IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
CIVIL ACTION NO. 3:19-CV-00024-GCM

DAVID OPPENHEIMER, **Plaintiff,** **v.** **THE ACL LLC,** **WILLIAM STACEY MOORE,** **Defendants.**	**ORDER**

THIS MATTER comes before the Court upon Plaintiff's Motion for Summary Judgment [ECF Doc. 13], which was filed on March 23, 2020. Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment [ECF Doc. 16] was filed on May 6, 2020 and Plaintiff filed a Reply on May 13, 2020. This Motion, now being fully briefed, is ripe for consideration and the Court finds the following.

I. BACKGROUND

This copyright infringement case was brought by Plaintiff David Oppenheimer on January 17, 2019 against Defendants William Stacey Moore and the ACL LLC ("ACL"). ECF Doc. 1. The Copyrighted Work is a photograph framing the event center lobby of Harrah's Cherokee Casino Resort ("Harrah's"). ECF Doc. 1-1. Defendant ACL operates the website "iplaycornhole.com" and advertised an event to be held at Harrah's, the "2016 Championship of Bags," on iplaycornhole.com. ECF Doc. 14-2 at 12. Without having licensed to use, obtained authorization, or in any way compensated Plaintiff for its use of the Copyrighted Work, Defendant ACL used the Copyrighted Work on its website to promote the 2016 Championship of Bags. ECF Doc. 14-2 at 2, 12; ECF Doc. 1-3. Plaintiff attests that his copyrighted photographs display his

copyright management information ("CMI") when first published, and the Copyrighted Work displayed his CMI when first published. ECF Doc. 1, ¶ 10; ECF Doc. 14-2 at 2. Because Defendants were on notice or should have been on notice for copyrights, Plaintiff sued Defendants for violating federal copyright law. ECF Doc. 1, ¶¶ 1, 10. Any other relevant facts are set forth in the discussion section below.

II. STANDARD OF REVIEW

Under the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant 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). Material facts are those "that might affect the outcome of the suit under the governing law," and "the materiality determination rests on the substantive law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is considered genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." *Id.* at 247–48 (alteration in original).

The "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the movant has met the initial burden, the burden then shifts to the non-moving party to identify specific facts showing there is a genuine issue of material fact. *See Anderson*, 477 U.S. at 256. In considering a motion for summary judgment, a Court views all evidence in the light most favorable to the nonmoving party. *Id.* at 255.

Where a nonmoving party "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order." Fed. R. Civ. P. 56(d)(1)–(3). Additionally, where "a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed." Fed. R. Civ. P. 56(e)(2). It is with these standards in mind that the Court considers the present matter.

III. DISCUSSION

Plaintiff seeks only partial summary judgment, moving for summary judgment as to: (1) Defendants' liability for direct copyright infringement and (2) five of Defendants' affirmative defenses, including fair use, unclean hands, de minimis use, implied license, and failure to mitigate damages. The Court addresses each argument in turn below.

a. Defendants' Liability for Direct Copyright Infringement

Plaintiff maintains there is no dispute of material fact and Plaintiff is entitled to judgment as a matter of law as to Plaintiff's claim for direct copyright infringement. A copyright holder is granted "'exclusive rights' to use and to authorize the use of his work in five qualified ways, including reproduction of the copyrighted work in copies." *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 433 (1984); 17 U.S.C. § 106 (2018). Whoever violates an exclusive right of the copyright holder infringes upon the copyright. 17 U.S.C. § 501(a); *Sony Corp. of Am*, 464 U.S. at 433. To allege copyright infringement, a plaintiff must prove: (1) valid copyright ownership and (2) copying of the original elements of the copyright. *CoStar Grp., Inc. v. LoopNet, Inc.*, 373 F.3d 544, 549 (4th Cir. 2004).

Plaintiff sets forth that he holds a certificate of copyright registration for the Copyrighted Work issued by the United States Copyright Office. ECF Doc. 1-2. A certificate of registration "shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate." 17 U.S.C. § 410(c). Thus, Defendants have the burden to overcome the presumption that the copyrights are valid. *See Universal Furniture Int'l, Inc. v. Collezione Europa USA, Inc.*, 618 F.3d 417, 429 (4th Cir. 2010). Defendants make no attempt to dispute the validity of the copyrights for the Copyrighted Work. Therefore, Plaintiff has succeeded in establishing valid copyright ownership exists.

Next, Plaintiff argues there is no contrary evidence to that establishing Defendants directly copied the Copyrighted Work and published it on the internet without license or authorization. ECF Doc. 1-3 (showing the website post where the Copyrighted Work was copied); ECF Doc. 14-2 at 9, 12 (documenting that Defendant Moore admitted the Copyrighted Work was displayed on iplaycornhole.com); ECF Doc. 14-2 at 11 (explaining that Defendant Moore was responsible for managing iplaycornhole.com and showing that Defendant Moore admitted Defendant ACL ran the website where Plaintiff's photograph was used); ECF Doc. 14-2 at 15, 18 (explaining in Defendants' Response to Plaintiff's First Interrogatories that, although Defendants do not recall whether the Copyrighted Work was acquired from Harrah's or a Google search, the Copyrighted Work was posted on Defendant ACL's website on or around November 18, 2015 through December 2016). Again, Defendants do not seek to dispute the validity of this evidence, and by failing to dispute these facts, they have admitted that the Copyrighted Work was copied.

Nevertheless, Defendants argue there could be an issue of material fact as to whether the photograph was provided to Defendants by an act of a sovereign state, the Eastern Band of Cherokee Indians and its tribal entities ("the Tribe"), which could bar Plaintiff's claims. The act

of state doctrine is applicable where "the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990). The issue only arises "when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine." *Id.* at 406 (emphasis in original). The purpose behind the doctrine is that, were the United States to reexamine and possibly condemn the acts of another sovereign state, it could "imperil the amicable relations between governments and vex the peace of nations." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 417–18 (1964) (quoting *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303–04 (1918)). In considering whether the doctrine should be invoked, the policies underlying the act of state doctrine may be considered. *W.S. Kirkpatrick & Co.*, 493 U.S. at 409.

Defendants urge the Court to conclude that because there may be an issue of fact as to whether the Tribe or its entities acted officially by supplying Defendants with the photograph to be used in marketing the event at Harrah's, summary judgment is improper. According to Defendants, if the Tribe provided the photo to Defendants, granting Plaintiff summary judgment would be an indirect attack on the Tribe's sovereignty. The Court disagrees. To say that the act of state doctrine applies is to argue that the outcome of this case turns on whether the Tribe validly gave the photo to Defendants in its official capacity and, thereby, made it so that Defendants' copying and posting of the Copyrighted Work was not infringement. This theory is far too attenuated where Defendants, who are not alleged to be part of the Tribe, took the Copyrighted Work and illegally copied it onto their website. Such a conclusion is especially true given that Defendants' theory in no way serves to promote the rationale behind the act of state doctrine.

DOCKET ALARM

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts

Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research

With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips

Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS
Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS
Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS
Sync your system to PACER to automate legal marketing.