FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

THE IQ GROUP, LTD. d/b/a INSURANCE IQ, Plaintiff, v. WIESNER PUBLISHING, LLC t/a ADVISORS DATA SOURCE and t/a IT BUYERS, and LISA HULAC; ERIC BENDER; NATIONAL SENIOR ASSOCIATES COMPANY, LLC; CAPITAL CARE, INC.; and JOHN DOES 1-100, Defendants.	:	Civil Action No. 03-5221 (JAG) **OPINION**

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GREENAWAY, JR., U.S.D.J.

This matter comes before the Court on the Motion for Summary Judgment by Defendant Wiesner Publishing, LLC ("Wiesner") and the Cross-Motion for Summary Judgment by Plaintiff IQ Group, Ltd. ("IQ"), pursuant to FED. R. CIV. P. 56. For the reasons set forth below, Defendant's Motion will be granted in part and denied in part. Plaintiff's Cross-Motion will be denied.

INTRODUCTION

These motions arise in the context of a dispute between business competitors. IQ and Wiesner are businesses that provide advertising services for insurance companies: they send ads by email to insurance agents. In 2003, National Senior Associates Company, LLC ("NSAC") and Capital Care, Inc. ("Capital Care"), insurance companies, both hired IQ to send advertisements. NSAC and IQ dispute who created the ad for NSAC, and thereby who is entitled to claim authorship and hold the copyright. IQ distributed copies of ads for Capital Care and NSAC via email to insurance agents; the ads sent by IQ displayed a graphic described by IQ as a logo. The IQ logo consists of the outline of a capital "Q" with the outline of a lower-case "I" in the center. Both outlines are shaded, as if in graphical relief. The ads also contained a hyperlink that, when clicked, directed the user to a page of IQ's website which IQ claims contained copyright notices.

After IQ had distributed the NSAC and Capital Care ads, both NSAC and Capital Care hired Wiesner to distribute the ads via email. Both NSAC and Capital Care provided Wiesner with the ads that IQ distributed. Wiesner removed the IQ logo and hyperlink, added new information so that responses to the ads would go to NSAC and Capital Care, and then copied

and distributed the ads via email.

IQ subsequently applied to the U.S. Copyright Office for copyright registration, claiming authorship of the NSAC and Capital Care ads. IQ obtained copyright registrations as of October 22, 2003. IQ then filed suit against Wiesner, NSAC, Capital Care and other parties, stating claims for: 1) slander, libel and conspiracy to defame IQ (Count 1, against Wiesner et al.); 2) negligence in making false and damaging statements (Count 2, against Wiesner et al.); 3) breach of contract (Count 3, not against Wiesner); 4) copyright infringement and violations of the Digital Millennium Copyright Act ("DMCA") (Count 4, against Wiesner et al.); 5) tortious interference with business relationships (Count 5, against Wiesner et al.); and 6) copyright infringement and violations of the DMCA (Count 6, not against Wiesner). Subsequently, IQ conceded that it is not entitled to statutory damages for copyright infringement related to the Capital Care ad. (Pl. Mem. Opp. Mot. S.J. 16.)

The instant motion and cross-motion for summary judgment concern the claims of copyright infringement and violation of the DMCA. Wiesner filed a motion for summary judgment on these issues: 1) IQ is entitled to a maximum of one award of statutory damages for copyright infringement of the NSAC and Capital Care ads; and 2) IQ's DMCA claims, for violation of 17 U.S.C. § 1202, should be dismissed as a matter of law. IQ filed a cross-motion for summary judgment on these issues: 1) Wiesner has infringed IQ's copyright on the NSAC ad; 2) IQ is entitled to statutory damages for Wiesner's infringement of the copyright on the NSAC ad; 3) IQ is entitled to increased statutory damages for Wiesner's willful infringement of the copyright on the NSAC ad; and 4) Wiesner violated the DMCA, 17 U.S.C. § 1202, with regard to both the Capital Care and NSAC ads.

ANALYSIS

I. Governing Legal Standards

A. Standard for a Rule 56 Motion for Summary Judgment

Summary judgment is appropriate under FED. R. CIV. P. 56(c) when the moving party demonstrates that there is no genuine issue of material fact and the evidence establishes the moving party's entitlement to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Orson, Inc. v. Miramax Film Corp., 79 F.3d 1358, 1366 (3d Cir. 1996). In making this determination, the Court must draw all reasonable inferences in favor of the non-movant. Hullett v. Towers, Perrin, Forster & Crosby, Inc., 38 F.3d 107, 111 (3d Cir. 1994); Nat'l State Bank v. Fed. Reserve Bank of N.Y., 979 F.2d 1579, 1581 (3d Cir. 1992).

Once the moving party has satisfied its initial burden, the party opposing the motion must establish that a genuine issue as to a material fact exists. Jersey Cent. Power & Light Co. v. Lacey Township, 772 F.2d 1103, 1109 (3d Cir. 1985). The party opposing the motion for summary judgment cannot rest on mere allegations and instead must present actual evidence that creates a genuine issue as to a material fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Siegel Transfer, Inc. v. Carrier Express, Inc., 54 F.3d 1125, 1130-31 (3d Cir. 1995). "[U]nsupported allegations . . . and pleadings are insufficient to repel summary judgment." Schoch v. First Fid. Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990); see also FED. R. CIV. P. 56(e) (requiring nonmoving party to "set forth specific facts showing that there is a genuine issue for trial").

If the nonmoving party has failed "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof

at trial, . . . there can be 'no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Katz v. Aetna Cas. & Sur. Co., 972 F.2d 53, 55 (3d Cir. 1992) (quoting Celotex, 477 U.S. at 322-23). In determining whether there are any issues of material fact, the Court must resolve all doubts as to the existence of a material fact against the moving party and draw all reasonable inferences – including on issues of credibility – in favor of the non-moving party. Watts v. Univ. of Del., 622 F.2d 47, 50 (3d Cir. 1980).

II. Defendant's Motion for Summary Judgment

A. Plaintiff's Maximum Entitlement to Statutory Damages

In the Complaint, pursuant to Count 4, IQ seeks the greater of actual damages or statutory damages for copyright infringement. The parties do not dispute that Plaintiff has subsequently elected to seek statutory damages for copyright infringement under 17 U.S.C. § 504(c)(1). The parties also agree that Plaintiff is not entitled to statutory damages in regard to the Capital Care ad. Wiesner asks the Court to determine simply whether Plaintiff is entitled to one or multiple statutory damage awards if infringement of the NSAC ad is proven, under 17 U.S.C. § 504(c). Wiesner contends that only one award of statutory damages is available under this statute. IQ does not address the question of number in its responsive brief, which argues only that it is entitled to statutory damages under 17 U.S.C. § 504(c). In the Complaint, IQ seeks statutory damages "for each E-mail sent by the defendants in violation of 17 U.S.C. § 1202," but does not quantify its request for damages under 17 U.S.C. § 504(c) as to each email. (Compl. 9.) Because IQ takes no position as to how many damage awards it seeks, there may be no controversy between the parties on this matter.

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