UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LIVE FACE ON WEB, LLC, a Pennsylvania company,	)	
Plaintiff,	)	
v.	)	16 C 8604
KAM DEVELOPMENT, L.L.C. d/b/a, GREEN ENERGY AIR SEALING, an Illinois company, and KIMBERLY RADOSTITS, an individual,	)	
Defendants.	)	

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter comes before the Court on Defendants' KAM Development, L.L.C., ("KAM Development") doing business as Green Energy Air Sealing, and Kimberly Radostits ("Radostits") (collectively, "Defendants") motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), Plaintiff Live Face on Web, LLC's ("LFOW") Complaint. LFOW opposes the motion, and alternatively, seeks leave to amend the Complaint. For the following reasons, the motion is granted in part and denied in part. LFOW is granted twenty-one days to amend the Complaint consistent with this Opinion.

BACKGROUND

For purposes of the instant motion, the following well-pleaded allegations derived from LFOW's Complaint are accepted as true and the Court draws all reasonable inferences in LFOW's favor. *See Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). "LFOW is a developer and owner of 'live person' software, which is an original work of authorship independently created by LFOW." LFOW's software "allows a company to display a video of a 'walking' and 'talking' personal host who introduces a website to an online visitor," and "explains a company's products and/or services and directs a visitor's attention to a particular product or aspect of the website." LFOW's software uses "a real spokesperson to capture, hold and prolong the attention of the average online visitor" to enhance a customer's website. Companies can "customize and [ ] modify settings and functionality of the web spokesperson." LFOW charges customers a license fee and its software is subject to an "End User License Agreement ('EULA')." Since October 2007, "anyone who accessed" LFOW's software "had notice of the EULA." "[O]n December 20, 2007, LFOW [ ] registered the copyright in the LFOW Software version 7.0.0, prior to the publication of version 7.0.0, in the United States Copyright Office" and received a certificate of registration from the Register of Copyrights.

LFOW alleges that Defendants "own, and/or have operated and/or have controlled the website http://www.greenenergyairsealing.com." LFOW claims that "Defendants have used a web spokesperson video to promote [their] products and/or

services," and that "in order to display the web spokesperson," on their website, "Defendants used and distributed, without permission," LFOW's software. LFOW further alleges that "Defendants copied and stored an infringing version of the LFOW Software on the webserver(s) for" their website. To implement the supposedly infringing version of LFOW's software, Defendants allegedly modified their website to include a specific "source code and/or text," which apparently linked "the Defendants' website to the file 'new_player.js,' an infringing version of the LFOW Software." LFOW claims that every time "a web browser retrieved a page from Defendants' website," Defendants distributed a copy of LFOW's software to the website visitor, which was stored on the visitor's computer. Thus, LFOW asserts, "each visit to the Defendants' website was a new act of copyright infringement."

According to LFOW, Defendants never paid the applicable license and video production fees when it used LFOW's software. Allegedly, "Defendants have caused, enabled, facilitated, and/or materially contributed to the infringement," by distributing copies of LFOW's software to each website visitor. Although Defendants allegedly own, operate, and/or control their website, and supposedly have "the right and ability to supervise and control the infringement," they "refused to exercise their ability to stop the infringement." Moreover, LFOW claims that Defendants acted with "reckless disregard for, or [with] willful blindness to LFOW's rights" when it "initiated or continued the infringing conduct with knowledge of the infringement."

LFOW also alleges that "Defendants profited directly from and have a direct financial interest in the infringement," because LFOW's software "allowed Defendants to more effectively promote and sell their products and/or services by capturing, holding and prolonging the attention of the average online visitor, providing a direct positive impact on sales and/or the brand, public image and reputation of Defendants." LFOW also claims that Defendants used the infringing version of its software "to generate revenues and profits," while LFOW suffered "loss of licensing revenue." Consequently, LFOW filed a one-count Complaint against Defendants pursuant to 17 U.S.C. § 501, alleging "direct, indirect, and/or vicarious infringement of registered copyrights."

LEGAL STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) "tests the sufficiency of the complaint, not the merits of the case." *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873, 878 (7th Cir. 2012). The allegations in a complaint must set forth a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A plaintiff need not provide detailed factual allegations, but must provide enough factual support to raise his right to relief above a speculative level. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A claim must be facially plausible, meaning that the pleadings must "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The claim must be described "in sufficient detail to give

the defendant 'fair notice of what the . . . claim is and the grounds upon which it rests.'" *E.E.O.C. v. Concentra Health Servs., Inc.*, 496 F.3d 773, 776 (7th Cir. 2007) (quoting *Twombly*, 550 U.S. at 555).

DISCUSSION

I. Direct Copyright Infringement

To establish a claim for direct copyright infringement, LFOW must allege: "(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991). Defendants do not challenge that LFOW owns a valid copyright. Rather, Defendants contend that LFOW failed to sufficiently plead the second element of direct infringement. Specifically, Defendants argue that LFOW fails to allege "that KAM ever had 'access to' or the opportunity to view the actual 'expression' of the software in question, namely any of the sets of statements or instructions allegedly owned by LFOW." Without such allegations, they claim, "there cannot be any inference of copying," and thus, "no claim of copyright infringement."

Conversely, LFOW contends that Defendants erroneously argue that it had to allege that Defendants had "access to" LFOW's copyrighted work. Moreover, according to LFOW, at this stage of the litigation, the allegations in the Complaint are sufficient to state a claim for copyright infringement.

The Seventh Circuit has acknowledged that:

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