

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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ANDREW M. LIEB,

Plaintiff,

-against-

**MEMORANDUM
AND ORDER
CV 15-0040 (AYS)**

KORANGY PUBLISHING, INC.
(d/b/a/ THE REAL DEAL),

Defendant.

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APPEARANCES:

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SHIELDS, Magistrate Judge:

Plaintiff, Andrew Lieb (“Plaintiff” or “Lieb”), is an attorney who handles real estate matters. He is also an independent contractor blogger. This litigation arises out of articles authored by Lieb that he arranged to have posted, first in an online publication known as Dan’s Papers, and then again (with limited revision) in the Huffington Post online publication (the “HuffPost Article”). Lieb claims that Defendant, Korangy Publishing, Inc. (“Korangy” or

“Defendant”), infringed the copyright held by Plaintiff for the Huffington Post article – Plaintiff holds no copyright protection for the Dan’s Papers article. In addition to copyright infringement, Plaintiff claims that Defendant’s publication amounts to a deceptive trade practice in violation of Section 349 of the New York State General Business Law (“Section 349” of the “GBL”). (See generally Am. Compl., Docket Entry (“DE”) [21].) Presently before the Court are the parties’ renewed motions for summary judgment.¹

For the reasons set forth below, Defendant’s motion is granted with respect to the copyright claim to the extent that this matter is referred to the Copyright Office for its advice as to whether it would have granted a copyright for the HuffPost Article if it had known of Lieb’s misrepresentation to that office. The motion for summary judgment dismissing the Section 349 claim is granted in full. In view of these rulings, the Plaintiff’s motion is denied in its entirety.

BACKGROUND

I. Factual Background: Basis of Facts Recited Herein

The facts set forth below are drawn from the parties’ statements of material facts submitted pursuant to Rule 56.1 of the Local Rules of the United States District Courts for the Southern and Eastern Districts of New York (“Rule 56.1”). (See DE [47-1] (Defendant’s Rule 56.1 Statement); DE [49-2] (Plaintiff’s Rule 56.1 Statement) (collectively the (the “Rule 56.1 Statements”).) The facts are undisputed unless otherwise noted. For ease of reference, and to avoid repetition where there is no factual dispute, the Court cites only to Plaintiff’s Rule 56.1

¹ The parties originally moved for summary judgment in 2016. (See DE [38], [39].) The formerly assigned Magistrate Judge, to whom this matter was assigned for all purposes, denied in part and granted in part Defendant’s motion, with an opinion to follow. (DE [43].) This Court was assigned the case on October 25, 2021. After a scheduling conference held on November 1, 2021, counsel were granted the opportunity to re-brief their motions. The presently pending cross-motions for summary judgment, (DE [47] and [49]), were fully briefed on March 14, 2022.

Statement. The Court also considers and refers to documents submitted by the parties.

Defendant's documents submitted in support of its motion (Exhibits A-P) are annexed to the Declaration of Barry J. Friedberg, Esq., dated January 31, 2022 (the "Friedberg Decl."). (DE [47-2].) Plaintiff's documents submitted in support of his motion (Exhibits 1-3) are annexed to the Declaration of Dennis C. Valet, Esq. dated February 22, 2022 (the "Valet Decl."). DE [49-3].) Where there is any meaningful discrepancy between the parties' Rule 56.1 Statements, the Court refers to and relies directly upon the underlying documents forming the basis of the parties' statements.

II. The Parties

Plaintiff is an attorney. He is a real estate lawyer and blogger. (DE [49-2] ¶ 1.) Defendant is the publisher of, among other things, a website devoted to real estate news called "The Real Deal." (DE [49-2] ¶ 2.)

III. The Online Articles

A. Lieb's October 24, 2014 Dan's Papers Article

On October 24, 2014, Lieb published an article on the website of a publication known as Dan's Papers. While Lieb's declaration states the date of this publication as October 24, 2016, (DE [49-4]), it is clear that the date of publication was 2014, and not 2016. In any event, that October 24, 2014 article, referred to herein as the "Dan's Papers Article," was entitled "10 Secrets: What to Do When You Inherit a Hamptons Estate." (Friedberg Decl., Ex. A.) Lieb neither applied for nor obtained a copyright with respect to the Dan's Papers Article. (DE [47-1] ¶ 6; (DE [49-2] ¶ 6; Pl.'s Responses to Def.'s 1st Set of Interrogatories (Friedberg Decl., Ex. J) ¶ 9.) While Plaintiff does not dispute the lack of copyright registration for the Dan's Papers Article, he states that he "granted Dan's Papers a license" to publish his article. (DE [49-2] ¶ 4.)

Lieb received no monetary compensation for publication of the Dan's Papers Article. (DE [49-2] ¶ 5.)

B. Lieb's October 31, 2014 Huffington Post Article

On October 31, 2014, one week after publication of the Dan's Papers Article, Lieb made certain edits thereto and submitted it in the form of a blog post to the Huffington Post online publication. (Friedberg Decl., Ex. C.) That blog post was entitled "10 Surprises when Inheriting Real Estate." (DE [49-2] ¶1.) In the HuffPost Article, Lieb expressly notes that it was "[a]dapted from" the Dan's Papers Article. (Friedberg Decl., Ex. C at 3.) The title of the HuffPost Article removed reference to the Hamptons. (DE [49-2] ¶ 13.) Lieb similarly removed references to "Long Island's East End" and the Hamptons from the body of the HuffPost Article. (DE [49-2] ¶ 14.) He also made other edits when adapting the Dan's Papers Article for publication as the HuffPost Article.

Plaintiff agrees with Defendant's characterization of the HuffPost Article as set forth in Defendant's Rule 56.1 Statement. However, Plaintiff's Rule 56.1 Statement amplifies Defendant's characterization, stating that the HuffPost Article and the Dan's Papers Article shared the primary purpose of "assembl[ing] and explain[ing] ten (10) legal issues which may be relevant to someone who inherits real estate," and that this "primary purpose" "remained constant between the two articles." (DE [49-2] ¶ 15.) With the exception of differences discussed in further detail below, the HuffPost Article was a verbatim restatement of the Dan's Papers Article. (DE [49-2] ¶ 16.) Like the Dan's Papers Article, Lieb received no monetary compensation for publication of the HuffPost Article. (DE [49-2] ¶ 17.)

Publication of the HuffPost Article was governed by an agreement between Plaintiff and the Huffington Post, which was agreed to by Lieb, and reflected in an email dated March 26,

2014 – approximately seven months prior to publication of the HuffPost Article. In that email, a representative of the Huffington Post (referred to as the “Huffpost Blogteam”) welcomed Lieb to the “HuffPost blogging platform.” (DE [47-13] at 10.) Attached to this email is a document entitled “HuffPost Blogger Terms, Guidelines, Tips and FAQ” (the “Blogger Terms”). (*Id.* at 11.) This document sets forth the terms under which articles are posted to the HuffPost site. Specifically, the Blogger Terms inform Lieb that by submitting posts, he is an independent contractor who is not entitled to any compensation. The email states that bloggers like Lieb own the copyright to any submitted content and that they can post that content anywhere. (*Id.* at 12.) However, by submitting material to HuffPost, writers grant to HuffPost “a non-exclusive worldwide, royalty-free, irrevocable, perpetual license to exercise all rights under copyright law with respect to such content,” which the Huffington Post is free to use in a variety of unrestricted ways. (*Id.*) In accord with the date of this email, Plaintiff states that he entered into a licensing agreement with HuffPost on March 26, 2014, and not on October 31, 2014 – when he later published an article on the HuffPost site. (DE [42-9] ¶ 7.) The Blogger Terms note that HuffPost allows others accessing articles on its site to make “fair use” of materials published therein. Thus, the license states that bloggers like Lieb can make such fair use of HuffPost content. The Huffington Post is not a party to this lawsuit.

C. Defendant’s Website and the Article at Issue

a. Real Deal Content

Defendant states that certain content on its Real Deal site are summaries of articles about real estate that appear elsewhere. These posts link to the original source reporting. (DE [49-2] ¶ 18.) Christopher Cameron, one of Defendant’s reporters, testified at his deposition that he “aggregates” news for the Real Deal website. (DE [49-6] at 7.) Cameron does not create

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