UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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GREAT MINDS,

Plaintiff,

-against-

FEDEX OFFICE AND PRINT SERVICES, INC.

Defendant.
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MEMORANDUM & ORDER
16-CV-1462 (DRH)(ARL)

APPEARANCES:

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HURLEY, Senior District Judge:

Plaintiff Great Minds ("plaintiff" or "GM") commenced this action against defendant FedEx Office and Print Services, Inc. ("defendant" or "FedEx") alleging violations of the Copyright Act of 1976, as amended, 17 U.S.C. §§ 101 *et seq*. Presently before the Court is defendant's motion to dismiss the complaint and for an award of attorney's fees. For the reasons set forth below, the motion to dismiss is granted and the motion for attorney's fees is denied.

BACKGROUND

The following allegations are taken from the complaint ("Compl.") and documents attached thereto.

Plaintiff is a non-profit organization that produces various educational materials used by school districts across the county. Included in those materials is a comprehensive mathematics curriculum, *Eureka Math*, for grades PreK-12 ("Material" or "Licensed Material") for which GM owns the federal copyright. Plaintiff publishes and sells printed book versions of the Material and has entered into royalty bearing licenses with third parties for commercial reproduction of the Material. Compl. ¶¶ 8-11, 15.

Plaintiff also makes the Material available under a "Creative Commons Attribution - Non Commercial - Share Alike 4.0 International Public License (the "License")." Compl. ¶ 12 & Ex. B. As such, GM is the licensor. GM's "public licensing of its *Eureka Math* curriculum under this Creative Commons license advances [its] mission and benefits the public by allowing teachers, students, and school districts to freely share, reproduce, and use the Materials for their non-commercial, educational benefit." Compl. ¶ 12.

The License describes the licensed rights in relevant part as follows: "Licensor hereby grants You a worldwide, royalty-free, non-sublicensable, non-exclusive, irrevocable license to exercise the Licensed Rights in the Licensed Material to reproduce and Share the Licensed Material, in whole or in part, for NonCommercial purposes only." Compl. Ex. B, ¶ 2(a)(1)(A). "You" is defined as "the individual or entity exercising the Licensed Rights." Compl. Ex. B ¶ 1(n). The License further provides that as Licensor, plaintiff "waives any right to collect royalties from You for the exercise of the Licensed Rights, whether directly or through a collecting society

under any voluntary or waivable statutory or compulsory licensing scheme. In all other cases the Licensor expressly reserves any right to collect such royalties, including when the Licensed Material is used other than for NonCommercial purposes." *Id.* at ¶ 2(b)(3). The License defines NonCommercial as "not primarily intended for or directed towards commercial advantage or monetary compensation. For purposes of this Public License, the exchange of Licensed Materials for other material subject to Copyright or Similar Rights by digital file-sharing or similar means is NonCommercial provided there is no payment of monetary compensation in connection with the exchange." *Id*. ¶ 1(k). "You" is defined as "the individual or entity exercising the Licensed Rights under this Public License." *Id*. ¶ 1(l). The License requires that a licensee who shares the Material must, *inter alia*, "indicate the Licensed Material is licensed under this Public License, and include the text of, or the URI or hyperlink to, this Public License." *Id*. ¶ 3(a)(1)(C). With respect to "Downstream recipients," the License provides that "[e]very recipient of the Licensed Material automatically receives an offer from the Licensor to exercise the Licensed Rights under the terms and conditions of this Public License" and "[y]ou may not offer or impose any additional or different terms or conditions on, or apply any Effective Technological measures to, the Licensed Material if doing so restricts exercise of the Licensed Rights by any recipient of the Licensed Material." *Id*. at ¶ 3(a)(5)(A) & (C).

Sometime around October 2015 GM discovered that "at least one FedEx store in Michigan had reproduced the Material for profit - a commercial use - without authorization." In response to GM's demand that FedEx enter into a royalty-bearing license or cease reproduction of the Materials, FedEx asserted that "its duplication of the Materials for its own profit was lawful because FedEx was assisting school districts in their noncommercial use of the Materials"

and refused to comply with GM's demand. Compl. ¶¶ 16-18.

In February 2016, GM "discovered that at least one FedEx store in or around Suffolk County, New York also had reproduced the materials for profit without authorization or license . . . ." Compl. ¶ 19. In response to GM's renewed demand to cease commercial reproduction of the Materials or to enter into a license, FedEx again declined because "in FedEx's view, FedEx is merely acting as agent for school districts in assisting them with their lawful activities under the License." *Id.* ¶¶ 20, 21.

This action asserting a claim for copyright infringement followed.

DISCUSSION

A. Standard of Review - Motion to Dismiss

In deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court should "draw all reasonable inferences in Plaintiff['s] favor, assume all well-pleaded factual allegations to be true, and determine whether they plausibly give rise to an entitlement to relief." *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011) (internal quotation marks omitted). The plausibility standard is guided by two principles. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)); *accord Harris v. Mills*, 572 F.3d 66, 71–72 (2d Cir. 2009).

First, the principle that a court must accept all allegations as true is inapplicable to legal conclusions. Thus, "threadbare recitals of the elements of a cause of action supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Although "legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Id.* at 679. A plaintiff must provide facts sufficient to allow each named defendant to have a fair

understanding of what the plaintiff is complaining about and to know whether there is a legal basis for recovery. *See Twombly*, 550 U.S. at 555.

Second, only complaints that state a "plausible claim for relief" can survive a motion to dismiss. *Iqbal,* 556 U.S. at 679. "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. The plausibility standard is not akin to a 'probability requirement,' but asks for more than a sheer possibility that defendant acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line' between possibility and plausibility of 'entitlement to relief.' " *Id.* at 678 (quoting *Twombly*, 550 U.S. at 556-57) (internal citations omitted); *see In re Elevator Antitrust Litig*., 502 F.3d 47, 50 (2d Cir. 2007). Determining whether a complaint plausibly states a claim for relief is "a context specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679; *accord Harris*, 572 F.3d at 72.

B. Copyright Infringement

To state a claim for copyright infringement, a plaintiff 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). A claim for copyright infringement will fail if the challenged use of the copyrighted work is authorized by a license. *See Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998). The existence of a license to engage in the challenged copying is an affirmative defense and the party claiming the benefit of the license has the burden of proving its existence. *Tasini v. New York Times Co., Inc.*, 206 F.3d 161, 170-71 (2d Cir. 2000). This is because "[a] copyright owner who grants a nonexclusive license to use

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