

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico**

Civil Action No. 22-cv-00457-DDD-SKC

REPORTHOST LLC,

Plaintiff,

v.

SPECTORA INC.,

Defendant.

**ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT’S MOTION TO DISMISS**

Defendant Spector, Inc. moves to dismiss all but one claim asserted by Plaintiff ReportHost in this action. *Doc.* 16. For the following reasons, the motion is denied with respect to ReportHost’s claims alleging copyright infringement, vicarious copyright infringement, contributory copyright infringement, and the Colorado Consumer Protection Act. The motion is granted with respect to the permanent injunction claim.

BACKGROUND

The following facts are drawn from the allegations in Plaintiff’s Amended Complaint (*Doc.* 13), which I must take as true for purposes of Defendant’s motion to dismiss.

Plaintiff and Defendant are both in the business of providing tools to home inspectors to allow them to create home inspection reports more efficiently. *Id.* at ¶¶ 14, 28. ReportHost owns two copyright registrations, one for the boilerplate language that is included in its home inspection reports, and one for the data templates containing proprietary home

inspection narratives. *Id.* at ¶¶7-8. ReportHost licenses its software, templates, and associated narratives to customers to allow them to complete home inspection reports. *Id.* at ¶18. ReportHost’s customers must use its software platform to choose a template and then select specific narratives to insert into the draft home inspection report. *Id.* at ¶20. A home inspector can then provide a completed home inspection report to their client that has been populated with the boilerplate language from ReportHost’s system. *Id.* at ¶2.

Spectora provides its home inspector clients with access to a library of templates for use in generating home inspection reports. *Id.* at ¶29. Spectora’s library contains unauthorized copies of ReportHost’s data templates. *Id.* at ¶31. Spectora’s website also provides “sample reports” to customers, some of which, ReportHost alleges, contain a large quantity of content from ReportHost’s data templates. *Id.* at ¶45.

In March of 2020, ReportHost applied to register its copyrights by submitting to the Copyright Office 12 deposit copies (the “Deposit Works”), which together contain the universe of every piece of boilerplate that an inspector could possibly insert into an inspection report created with ReportHost’s software at the time. *Id.* at ¶46; Ex-1 (“ReportHost is in the process of registering the relevant works with the U.S. Copyright Office.”). Prior to obtaining copyright registrations, ReportHost granted a limited license to its customers allowing them to access report-building software containing the templates and the associated boilerplate language. *Id.* at ¶2; see also Ex-1 (“ReportHost’s business model is to license this copyrighted material to its clients.”). ReportHost does not, however, offer its templates for public consumption, or as stand-alone products to its licensees. The license is exclusive, non-sublicensable, non-transferable, and only allows the licensee to use the reports they generate through ReportHost’s software and under the

terms of the terms of service agreement. *Id.* at ¶22. In applying for its copyright registrations, ReportHost classified its works as “unpublished,” which allowed it to register up to 10 unpublished works at a time within a single \$85 application. Published works, on the other hand, must be applied for on a work-by-work basis, and cost \$45 each.

Since 2020 ReportHost has submitted hundreds of takedown requests to Spectora regarding sample reports that reproduce ReportHost’s copyrighted material. *Id.* at ¶52. Beginning in September 2021, Spectora informed ReportHost that it needed to use a “self-serve tool” for takedown notices. *Id.* at ¶55. ReportHost continued to use its previous procedure, though Spectora has ignored these takedown notices since the fall of 2021. *Id.* at ¶59. ReportHost now alleges that Spector’s actions constitute copyright infringement, vicarious copyright infringement, contributory copyright infringement, false association, and a violation of the Colorado Consumer Protection Act.

STANDARD OF REVIEW

When presented with a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a court “must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff.” *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007) (internal quotation marks omitted). “Mere ‘labels and conclusions’ and ‘a formulaic recitation of the elements of a cause of action’ will not suffice.” *Khalik v. United Air Lines*, 671 F.3d 1188, 1191 (10th Cir. 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). So a court can “disregard conclusory statements and look only to whether the remaining, factual allegations plausibly suggest the defendant is liable.” *Id.* “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.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Generally, a court may only consider the contents of a complaint when ruling on a 12(b)(6) motion. *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir.2010). Exceptions to this rule include: documents incorporated by reference in the complaint; documents referred to in and central to the complaint, when no party disputes its authenticity; and matters of which a court may “take judicial notice.” *Berneike v. CitiMortgage, Inc.*, 708 F.3d 1141, 1146 (10th Cir. 2013) (internal quotation marks and citations omitted).

DISCUSSION

I. Validity of Copyright Registration

Under the Copyright Act, “a plaintiff must prove two elements to establish copyright infringement: ‘(1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original.’” *Savant Homes, Inc. v. Collins*, 809 F.3d 1133, 1138 (10th Cir. 2016) (quoting *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361 (1991)). Without a copyright registration, “no civil action for infringement of the copyright in any United States work shall be instituted” 17 U.S.C. § 411(a). There is no dispute that ReportHost registered the Copyrighted Works.

Spectora does not argue in its motion to dismiss that it did not infringe, but rather that ReportHost’s copyright registrations are not valid and therefore it cannot bring a claim under the Copyright Act. A district court has the power to invalidate a copyright registration in deciding a motion to dismiss. *Seattlehaunts, LLC v. Thomas Family Farm, LLC*, 2020 WL 1674124 at *5 (W.D. Wash. Apr. 6, 2020). However, the bar is high—a copyright registration certificate “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). “Evidence of [a] certificate shift[s] the burden of proof to [Defendant] to dispute the validity of the copyright.” *Harris Mkt. Research v. Marshall Mktg. & Communs*, 948 F.2d 1518, 1526 (10th Cir. 1991). Spector asks me to invalidate ReportHost’s copyright registrations. *Doc.* 16 at 9. I decline to do so.

Under 17 U.S.C. § 411(b), a certificate of registration is typically valid regardless of inaccurate information. An exception to this rule exists when “(A) inaccurate information was included on the application for copyright registration with the knowledge that it was inaccurate; and (B) the inaccuracy of the information, if known, would have caused the Register of Copyrights to refuse registration.” 17 U.S.C. § 411 (b)(1)(A), (B). The Supreme Court has held that “lack of knowledge in either fact or law can excuse an inaccuracy in a copyright registration.” *Unicolors, Inc. v. H&M Hennes & Mauritz, L. P.*, 142 S. Ct. 941, 945 (2022). This is not *carte blanche* for registrants to claim ignorance when inaccuracies in their registration are later challenged—“Circumstantial evidence, including the significance of the legal error, the complexity of the relevant rule, the applicant’s experience with copyright law, and other such matters, may also lead a court to find that an applicant was actually aware of, or willfully blind to, legally inaccurate information.” *Id.* at 948. Spector must show that ReportHost had “actual, subjective awareness of both the facts and the law” through direct or circumstantial evidence of knowledge or willful blindness. *Id.* at 947. It fails to do so.

Spector argues that ReportHost’s copyrights are invalid because the application stated that the claimed materials were unpublished when ReportHost had full knowledge that the works were published—much of the boilerplate language had been licensed out to ReportHost’s clients before ReportHost applied for copyright registration, and clients had

access to the report-building software containing templates. *Doc.* 16 at 9, 11. Spectora argues that ReportHost knew it needed to register each published individual boilerplate component and chose to erroneously submit an application for the compiled templates. *Doc.* 21 at 6. ReportHost responds that it has zealously guarded the home inspection templates, which were the correct unit of copyright, and the use of components of the templates or the software that builds on the templates does not equate to a publication of the copyrighted templates themselves. *Doc.* 18 at 12-13.

The complexity of the relevant rule that ReportHost allegedly inaccurately construed weighs in favor of finding that ReportHost did not act with actual knowledge or willful blindness. The question of what constitutes publication in the context of this sort of mixed-use software is not clear-cut. 17 U.S.C. § 101 defines publication as “the distribution of copies...of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” The Copyright Office has noted modern difficulties with determining publication. The Office “recognize[d] that applicants may struggle with determining whether a work is published or unpublished, and this determination can be less straightforward in many instances,” particularly for works distributed online. 84 FR 3693, 3695-96(2019). The Office has noted a “relative lack of consensus among courts” concerning “the definition of publication in the modern context.” 84 FR 66328, 66329 (2019). Beyond guidance that is hazy at best, the legislative history of the Copyright Act further complicated ReportHost’s decision. The legislative history of the Copyright Act explains that “a work is published’ if one or more copies or phonorecords embodying [the work] are distributed to the public” with “no explicit or implicit restrictions with respect to [the] disclosure of [the] contents [of that work].” H.R. REP. NO. 94-1476, at 138 (1976), reprinted in 1976

U.S.C.C.A.N at 5754. The limitations contained in the license that ReportHost granted to its customers constituted explicit restrictions with respect to the disclosure of the work's contents. ReportHost took a side on an ambiguous, highly complex issue. Viewing the allegations in the light most favorable to the plaintiff, while ReportHost picked the side that was most cost-effective for it, their decision certainly is not indicative of actual knowledge of or willful ignorance toward inaccuracies in their application.

In its quest to establish that ReportHost knowingly included inaccurate information regarding the publication status of its works, Spectora cites to a letter ReportHost wrote to Spectora on March 12, 2020.¹ In the letter, ReportHost does not distinguish between the boilerplate and the templates when accusing Spectora of infringing on "copyrighted materials," which ReportHost was in the process of applying for copyrights on at the time. *Doc.* 16-2. Spectora also references ReportHost's familiarity with copyright law. *Doc.* 16 at 16. Spectora, in effect, asks me to construe allegations in the light most favorable to the defendant, contrary to the standard under 12(b)(6). ReportHost's failure to distinguish between the templates and the boilerplate, and use of copyright lawyers, may be evidence that ReportHost had a crystalline view of a notoriously ambiguous question and chose to include erroneous information in its application. But it cannot be said to establish that beyond any contrary inference, and thus isn't sufficient to grant the motion. Spectora says the question is simple: either the works were published or they were not. CITE. That question may be simple to state, but it is not so simple to

¹ The letter was not included in the operative complaint, nor was it incorporated by reference. However, the letter is referenced in the complaint (*Doc.* 13 at ¶4), is undisputed and I accept the defendant's undisputed contention that it is central to the plaintiff's claims. I will thus take judicial notice of it.

answer, and I therefore cannot say that as a matter of law ReportHost knowingly included false information in its application.

Both parties make a further host of arguments regarding whether or not the Copyrighted Works were published prior to registration. I need not make a definitive ruling on that question at the motion to dismiss stage. It is enough that I find Spectora has not met its burden to show that ReportHost knowingly included inaccuracies in its application for copyright registrations, and decline to move on to Step B of § 411(b)(1).

II. CCPA Claim

ReportHost also alleges that Spectora's use of its work constitutes a violation of the Colorado Consumer Protection Act, C.R.S. 6-1-105. To succeed on a CCPA claim, a plaintiff must establish (1) that the defendant engaged in an unfair or deceptive trade practice; (2) that the challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) that it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) that the plaintiff suffered injury in fact to a legally protected interest; and (5) that the challenged practice caused the plaintiff's injury. *Hall v. Walter*, 969 P.2d 224, 235 (Colo. 1998). In alleging fraud, a party must "state with particularity the circumstances constituting fraud," while "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). The Tenth Circuit "requires a complaint alleging fraud to '[1] set forth the time, place and contents of the false representation, [2] the identity of the party making the false statements and [3] the consequences thereof.'" *Koch v. Koch Indus.*, 203 F.3d 1202, 1236 (10th Cir. 2000) (quoting *In re Edmonds*, 924 F.2d 176, 180 (10th Cir. 1991)), *cert. denied*, 531 U.S. 926 (2000).

Spectora alleges that ReportHost's claim fails to allege specific facts to support this claim. *Doc.* 16 at 17. ReportHost's CCPA claim is light on details. At this point in the proceedings it is enough however. It alleges that Spectora "made templates bearing ReportHost's name," "copied and published reports containing ReportHost's URLs," edited ReportHost's copyrighted works "so that Spectora Clients could use ReportHost-sourced materials as 'sample reports,'" and that this confused potential consumers as to the true source of their products. *Doc.* 1 at 16. More detail is provided in the background section of the complaint. *Id.* at 6-7. This is sufficient to state with sufficient particularity the circumstances constituting fraud, and addresses the five elements of a CCPA claim.

III. Claim for Injunctive Relief

Defendant argues Count VI of Plaintiff's amended complaint must be dismissed because a "claim for permanent injunction is no claim at all." *Doc.* 16 at 19. An injunction is a remedy that may be granted after a plaintiff shows that a legal right is being infringed upon. *Romstad v. City of Colo. Springs*, 650 F. App'x 576, 585 (10th Cir. 2016). Section 512(j) outlines how injunctive relief may be applied. It does not appear that the statute created a separate claim which plaintiffs may plead for relief regarding injunctions. I grant the defendant's motion on this issue, but note that injunctive relief may still be issued as a remedy depending on the outcome of the case.


CONCLUSION

It is ORDERED that:

The MOTION TO DISMISS (Doc. 16) is **DENIED** on Counts I-III and V; and **GRANTED** on Count VI, the application for injunctive relief.

DATED: March 29, 2023

BY THE COURT:

A handwritten signature in black ink, appearing to read 'Daniel D. Domenico', is written over a horizontal line.

Daniel D. Domenico
United States District Judge