

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

DEFINED SPACE, INC.,)	
an Illinois corporation)	
)	
Plaintiff,)	Case No. 1:10 CV 03297
v.)	
)	Judge Joan B. Gottschall
LAKESHORE EAST, LLC,)	
An Illinois limited liability company,)	
MAGELLAN DEVELOPMENT GROUP,)	
LLC, an Illinois limited liability company,)	
NNP RESIDENTIAL, LLC, an Illinois)	
limited liability company,)	
and DOE I through DOE V,)	
)	
Defendants.)	

MEMORANDUM OPINION & ORDER

Defendants Lakeshore East, LLC, Magellan Development Group, LLC, and NNP Residential, LLC (collectively, the “defendants”) have moved to dismiss Counts II–V, VIII, and IX of Defined Space, Inc.’s amended complaint under Federal Rule of Civil Procedure 12(b)(6). The defendants have also moved for a more definite statement with regard to Counts I and VI under Rule 12(e). The defendants’ motion to dismiss is denied as to Counts II, VIII, and IX but granted as to Counts III, IV, and V. The defendants’ motion for a more definite statement of Counts I and VI is denied.

I. BACKGROUND

Defined Space, Inc. (hereinafter, “DSI”) is the firm through which professional photographer David B. Seide conducts his business. In 2005, DSI entered into a series of agreements with the defendants to produce color photographs of the defendants’ properties. The

defendants planned to use these photographs as part of their marketing campaign to rent and sell their properties. The parties entered into a licensing agreement, in which the defendants agreed not to display DSI's works without attribution. Although the defendants occasionally credited DSI's work to DSI, sometimes they omitted this notice in their uses of DSI's work. DSI called this lack of attribution to the defendants' attention from time to time, but on occasion these omissions of attribution were not corrected.

DSI brought this suit against the defendants seeking relief under the Digital Millennium Copyright Act, 12 U.S.C. § 1202; the Lanham Act, 15 U.S.C. § 1125(a); the Copyright Act, 17 U.S.C. § 501; the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 Ill. Comp. Stat. 505/2, § 2; and the Illinois Uniform Deceptive Trade Practices Act, 815 Ill. Comp. Stat. 510/2, § 2(2), (5), (12); for injuries it sustained when the defendants allegedly omitted agreed-upon copyright credit and notice in the republication of images and certain of DSI's images which were posted on the defendants' website. The defendants respond by arguing that most of DSI's claims are preempted by the Copyright Act.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) enables a defendant to seek dismissal of a complaint that fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). When considering a Rule 12(b)(6) motion to dismiss, the court must "tak[e] all well-pleaded allegations of the complaint as true and view[] them in the light most favorable to the plaintiff." *Zimmerman v. Tribble*, 226 F.3d 568, 571 (7th Cir. 2000). Legal conclusions, however, are not entitled to any assumption of truth. *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 1949 (2009). To survive a Rule 12(b)(6) motion to dismiss, the complaint must provide "a short and plain

statement of the claim showing that the pleader is entitled to relief” so as to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Fed R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Although “detailed factual allegations” are not necessary, “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555. Rather, the plaintiff must provide enough factual allegations to state a claim for relief that is not only conceivable, but “plausible on its face.” *Id.* at 555, 570; see *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010) (“[A] plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, *might* suggest that something has happened to her that *might* be redressed by the law.”). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S. Ct. at 1499.

In addition, Rule 12(e) enables a defendant to seek “a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response.” Fed. R. Civ. P. 12(e). A Rule 12(e) motion must identify the “defects complained of and the details desired.” *Id.* A motion for a more definite statement should be granted “where the movant cannot reasonably be required to frame an answer or other responsive pleading to the pleading in question.” Fed. R. Civ. P. 12(e) advisory committee note. A motion for a more definite statement must “point out the defects complained of and the details desired.” Fed. R. Civ. P. 12(e). A more definite statement is required in claims involving contracts when the “defendants can only guess [as] to what conduct and

contract(s) [an] allegation refers.” *Jackson Nat’l. Life Ins. Co. v. Gofen & Glossberg, Inc.*, 882 F. Supp. 713, 726 (N.D. Ill. 1995); *see also Zaragon Holdings, Inc. v. Indian Harbor Ins. Co.*, No. 08 CV 0111, 2008 WL 1883472 at *5 (N.D. Ill. Apr. 25, 2008).

III. ANALYSIS

A. Whether Count II Should Be Dismissed For Failure To State A Valid Lanham Act Claim.

The defendants argue that Count II of DSI’s amended complaint, which alleges a Lanham Act claim, should be dismissed under Rule 12(b)(6) because Count II is preempted by the Copyright Act. The defendants contend that the claim DSI is bringing under the Lanham Act is essentially the same claim as Count VI of the complaint, which alleges copyright infringement for the same underlying acts. The defendants argue that the Lanham Act claim is preempted by the Court’s holding in *Dastar v. Twentieth Century Fox*, 539 U.S. 23 (2003). The defendants also cite to *Natkin v. Winfrey*, 111 F. Supp. 2d 1003 (N.D. Ill. 2000), and *Cyber Websmith v. American Dental Ass’n*, No. 09-CV-6198, 2010 WL 3075726 (N.D. Ill. Aug 4, 2010). In response, DSI cites to *Cable v. Agence France Presse*, 728 F. Supp. 2d 977 (N.D. Ill. 2010).

In *Dastar*, Twentieth Century Fox had acquired the exclusive television rights to General Dwight D. Eisenhower’s written account of the allied campaign in Europe, “Crusade in Europe.” Fox arranged for a production of a television series based upon the book, but did not renew the copyright on the television series when it expired in 1977, leaving the series in the public domain. *Dastar* then took the original Crusade television series, copied the original beta cam tapes,¹ edited them, and produced a “Campaigns” series that had a new opening sequence, credit

¹ The phrase “beta cam tape” refers to the first home video system, Betamax, developed by Sony. For an explanation of the Betamax technology, see *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 422–24 (1984).

page, and final closing different from the original “Crusade” series. Dastar then manufactured and sold the Campaigns video set as its own product without giving credit to Fox. *Dastar*, 539 U.S. at 27. Fox brought multiple claims against Dastar, including a “reverse passing off claim” alleging that by not providing proper credit to the Crusade television series, Dastar violated § 43(a) of the Lanham Act by passing off Fox’s product as Dastar’s own work.

The Supreme Court held that the Copyright Act precluded Fox’s claims under the Lanham Act. *Id.* at 34–35. The Court began by noting that:

The Lanham Act was intended to make “actionable the deceptive and misleading use of marks,” and “to protect persons engaged in . . . commerce against unfair competition.” While much of the Lanham Act addresses the registration, use and infringement of trademarks and related marks, § 43(a), 15 U.S.C. § 1125(a) is one of the few provisions that goes beyond trademark protection. As originally enacted § 43(a) created a federal remedy against a person who used in commerce either “a false designation of origin, or any false description or representation” in connection with “any goods or services.”

Id. at 28–29 (internal citation omitted). The Court reasoned that if “origin” were read to mean the person or entity that authored the material, such a reading would effectively create a system of perpetual copyright as it would force those wishing to use uncopyrighted works in the public domain to credit the original authors or face liability under the Lanham Act. *See id.* at 36–37. Accordingly, this could cause serious practical problems for individuals who sought to use materials in the public domain in as much as discerning the original author of many such materials would require a “search for the source of the Nile and all its tributaries.” *Id.* at 35–36. The Court held that as used in the Lanham Act, “origin of goods” refers only to the producer of the tangible product sold in the marketplace—not the person or entity that originated the ideas. *Id.* at 31. Because Dastar was the producer of the tangible product sold on the marketplace,

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