

entitled to judgment as a matter of law. (ECF No. 262 at PageID 1734.) Defendant did not respond to the Motion.

For the reasons explained below, Plaintiff's Motion is **GRANTED IN PART** and **DENIED IN PART**. Because there are no genuine issues as to any fact material to Defendant's liability under the Copyright Act and VARA, Plaintiff's Motion is **GRANTED** with respect to those claims. However, Plaintiff's Motion is **DENIED** with respect to her TCPA claim as it is preempted by the Copyright Act.

FACTUAL BACKGROUND

The following facts are taken from Cheairs' Statement of Material Facts in support of this Motion. (ECF No. 262-1). The Court only discusses the facts that are pertinent to the Motion. As Thomas did not respond to the Motion, none of the following facts are disputed.

Cheairs initially filed suit against only Thomas and an unknown "John Doe," alleging that Thomas sold a number of forgeries of her works in cooperation with John Doe, who assisted him in locating original, authentic works by Cheairs that were then used to create forgeries. (ECF No. 1 at PageID 4.) Cheairs alleges that between 2019 and 2020, Thomas took a number of oil paintings to Memphis Professional Imagining ("MPI") to have them scanned, digitized, and printed onto canvas. (ECF No. 262-1 at PageID 1735-36.) Thomas represented to Cliff Satterfield, the owner of MPI, that he had the right to make copies of the paintings and that making copies would not be copyright infringement. (*Id.* at PageID 1735.) Mr. Satterfield testified that each of these oil paintings had the name "Nancy Cheairs" on it. (*Id.*) He also testified that he believed Thomas' representations as to his intellectual property rights and delivered the digital images and copies to him in accordance with his instructions. (*Id.* at PageID

1735-36.) Cheairs testified that she did not in fact give Thomas permission to make copies of her artwork. (Id. at PageID 1737.)

During this same time period, Thomas ran multiple advertisements in the local newspaper, the Commercial Appeal, promoting art for sale by several Memphis artists, including Cheairs. (Id. at PageID 1736.) In December 2019, after seeing this ad, Haywood Henderson contacted Thomas about viewing his art collection. (Id.) Mr. Henderson testified that he had initially turned down Thomas' offer to view the art collection due to high prices, but that Thomas contacted him months later offering a discount. (Id.) In June 2020, Mr. Henderson met with Thomas to view his art collection at 4628 Peppertree Lane, the residence of Thomas' mother Helen Thomas.² (Id.) Mr. Henderson paid Thomas \$5,000 for four paintings. (Id.) Thomas told Mr. Henderson that these paintings were by Cheairs. (Id.)

Shortly after purchasing the paintings from Thomas, Mr. Henderson showed his newly acquired artwork to Cheairs. (Id.) After examining the paintings, Cheairs concluded that each was an unauthorized forgery of her work. (Id. at PageID 1736-37.) On February 10, 2022, during the course of this lawsuit, Cheairs visited Helen Thomas' home to view Mark Thomas' art collection. (Id. at PageID 1737.) At the residence, she observed many unauthorized copies of her

² Cheairs later added Helen Thomas as a defendant. (ECF No. 116.) Cheairs alleges that Helen Thomas participated in her son's forgery scheme by providing payment to MPI in exchange for proceeds from the sale of the disputed copies, providing other funds to further her son's scheme, and allowing him to store the alleged forgeries and meet potential buyer in her home. (Id. at PageID 720-21.) Helen Thomas passed away in January 2022, and the Court granted Cheairs' Motion for Substitution of Parties, with Lisa Thomas Fox, the Executor of Helen Thomas' Estate, Successor Trustee of the Helen T. Thomas Revocable Living Trust, and Successor Trustee of the John E. Thomas Residuary Trust taking her place. (ECF Nos. 169, 177). For a full summary of Helen Thomas' involvement in this matter, see the Court's Order Granting in Part and Denying in Part Defendant Lisa Thomas Fox's Motion for Summary Judgment. (ECF No. 286.)

artwork and determined that these copies were derived from fourteen of her original works of art. (Id.)

Cheairs testified that the forgeries she viewed with Mr. Henderson and at Helen Thomas' residence were digital images printed with ink in such a way as to make them appear to be original, and featured her signature to further bolster the appearance of authenticity. (Id.) The forgeries used physical materials, such as canvas and wooden mounting materials, that were not of the quality she typically uses in her work. (Id.) These inferior physical materials contributed to a poor appearance and cheap representation of Cheairs' work. (Id.) Furthermore, some of the forgeries were printed in sizes that differed from the dimensions of the corresponding original work, which made them appear pixelated and distorted. (Id.) Some also had stains or blemishes on the back of the canvas, in an attempt to make the works appear more convincingly hand made as opposed to printed. (Id. at PageID 1738-39.) Many had paint applied to the sides of the canvas to conceal their clean machine-printed edges. (Id. at PageID 1738.) Thomas' creation of forgeries in a medium that Cheairs did not authorize, using inferior physical materials, creating images with machine-created edges, changing the proportions of the works, and placing her signature on these objects without her permission damaged her reputation and caused financial and emotional damage to her. (Id.)

Cheairs also states that the Copyright Office granted her copyright registration in each work that Thomas copied. (Id. at PageID 1745.) Before the filing of her Fifth Amended Complaint, the Copyright Office issued a certificate of copyright registration to Cheairs for each work at issue. (Id.)

PROCEDURAL HISTORY

Cheairs filed her Fifth Amended Complaint on March 10, 2022. (ECF No. 198.) She seeks a continuation of the temporary restraining order and preliminary injunction the Court granted on July 14, 2020, which restrained Thomas from creating, copying, marketing, offering, showing, or selling any work he claims are works by Cheairs, along with an eventual permanent injunction to that same effect. (Id. at PageID 1242-45.) Cheairs alleges that Thomas' reproduction and sale of her work constitutes violations of the Copyright Act and VARA. (Id. at PageID 1245.) She requests the relief afforded by these statutes, including but not limited to, impoundment, damages, statutory damages, and attorney's fees and costs. (Id. at PageID 1245-47.) Cheairs also alleges that Thomas' placement of objects made with inferior physical materials into the stream of commerce under the false pretense that they were created by Cheairs violated the TCPA. (Id. at PageID 1249.) She requests the relief afforded by the TCPA, including damages, treble damages, and attorney's fees and costs. (Id. at PageID 1252.)

Cheairs filed this Motion for Partial Summary Judgment on October 3, 2022. (ECF No. 262.) To date, Thomas has not filed a Response. Furthermore, throughout this litigation, Thomas has declined to provide any evidence. He repeatedly invoked his Fifth Amendment privilege against self-incrimination at his deposition. (See ECF No. 262-5 at PageID 1764.) And, on May 2, 2022, he invoked his Fifth Amendment privilege in his Response to Cheairs' Fifth Amended Complaint, (ECF No. 215), Response to Request for Documents, (ECF No. 215-2), and Answer to Interrogatories, (ECF No. 215-3). Although Thomas did not have an attorney at the time of the May 2, 2022 filing, he is now represented by counsel. (See ECF No. 215 at PageID 1390; ECF No. 252.) His counsel has not sought leave to amend his May 2, 2022 filing or sought an extension to respond to this Motion.

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