

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

LESLIE J. SCHULTZ,)	
)	
Plaintiff,)	No. 3:13-cv-68-RAW
)	
vs.)	RULING ON DEFENDANTS' MOTIONS
)	FOR SUMMARY JUDGMENT
LOST NATION BOOSTER CLUB and)	
TOM MCCUTCHEON,)	
)	
Defendants.)	
)	

Before the Court following argument are Defendants' resisted motions for summary judgment [26][35] on Plaintiff's claim of copyright infringement. The Court has jurisdiction under 28 U.S.C. §§ 1331, 1338(a). The case is before the undersigned pursuant to 28 U.S.C. § 636(c).

I.

FACTUAL BACKGROUND¹

Plaintiff Leslie Schultz is a former resident of Lost Nation, a town of approximately 500 people, and a former member of the Lost Nation Booster Club. Plaintiff created and maintained a website using her own and other Booster Club members' photographs and content. Local businesses paid twenty-five dollars per year to include their information on the website. Plaintiff moved out of Lost Nation in December 2011.

¹ The factual background is drawn from Defendants' Statements of Undisputed Material Facts [26-2][35-2], admitted by the Plaintiff (either explicitly or implicitly by denying or qualifying, but then providing additional information, leading the Court to believe that the facts were true). (See Pl.'s Resp. to Statement of Undisputed Facts [39-2]).

She emailed the Booster Club and member businesses to say that she would no longer maintain the website regularly. She offered for the website to be updated twice a year or to be taken down.

In March of 2012, Tom McCutcheon, on behalf of the Booster Club, created a website with the same purpose as Plaintiff's website—to promote the town of Lost Nation and its businesses. Subsequently, Plaintiff accused McCutcheon and other members of the Booster Club of copyright infringement. The website was up for approximately one week before Defendants took it down and started a new website, which is not in issue.

In August of 2012, Plaintiff registered her website with the U.S. Copyright Office as visual material, but her deposit of materials consisted entirely of 215 pages of Hyper Text Mark-up Language ("HTML") code. "HTML code is a programming language which generates the visual appearance of a website." *ACTONet, Ltd. v. Allou Health & Beauty Care*, 219 F.3d 836, 847 (8th Cir. 2000). By definition HTML code is a "computer program." 17 U.S.C. § 101. No photographs or graphic material were submitted.

In May of 2013, Plaintiff instituted this action [1]. Plaintiff alleges that Defendants copied HTML code from her website to create their website. Plaintiff alleges that the HTML code provides evidence of access and copying, but that

actionable copying can be proven by viewing the websites side-by-side because the format is eerily similar.

II.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate if the moving party establishes that there are no genuine disputes over any material fact, and it is entitled to judgment as a matter of law. *Haigh v. Gelita USA, Inc.*, 632 F.3d 464, 467 (8th Cir. 2011) (citing Fed. R. Civ. P. 56(a)). The Court must view all facts and reasonable inferences in the light most favorable to the non-moving party, but it does not resort to speculation. *Hervey v. Cnty. of Koochiching*, 527 F.3d 711, 727 (8th Cir. 2011) (citing *Holland v. Sam's Club*, 487 F.3d 641, 643 (8th Cir. 2007)). The non-moving party must provide "sufficient evidence to allow a rational jury to find in [her] favor." *Ridout v. JBS USA, LLC*, 716 F.3d 1079, 1083 (8th Cir. 2013) (citing *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc)).

III.

LAW AND DISCUSSION

In order to establish copyright infringement, Plaintiff must prove that 1) she has a valid copyright and 2) Defendants copied original elements of said copyrighted material. *Taylor Corp. v. Four Seasons Greetings, LLC*, 403 F.3d 958, 962-63 (8th Cir. 2005) (quoting *Mulcahy v. Cheetah Learning*,

LLC, 386 F.3d 849, 852 (8th Cir. 2004)). Plaintiff may prove copying through direct or indirect evidence. There is no direct evidence of copying. The indirect method requires Plaintiff show 1) Defendants had access to the copyrighted material and 2) that the infringing material is "substantially similar." *Id.* at 964 (citing *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 120 (8th Cir. 1987)). Defendants challenge only the second prong: substantial similarity. (HTML code is public and available to any internet user).

The Court will take Defendants' motions in reverse order. The second motion for summary judgment attacks the merits of Plaintiff's claim, arguing 1) the visual presentation of the website was not within the scope of the copyright registration; 2) the copying, if any, was not actionable because after non-protected elements are filtered out no items of protectable expression remain to establish actionable copying, and 5) Plaintiff has no damages.

The first motion for summary judgment asks whether evidence involving HTML code requires expert witness testimony in Plaintiff's case in chief.²

² On March 24, 2014 the Court denied Plaintiff's motion to extend the expert disclosure deadline for lack of good cause though Plaintiff was permitted to identify a rebuttal expert. Defendants argue HTML code is much more complicated than greeting cards and that Plaintiff cannot prove substantial similarity between HTML codes without the aid of expert testimony. In *Taylor Corp. v. Four Seasons Greetings, LLC*, a case alleging copyright infringement of greeting cards, the fact finder compared the cards side-by-side for similarities. 403 F.3d at 966-67. No expert is mentioned as aiding the fact

A. Visual Presentation

A threshold question is whether Plaintiff's copyright in the HTML code included the visual appearance of the website. The answer is no. Defendants have provided persuasive authority indicating that material with visual representations of the website must be deposited with the Register in order to be granted a copyright.

The court in *Computer Associates Int'l v. Altai, Inc.* stated (in dicta) that a screen display is "categorically distinct" from the coding in a computer program, and it falls under an audiovisual copyright, while a computer code falls under a literary copyright. 982 F.2d 693, 703 (2d Cir. 1992). This Court also finds the Code of Federal Regulations and the Copyright Office's Circular 66 on this topic to be persuasive. 37 C.F.R. 202.20(c)(2)(vii)(c) states:

- (C) Where the application to claim copyright in a computer program includes a specific claim in related computer screen displays, the deposit . . . shall consist of:
- (1) Visual reproductions of the copyrightable expression in the form of printouts, photographs, or drawings no smaller than 3×3 inches and no larger than 9×12 inches; or
 - (2) If the authorship in the work is predominantly audiovisual, a

finder. The Court, as the fact finder, found that substantial similarities existed in (holiday) theme, color and shape. *Id.* Analysis of greeting cards is within the knowledge and ability of lay people.

one-half inch VHS format videotape reproducing the copyrightable expression, except that printouts, photographs, or drawings no smaller than 3×3 inches and no larger than 9×12 inches must be deposited in lieu of videotape where the computer screen material simply constitutes a demonstration of the functioning of the computer program.

The Copyright Office's Circular 66, Copyright Registration for Online Works (2012), provides further guidance. It states:

For all online works other than computer programs and databases, the registration will extend only to the copyrightable content of the work as received in the Copyright Office and identified as the subject of the claim. . . .

.

For a claim in a computer program that establishes the format of text and graphics on the computer screen when a website is viewed (such as a program written in html), registration will extend to the entire copyrightable content of the computer program code. It will not, however, extend to any website content generated by the program that is not present in the identifying material received and that is not described in the application.

The copyright registration of the HTML code does not extend to the visual presentation of the website. Thus, Plaintiff needed to include the visual presentation of the website in the deposit materials in order for the copyright registration to extend to those materials. Therefore, Plaintiff may not prove her case by simply comparing the visual presentations of the website side-

by-side. She must establish copyright infringement by showing that a reasonable factfinder could find that there was substantial similarity between the two HTML codes and that there was actionable copying of the HTML code, an approach she did not thoroughly brief.

B. Substantial Similarity & Proof of Actionable Copying³

As discussed above, Plaintiff may indirectly show that Defendants copied her copyrighted original material by showing that Defendants had access to the material (not disputed) and that the infringing material is substantially similar. *Taylor Corp.*, 403 F.3d at 964 (citing *Hartman v. Hallmark Cards, Inc.*, 833 F.2d 117, 120 (8th Cir. 1987)). The substantial similarity test in the Eighth Circuit is two pronged: extrinsic and intrinsic. *Frye v. YMCA Camp Kitaki*, 617 F.3d 1005, 1008 (8th Cir. 2010). The extrinsic prong asks whether there is a similarity of ideas. There is—both websites promote the town of Lost Nation and its businesses. The intrinsic prong asks whether there was a substantial similarity in expression of ideas. The Eighth Circuit allows for the filtering out of non-protectable elements when comparing the materials. *Id.* The filtration process is particularly useful in analyzing the substantial

³ The Court recognizes that there are multiple copies of Defendants' code available—two copies provided by Defendants on different dates and one copy provided by Plaintiff. Because Defendants are willing to have the Court analyze Plaintiff's version and because it is the most favorable to Plaintiff, the Court conducts its analysis also using that version.

similarity of computer programs, which can be difficult to understand. "Infringement is shown by a substantial similarity of *protectable expression*, not just an overall similarity between the works. Thus, before evaluating substantial similarity it is necessary to eliminate from consideration those elements of the program that are not protected by copyright." 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.03[F] (Matthew Bender Rev. ed. 2014) (emphasis in original) (hereinafter "Nimmer"); see *Computer Assocs. Int'l*, 982 F.2d at 706-11 (adopting Nimmer's successive filtration approach to analyzing substantial similarity of computer programs); Nimmer § 13.03[F][6]; see also *Rouse v. Walter & Assocs., L.L.C.*, 513 F.Supp.2d 1041, 1066 (S.D. Iowa 2007) (indicating, in dicta, that the *Computer Associates International* test is the most comprehensive test); *Control Data Systems, Inc. v. Infoware*, 903 F.Supp. 1316, 1322-25 (D.Minn. 1995) (applying the *Computer Associates International* test). *But c.f. Taylor Corp. v. Four Seasons Greetings, LLC*, 315 F.3d 1039, 1043 (8th Cir. 2003) (a greeting cards case discussing total concept and feel test, stating that the district judge did not err in not filtering out non-protected elements); *Taylor Corp.*, 403 F.3d at 966 (citing *id.*) (same case on subsequent appeal reiterating that there is no requirement to filter out when conducting the intrinsic analysis). Non-protected elements include facts, data,

"[w]ords and short phrases such as names, titles, and slogans." See *Feist Publ'ns, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 347-48 (1991); 37 C.F.R. 202.1(a). Thus the ultimate question of whether there has been actionable copying of Plaintiff's HTML code requires that the non-protected elements be filtered out first before determining if there is a substantial degree of similarity to find infringement. A *de minimis* amount of copyright infringement is insufficient. *West Publ'g Co. v. Edward Thompson Co.*, 169 F. 833, 861 (E.D.N.Y. 1909).

Defendants allege that once the non-protected elements are filtered out there is not a substantial similarity between the codes. The Court agrees. There is insufficient proof of actionable copying to allow this matter to go forward.

Allegedly 45 out of approximately 8,032 lines of Plaintiff's code were infringed. (Defs.' Statement of Undisputed Facts No. 13, 22 [35-2]; Defs.' Br. 15 [35-1] (estimating number of lines on 215 pages of code)). The Court will go through the challenged lines, conduct the filtration process and compare similarities. The Court considers the admitted statements of undisputed fact and the meaning of the code as the parties agreed to it.

Lines 1-6, 8-9, 23-29: These lines do not have a counterpart in Plaintiff's code. (See Defs.' Statement of

Undisputed Facts No. 25 [35-2]). Accordingly, they could not have been copied from her code.

Line 7: Plaintiff's and Defendants' respective code lines refer to a "stylesheet" type which Defendants' contend has to do with setting page borders and similar formatting items. (See Defs.' Statement of Undisputed Facts No. 27 [35-2]). Plaintiff responds the meaning of the stylesheet references "has not been established." (Pl.'s Resp. to Statement of Undisputed Facts No. 27 [39-2]). Plaintiff thus presents no evidence to conclude this element is protectable expression.

Lines 10-13: These lines refer to meta names, keywords, and content that were allegedly copied. (See Defs.' Statement of Undisputed Facts No. 28 [35-2]). However, such short words and phrases of the kind in question are excluded from copyright protection. See *Feist Publ'ns, Inc.*, 499 U.S. at 347-48; 37 C.F.R. § 202.1(a).

Line 14: This line refers to the name of the website template that Plaintiff purchased to design her website. (See Defs.' Statement of Undisputed Facts No. 29 [35-2]). Names are not entitled to copyright protection. See *Feist Publ'ns, Inc.*, 499 U.S. at 347-48; 37 C.F.R. § 202.1(a).

Lines 15-16: This line refers to a Norton website verification string from Plaintiff's HTML code. (See Defs.'

Statement of Undisputed Facts No. 30 [35-2])). Plaintiff does not hold the copyright to the code that was generated by another entity. It is not the result of Plaintiff's work, creativity, or originality. It is not protected.

Line 17: This line refers to the name of the town of Lost Nation, Iowa. It also refers to the name JavaScript. (See Defs.' Statement of Undisputed Facts No. 31 [35-2])). Neither of those names are protected by the copyright. See *Feist Publ'ns, Inc.*, 499 U.S. at 347-48; 37 C.F.R. § 202.1(a).

Lines 19-22: These lines refer to names and phrases on the menu of items, such as "calendar of events," "find us" and the like. (See Defs.' Statement of Undisputed Facts No. 32 [35-2])). There is no originality here. Short words and phrases are excluded from copyright protection. See *Feist Publ'ns, Inc.*, 499 U.S. at 347-48; 37 C.F.R. § 202.1(a).

Lines 30-37: These lines concern John Alden's business and the relevant contact information. (See Defs.' Statement of Undisputed Facts No. 33-34 [35-2])). This information is factual in nature. Facts are not protected by copyright law. Further, the business information is not created by Plaintiff. Mr. Alden and his business do not cede the right to have an internet presence because they at one time had a business page on Plaintiff's website.

Line 39: This line includes an advertisement of John Alden's business. (See Defs.' Statement of Undisputed Facts No. 35 [35-2]). Plaintiff concedes that Mr. Alden provided much of the wording for the advertisement slogan in question. (See *id.* at No. 36). Slogans are not protected by copyright law. See *Feist Publ'ns, Inc.*, 499 U.S. at 347-48; 37 C.F.R. § 202.1(a). Further, Plaintiff's claim to creation of this slogan is in question due to Mr. Alden's heavy contribution to its creation.

Lines 40, 42, 44, 45: These lines include web addresses for associated websites to Mr. Alden's website and URLs for three other websites. (See Defs.' Statement of Undisputed Facts No. 37 [35-2]). Plaintiff has admitted that she has no copyright ownership over third-party URLs. (See *id.* at No. 38).

Lines 18, 38, 41, 43: These lines were accused because of a visual representation of images or photographs, not because of the code. (See Defs.' Statement of Undisputed Facts No. 22 [35-2]). Plaintiff contends these lines are indicative of access and copying, not infringement. (Pl.'s Resp. to Defs.' Statement of Undisputed Facts No. 22 [39-2]). Plaintiff's copyright does not encompass the visual elements of her website because she did not submit any visual material with her deposit. Additionally, three of the photographs (lines 38, 41, and 43) were provided by

the owner of the business, not by Plaintiff. (See Defs.' Statement of Undisputed Facts at No. 23 [35-2]; Defs.' App. at 306-10). The fourth (line 18) refers to an image of the town sign. As Plaintiff does not hold the copyright to these visual elements, they must be filtered out.

Viewing the evidence in the light most favorable to Plaintiff, the Court finds that Plaintiff has not met her burden of showing that a reasonable jury could find actionable copying because the HTML codes are not substantially similar once the unprotectable elements are filtered out. The intrinsic prong for substantial similarity has not been met and Plaintiff's claim for copyright infringement must fail.

C. Damages

Plaintiff has alleged that she incurred approximately \$129 in damages as a result of losing business to Defendant Lost Nation Booster Club because of the competing website allegedly created by copying her code. (Defs.' Statement of Undisputed Facts No. 42 [35-2]; Pl.'s Resp. to Defs' Statement of Undisputed Facts No. 42 [39-2]). Defendants allege that Plaintiff lost business because she told the businesses that she was shutting down her website and did in fact shut down her website for a period of time. The Court does not reach this issue because liability has not been established.

D. Expert Testimony

Plaintiff did not timely identify an expert witness to support her case in chief. Defendants' contend expert testimony is necessary to explain the HTML code and prove copyright infringement based on copying the code.

The general standard for whether an issue requires expert testimony is whether the "subject matter is outside the knowledge or experience of lay people." *Phillips-Foster v. UNUM Life Ins. Co. of Am.*, 302 F.3d 785, 797 (8th Cir. 2002) (citing *Sherbert v. Alcan Aluminum Corp.*, 66 F.3d 965, 967 (8th Cir. 1995)). An expert is not needed if "the ability to make inferences and draw conclusions is within the common knowledge of a lay person." *Id.* (citing *Sherbert*, 66 F.3d at 967).

Neither party provided case law on whether as a matter of law HTML code necessitates expert testimony. Defendants argue that it does necessitate expert testimony, Plaintiff disputes this, but with little explanation.

The Court's independent search was not fruitful. The limited case law suggests it is not uncommon in copyright or patent cases for expert testimony to be offered to explain HTML code and for courts to rely on that testimony. See, e.g., *Liberty Am. Ins. Grp. v. Westpoint Underwriters L.L.C.*, 199 F.Supp.2d 1271, 1297 (M.D. Fl. 2001) (stating that both parties offered expert testimony at the preliminary injunction hearing

in a case involving copyright infringement of HTML code and the experts offered differing opinions on whether the copyrighted material was copied); *Perry v. Zupan*, No. CIV S-04-868 DFL EFB, 2007 U.S. DIST. LEXIS 11941, *22 (E.D. Cal. Feb. 21, 2007) (stating that the filtering out of unprotected elements to determine if two things are substantially similar "may even require the aid of experts;" however there was no discussion of whether expert testimony was offered when Plaintiff submitted evidence that Defendant had copied Plaintiff's HTML code); *Oracle Corp. v. Druglogic, Inc.*, NO. C-11-00910 JCS, 2013 U.S. DIST. LEXIS 164675, *59-61 (N.D. Cal. Oct. 16, 2013) (expert describing HTML coding).

The Court is inclined to agree that HTML code and the extent to which the comparatively few lines of code at issue in the thousands of lines in the respective codes here demonstrates substantial similarity would be subjects too complex to be within the knowledge or experience of lay persons if Plaintiff had demonstrated the existence of a genuine dispute about whether any significant protectable expression had been copied. Because the accused elements are outside the scope of Plaintiff's copyright protection, the absence of expert testimony becomes a moot point.

IV.

RULING AND ORDER

Defendants' Second Motion for Summary Judgment [35] is **granted**. Defendants' First Motion for Summary Judgment [26] is **denied as moot**. The Clerk shall enter judgment dismissing the complaint.

IT IS SO ORDERED.

Dated this 14th day of October, 2014.



ROSS A. WALTERS
UNITED STATES MAGISTRATE JUDGE