UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AUTO-OWNERS INSURANCE CO.,

Plaintiff, No. 2:14-cv-13046-GER-DRG

vs. Hon. Gerald E. Rosen

ERGONOMICS PLUS, INC., and
HUMANTECH, INC.,

Defendants.
_____/

OPINION AND ORDER DISMISSING CASE
FOR LACK OF FEDERAL SUBJECT MATTER JURISDICTION

At a session of said Court, held in
the U.S. Courthouse, Detroit, Michigan
on December 05, 2014

PRESENT: Honorable Gerald E. Rosen
United States District Judge

I. INTRODUCTION

This declaratory judgment action is presently before the Court on the Court's September 12, 2014 Order to Show Cause directing Plaintiff Auto-Owners Insurance Company to show cause in writing why this case should not be dismissed for lack of federal subject matter jurisdiction. Plaintiff timely responded to the Court's Order. Having reviewed the Plaintiff's response brief and the entire record of this matter, the Court finds that the pertinent facts and legal contentions are sufficiently presented in these materials, and that oral argument would not significantly assist in the resolution of

this matter. Accordingly, the Court will decide this matter "on the briefs." *See* Eastern District of Michigan Local Rule 7.1(f)(2). This Opinion and Order sets forth the Court's ruling.

II. PERTINENT FACTS

On August 6, 2014, Plaintiff Auto-Owners Insurance Company filed the instant declaratory judgment action against its insured, Ergonomics Plus, Inc. ("Ergonomics"), and Humantech, Inc. seeking a declaration that it owes no duty to defend or indemnify Ergonomics in another civil action that is currently pending in this court, *Humantech, Inc. v. Ergonomics Plus, Inc.*, No. 14-12141. The *Humantech* action arises out of Ergonomics' alleged infringement of Humantech's copyrighted materials and its subsequent electronic distribution of those copyrighted works.

According to the complaint in the *Humantech* action, Humantech owns copyrights for manuals, guidelines and other works relating to ergonomic risk assessment and workplace improvement. Among the works copyrighted by Humantech are certain "lifting calculators" that Humantech created to calculate guidelines for manual material handling tasks based upon a lifting equation which was created by the National Institute of Occupational Safety and Health ("NIOSH"). These calculators use an interactive form to be filled out by a user through Microsoft Excel Workbooks. The calculators are distributed to authorized users through Humantech's website and other media but are password protected to prevent access by users to the equations embedded in the calculators and to prevent alteration to the workbooks. The calculators are distributed to

customers for use in performing workplace ergonomic assessments, but even paying customers do not have access to the specific equations embedded in the calculators.

Defendant Ergonomics, an Indiana corporation, also specializes in the field of ergonomics. Ergonomics offers a "NIOSH Composite Lifting Calculator" for free download on its website, in the form of a Microsoft Excel Workbook. According to Humantech, the Ergonomics calculator is substantially similar to Humantech's and it incorporates large amounts of content and data from Humantech's calculators and utilizes the same proprietary equations that are contained in the Humantech calculator. Humantech contends that Ergonomics obtained a Humantech calculator through the State of Michigan website or through some other means,[1] circumvented Humantech's password protections, removed Humantech's name and copyright management information from the calculator and copied and distributed the calculator as its own.

Therefore, Humantech brought suit against Ergonomics based on its unlawful copying of Humantech's copyrighted work, as well as based on Ergonomics' failure to provide attribution for the copied works, its removal of copyright notices from Humantech's works, and other associated actions that are contrary to Humantech's rights in its proprietary works, specifically alleging violations of the Copyright Act, 17 U.S.C. §101 *et seq*., the Digital Millennium Copyright Act, 17 U.S.C. §1201, *et seq*., and Michigan trade secrets law.

[1] A version of its calculator was at some point in time available as a free download from the State of Michigan, Department of Labor and Economic Growth's website, although Humantech states that it did not authorize the posting of the calculator on the Michigan website.

Upon being served with the *Humantech* complaint, Ergonomics tendered the defense of the action to its insurer, Auto-Owners, requesting indemnification under a Tailored Protection Policy that included commercial general liability coverage. *See* Complaint for Declaratory Relief, ¶ 9.

The general liability provisions of the policy provide coverage for damages that an insured is legally obligated to pay because of a "personal injury" or an "advertising injury" to which the insurance applies, subject to the terms and conditions of the policy. *Id.* ¶10. There is, however, no duty to indemnify or defend an insured for any damages that are not covered by the policy. In this regard, the policy excludes from coverage: any advertising injury that is caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict personal or advertising injury, including injury "arising out of the infringement of a copyright, patent, trademark, trade secret, or other intellectual property." *Id.* ¶ 11; s*ee also* Commercial General Liability Policy, Doc. #1-3, Pg ID 79.

Auto-Owners claims that the alleged conduct of Ergonomics is excluded from coverage as it falls within the scope of the exclusions found in the insurance contract. Therefore, Auto-Owners instituted this declaratory judgment action.

In its Complaint for Declaratory Relief, Auto-Owners alleges federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338 or, in the alternative, supplemental jurisdiction pursuant to 28 U.S.C. § 1367, as the basis of this Court's subject matter jurisdiction. Specifically, Plaintiff alleges jurisdiction pursuant to the Copyright Act, 17 U.S.C. § 101 *et seq.*, and the Digital Millennium Copyright Act ["DMCA"], 17 U.S.C. §

1201, *et seq.*, based upon the copyright infringement claims alleged in the underlying case.

III. DISCUSSION

A. FEDERAL QUESTION JURISDICTION

The most fundamental question presented in every civil action brought in federal court must be whether there is subject matter jurisdiction. *Metro Hydroelectric Co., LLC v. Metro Parks*, 541 F.3d 605, 610 (6th Cir.2008); *Caudill v. North American Media Corp.*, 200 F.3d 914, 916 (6th Cir.2000). The Court has an independent obligation to strictly police the boundaries of its subject matter jurisdiction to ensure that jurisdiction exists, regardless of the assessment of the parties. *Valinski v. Detroit Edison*, 197 Fed.Appx. 403, 405 (6th Cir.2006); *Olden v. Lafarge Corp.*, 383 F.3d 495, 498 (6th Cir.2004); *Douglas v. E.G. Baldwin & Associates, Inc.*, 150 F.3d 604, 607 (6th Cir. 1998). Fed.R.Civ.P. 12(h)(3) provides: "If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action."

Federal courts are courts of limited jurisdiction and may exercise only those powers authorized by the United States Constitution and federal statutes enacted by Congress. It is presumed that a cause of action lies outside this limited jurisdiction, and Plaintiff bears the burden of overcoming the presumption and demonstrating that this Court has subject matter jurisdiction over the claims. *Kokkonen v. Guardian Life Insurance Co. of America*, 511 U.S. 375, 377, 114 S.Ct. 1673 (1994); *Fisher v. Peters*, 249 F.3d 433, 444 (6th Cir.2001); *Douglas*, 150 F.3d at 606.

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