UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LOGICAL OPERATIONS INC.,

Plaintiff,

Case # 15-CV-6646-FPG

v.

DECISION AND ORDER

30 BIRD MEDIA, LLC, et al.,

Defendants.

INTRODUCTION

Logical Operations Inc. ("Logical") brings suit for copyright infringement against 30 Bird Media, LLC ("30 Bird") and three of its officers—Adam A. Wilcox, Benham Tchoubineh, and Alireza Choubineh (the CEO, President, and CFO of 30 Bird, respectively). Logical and 30 Bird are in the business of developing and publishing instructional materials. At issue in this case are the parties' competing lines of instructional manuals for certain computer programs. Logical alleges that Defendants designed their materials to mimic Logical's series and, by doing so, infringed on Logical's copyrights. ECF No. 59. Presently before the Court is Defendants' motion for summary judgment. ECF No. 72. Plaintiff opposes the motion. ECF No. 74. For the reasons that follow, Defendants' motion is GRANTED IN PART, in that summary judgment is granted on Logical's claim of copyright infringement but denied without prejudice on Defendants' counterclaim for attorney's fees.[1]

[1] Defendants requested a hearing on the motion, ECF No. 75-9, but the Court concludes that a hearing is unnecessary.

LEGAL STANDARD

Summary judgment is appropriate when the record shows that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Disputes concerning material facts are genuine where the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding whether genuine issues of material fact exist, the court construes all facts in the light most favorable to the non-moving party and draws all reasonable inferences in the non-moving party's favor. *See Jeffreys v. City of New York*, 426 F.3d 549, 553 (2d Cir. 2005). However, the non-moving party "may not rely on conclusory allegations or unsubstantiated speculation." *F.D.I.C. v. Great Am. Ins. Co.*, 607 F.3d 288, 292 (2d Cir. 2010) (quotation omitted).

BACKGROUND

Consistent with the applicable standard of review, the following narrative consists of the undisputed facts and the disputed facts taken in the light most favorable to Logical. *See Smolen v. Wilkinson*, No. 11-CV-6001, 2013 WL 5417099, at *1 (W.D.N.Y. Sept. 26, 2013).

Logical develops, markets, and distributes training courseware for, among other things, various computer programs. At issue in this case are the "Axzo ILT Series line of . . . instructional manuals" for Microsoft Excel, Outlook, and Word. ECF No. 72-28 ¶ 28. Logical obtained the copyrights to these manuals when it acquired Axzo Press, the original publisher, in 2014.[2] *Id.* ¶ 29; *see also* ECF No. 74 at 9. The manuals in the Axzo ILT Series are intended to be used "for in-class instruction by an instructor to a student" and are sold in instructor and student versions.

[2] The entire genealogy of the Axzo ILT Series is more complex, but those details do not need to be recounted for present purposes. *See* ECF No. 74 at 6-9 (discussing history of Axzo ILT Series).

ECF No. 72-28 ¶ 33. The manuals are intended to prepare students for "specially designed Microsoft certification exams." *Id.*

Benham Tchoubineh founded 30 Bird in March 2014. Initially, 30 Bird did not publish instructional materials for the Microsoft suite of products. ECF No. 74-2 at 23. But, as Logical describes the sequence of events, 30 Bird undertook substantial efforts to develop a competing line of Microsoft Office coursework beginning in January 2015. At that time, 30 Bird hired Adam Wilcox as CEO and made him part owner of the company. ECF No. 72-28 ¶ 4. Wilcox had previously worked at Axzo Press before its acquisition by Logical, and he had been a designer on the Axzo ILT Series. Over the next months, 30 Bird went on to hire a number of former Logical and Axzo Press employees. *See* ECF No. 74 at 9-10. The crux of Logical's claim is that 30 Bird's designers had access to and used the Axzo ILT Series as the model for 30 Bird's series, substantially replicating its design, look, and feel.

In July 2015, Logical learned that 30 Bird was creating competing manuals, and it brought suit in October of that year. Logical brings one claim of copyright infringement against Defendants. ECF No. 59 at 9-11. Defendants have raised a counterclaim requesting attorney's fees under 17 U.S.C. § 505.

DISCUSSION

Defendants seek judgment as a matter of law on both Logical's claim and their counterclaim for attorney's fees. Because Defendants develop no argument as to why they are entitled to attorney's fees under 17 U.S.C. § 505, the Court denies their motion on that issue without prejudice. *See Baker v. Urban Outfitters, Inc.*, 431 F. Supp. 2d 351, 357 (S.D.N.Y. 2006) (stating that "[a]n award of attorney's fees and costs is not automatic" under § 505 and listing factors that a court should consider).

Turning to the claim for copyright infringement, Defendants argue, among other things, that summary judgment is appropriate because Logical cannot demonstrate that the 30 Bird manuals are substantially similar to the Axzo ILT series. More specifically, Defendants contend that the similarities between the competing series largely relate to unprotected elements. Defendants assert that once those unprotected elements are filtered out, there is no "room to find substantial similarity." ECF No. 72-29 at 11.

While not conceding that many of the similarities between 30 Bird's and Logical's manuals relate to unprotected elements, Logical focuses its opposition more on the argument that the Court should compare the works based on their total concept and feel, as opposed to dissecting the works into their component parts. Logical argues that under that standard, Defendants are not entitled to summary judgment.

In analyzing this dispositive issue, the Court begins by setting forth the relevant law. It then proceeds to analyze the elements of Logical's and 30 Bird's works that purportedly give rise to a claim for copyright infringement. Finally, the Court addresses the question of total concept and feel, concluding that Defendants are entitled to summary judgment.

I. Relevant Law

To prove a claim of copyright infringement, a plaintiff must establish three elements: "1) that his work is protected by a valid copyright, 2) that the defendant copied his work, and 3) that the copying was wrongful." *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 100 (2d Cir. 2014). The third element—wrongful copying—is at issue here.

a. Wrongful Copying

Wrongful copying exists "where two works are 'substantially similar.'" *Laspata DeCaro Studio Corp. v. Rimowa GmbH*, No. 16 Civ. 934, 2018 WL 3059650, at *3 (S.D.N.Y. June 20,

2018). The Second Circuit has articulated three standards that bear on the question of substantial similarity. "In most cases, the test for substantial similarity is the 'ordinary observer test,' which queries whether an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 100 (2d Cir. 1999); *see also Zalewski*, 754 F.3d at 102 (stating that the question is whether "the ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same"). "Although *dissimilarity* between some aspects of the works will not automatically relieve the infringer of liability, numerous differences tend to undercut substantial similarity." *Disney Enters., Inc. v. Sarelli*, 322 F. Supp. 3d 413, 442 (S.D.N.Y. 2018) (internal citations and quotation marks omitted); *see Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996) (stating that no liability attaches "when the similarities between the protected elements of plaintiff's work and the allegedly infringing work are of 'small import quantitatively or qualitatively'").

The second standard is the "more discerning observer" test, which is used when a work is not "wholly original" and "incorporates elements from the public domain." *Boisson v. Banian, Ltd*, 273 F.3d 262, 272 (2d Cir. 2001); *see also Zalewski*, 754 F.3d at 102. That test requires "substantial similarity between those elements, and only those elements, that provide copyrightability to the allegedly infringed work." *Belair v. MGA Ent., Inc.*, 503 F. App'x 65, 66 (2d Cir. 2012) (summary order) (internal quotation marks and brackets omitted). That is, "where the allegedly infringed work contains both protectible and unprotectible elements, the test must be more discerning, excluding the unprotectible elements from consideration." *Lynx Ventures, LLC v. Miller*, 45 F. App'x 68, 69 (2d Cir. 2002) (summary order) (internal quotation marks omitted).

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