as to whether the United States republished the copyrighted work to its server after May 3, 2020, precluding summary judgment on this issue. The Court also finds the United States' argument regarding minimum statutory damages is premature.

(Def.'s Mot. for Summ. J. at 4 ("In March 2018, the USDA used the Work in an AgResearch Magazine article entitled "Going Nuts Over Calories[.]"); Pl.'s Resp. at 5 ("On March 8, 2018, the Government published the Work on its website in an article titled Going Nuts Over Calories[.]"))

[4] (Def.'s Mot. for Summ. J. at 4 ("It is undisputed that no later than March 13, 2018, the USDA uploaded the Work onto its server and web content management system, Umbraco, and published the Work on the Website [.]"); Pl.'s Resp. at 5 ("The Work was "published" again on March 13, 2018, and March 23, 2018[.]") (citing https://www.ars.usda.gov/oc/images/photos/mar18/d2411-1/)).

A. Standard of Review

The Court may grant summary judgment if the pleadings, affidavits, and evidentiary materials filed in a case reveal that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." RCFC 56(a). The moving party bears the initial burden to demonstrate the absence of any genuine issue of material fact. The moving party bears the initial burden to demonstrate the absence of any genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Facts are material if they "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine factual dispute exists when "the evidence is such that a reasonable [factfinder] could return a verdict for the nonmoving party." *Id.* A party seeking to establish a genuine dispute of material fact must "cit[e] to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials." RCFC 56(c)(1)(A).

While "inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion," *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), summary judgment may still be granted when the party opposing the motion submits evidence that "is merely colorable . . . or is not significantly probative." *Anderson*, 477 U.S. at 251, (internal citation omitted). However, the moving party "need not produce evidence showing the absence of a genuine issue of material fact but rather may discharge its burden by showing . . . that there is an absence of evidence to support the nonmoving party's case." *Dairyland Power Co-op. v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994) (citing *Celotex Corp.*, 477 U.S. at 325). Courts may only grant summary judgment when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita, Elec. Indus. Co., Ltd. v. United States*, 475 U.S. 574, 587 (1986) (quoting *First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 289 (1968)). A trial court is permitted, in its discretion, to deny even a well-supported motion for summary judgment, if it believes the case would benefit from a full hearing. *Lowery v. United States*, 167 Fed. Cl. 28, 37 (2023) (citing *United States v. Certain Real & Pers. Prop. Belonging to Hayes*, 943 F.2d 1292 (11th Cir. 1991)).

B. Limitations Period Under 28 U.S.C. § 1498(b)

The Court possesses jurisdiction pursuant to § 1498(b), which provides that the "exclusive action" for a claim of copyright infringement against the United States . . . shall be before the United States Court of Federal Claims. 28 U.S.C. § 1498(b). Before the Court may even begin to determine whether Ms. Comet may be entitled to either statutory damages or actual damages, it must first determine whether recovery at all is permitted by § 1498(b).

The relevant language of the statute provides: "[e]xcept as otherwise required by law, no recovery shall be had for any infringement of a copyright covered by this subsection committed more than three years prior to the filing of the complaint[.]" 28 U.S.C. § 1498(b). From the plain language of the statute, recovery is prohibited for infringements that occurred more than three years prior to when a plaintiff files their initial complaint. Further, limitations periods that provide this Court with jurisdiction, along with any exceptions, "must be strictly construed." *Wechsberg v. United States*, 54 Fed. Cl. 158, 163 (2002). Claimants are permitted to sue the United States through a waiver of sovereign immunity, but "any statute that creates a waiver of

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