

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JAMES HAYDEN,)	CASE NO. 1:17CV2635
)	
Plaintiff,)	SENIOR JUDGE
)	CHRISTOPHER A. BOYKO
vs.)	
)	<u>OPINION AND ORDER</u>
2K GAMES, INC., et al.,)	
)	
Defendants.)	

CHRISTOPHER A. BOYKO, SR. J.:

This matter comes before the Court upon the Motion (ECF DKT #93*SEALED & #94*PUBLIC VERSION) of Plaintiff James Hayden for Partial Summary Judgment and the Motion (ECF DKT #95*SEALED & #101*PUBLIC VERSION) of Defendants 2K Games, Inc. and Take-Two Interactive Software, Inc. for Summary Judgment. For the following reasons, Plaintiff's Motion is granted in part and denied in part and Defendants' Motion is denied.

I. BACKGROUND

Plaintiff James Hayden filed his original Complaint on December 18, 2017. His Fourth Amended Complaint was filed on August 19, 2019, alleging copyright infringement by

Defendants 2K Games, Inc. and Take-Two Interactive Software, Inc. (ECF DKT #33).

Defendant Take-Two is a worldwide developer, publisher and marketer of interactive entertainment and video games. Defendant 2K Games sells and ships video games around the globe, including the alleged Infringing Games. Take-Two's video games include the popular basketball simulation series NBA 2K. The NBA 2K series is released annually and depicts players from the NBA in its interactive simulations. Defendants' video games display and allow players to control realistic avatars of over 400 NBA players.

Plaintiff does business as Focused Tattoos. Plaintiff is the artist who inked tattoos on various individuals depicted with those tattoos in the NBA 2K series. Plaintiff asserts that he obtained copyright registrations for six tattoos inked on Danny Green, LeBron James and Tristan Thompson (the "Registered Tattoos").

Plaintiff's Registered Tattoos with the U.S. Copyright Office have the following dates of registration and completion/publication (ECF DKT #93-5 through #93-10):

- "**Gloria**" (Reg. No. VAu 1-263-888), tattooed on LeBron James, completed in 2007 with the effective date of registration of September 6, 2016;
- "**Lion**" (Reg. No. VAu 1-271-044), tattooed on LeBron James, completed in 2008 with the effective date of registration of September 6, 2016;
- "**Shoulder Stars**" (Reg. No. VAu 1-270-802), tattooed on LeBron James, completed in 2007 with the effective date of registration of September 6, 2016;
- "**Fire D.G.**" (Reg. No. VAu 1-287-552), tattooed on Danny Green, completed in 2012 with the effective date of registration of August 11, 2017; Supplementary Registration including only the design, creation and placement of flames surrounding

and accenting character image and text and the addition of shading, accenting and design aesthetics to flames and character image (effective date July 30, 2019);

- “**Scroll D.G.**” (Reg. No. VAu 1-287-545), tattooed on Danny Green, completed in 2012 with the effective date of registration of August 11, 2017; Supplementary Registration including only design elements around the scroll, including the cloud designs, decorative spear head and character image around the edge of the scroll, and the shading in and around all elements (effective date July 30, 2019);

- “**Brother’s Keeper T.T.**” (Reg. No. VAu 1-292-453), tattooed on Tristan Thompson, completed in 2012 with the effective date of registration of August 11, 2017.

Plaintiff alleges unauthorized use by Defendants of his registered works in the accused games: NBA 2K16, 2K17, 2K18, 2K19, 2K20 and NBA 2KMobile. Plaintiff contends that his works are copied every time a game is played. It is undisputed that the realistic avatars of the NBA players in the accused games bear the physical features and likeness of each player, including their tattoos. In the Answer (ECF DKT #35 at ¶¶ 136, 142 & 147), Defendants admit that the accused games “include realistic depictions of NBA players including the tattoos that they have in real life.” Plaintiff asserts that sales of these games have generated over \$4.2 billion in revenue.

Plaintiff moves for judgment in his favor on the issues of: (1) copyright ownership and (2) copying by Defendants of the works protected by his copyrights. Defendants argue that Plaintiff’s Tattoos are not sufficiently original to qualify for copyright protection.

Defendants assert defenses of fair use, *de minimis* use and implied license or authorization. In

addition, Defendants contend that Plaintiff is not entitled to certain remedies.

The Court has before it the parties' Cross Motions, Oppositions and Replies, as well as a Supplemental Opposition Brief and Supplemental Reply Brief.

II. LAW AND ANALYSIS

Summary Judgment Standard of Review

Summary judgment shall be granted only 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.” *See* Fed.R.Civ.P. 56(a). The burden is on the moving party to conclusively show no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994). The moving party must either point to “particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations, admissions, interrogatory answers, or other materials” or show “that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.” *See* Fed.R.Civ.P. 56(c)(1)(A), (B). A court considering a motion for summary judgment must view the facts and all inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Once the movant presents evidence to meet its burden, the nonmoving party may not rest on its pleadings, but must come forward with some significant probative evidence to support its claim. *Celotex*, 477 U.S. at 324; *Lansing Dairy*, 39 F.3d at 1347.

This Court does not have the responsibility to search the record *sua sponte* for genuine

issues of material fact. *Betkerur v. Aultman Hospital Ass 'n.*, 78 F.3d 1079, 1087 (6th Cir. 1996); *Guarino v. Brookfield Township Trustees*, 980 F.2d 399, 404-06 (6th Cir. 1992). The burden falls upon the nonmoving party to “designate specific facts or evidence in dispute,” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986); and if the nonmoving party fails to make the necessary showing on an element upon which it has the burden of proof, the moving party is entitled to summary judgment. *Celotex*, 477 U.S. at 323. Whether summary judgment is appropriate depends upon “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Amway Distributors Benefits Ass 'n v. Northfield Ins. Co.*, 323 F.3d 386, 390 (6th Cir. 2003) (quoting *Anderson*, 477 U.S. at 251-52).

Copyright Registration and Presumption of Validity

To ultimately succeed on a claim of copyright infringement, a claimant must establish (1) ownership of a **valid** copyright, and (2) “copying of constituent elements of the work that are **original**.” *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991). (Emphasis added).

Pursuant to 17 U.S. C. § 410:

(c) In any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded the certificate of a registration made thereafter shall be within the discretion of the court.

This presumption of validity is rebuttable, and once the plaintiff introduces evidence of the registration within five years of publication, the burden shifts to the defendant to present evidence that the copyrights are invalid. *Varsity Brands, Inc. v. Star Athletica, LLC*,

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