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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

RJ CONTROL CONSULTANTS, INC.; PAUL E. ROGERS,
Plaintiffs-Appellants,

v.

MULTIJECT, LLC; RSW TECHNOLOGIES, LLC; JACK
ELDER,
Defendants-Appellees.

No. 23-1591

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:16-cv-10728—David M. Lawson, District Judge.

Decided and Filed: April 3, 2024

Before: SILER, COLE, and MATHIS, Circuit Judges.

COUNSEL

ON BRIEF: Eric Scheible, Jonathan D. Sweik, FRASCO CAPONIGRO WINEMAN SCHEIBLE HAUSER & LUTTMAN, Troy, Michigan, for Appellants. David C. Purdue, PURDUE LAW OFFICES, LLC, Toledo, Ohio, for Appellee RSW Technologies, LLC. Richard L. McDonnell, INTREPID LAW GROUP PLC, Rochester, Michigan, for Appellees Multiject, LLC and Jack Elder.

OPINION

MATHIS, Circuit Judge. This case involves the alleged infringement of a copyright on software code used in an industrial control system. This is the third time this case has come before us. RJ Control Consultants, Inc. and its sole shareholder, Paul Rogers (collectively, “Plaintiffs”), appeal the district court’s exclusion of their proposed expert and the grant of

summary judgment to Multiject, LLC; its sole owner, Jack Elder; and RSW Technologies, LLC (collectively, “Defendants”). In the first appeal, we reversed the district court’s grant of summary judgment to Defendants on Plaintiffs’ copyright-infringement claim related to the software code and remanded the case to the district court “for the taking of additional evidence.” *RJ Control Consultants, Inc. v. Multiject, LLC*, 981 F.3d 446, 458–59 (6th Cir. 2020) (*RJ Control I*). We dismissed the second appeal for lack of appellate jurisdiction. *RJ Control Consultants, Inc. v. Multiject, LLC*, No. 22-1102, 2023 WL 2785764 (6th Cir. Apr. 5, 2023) (*RJ Control II*). Because the district court did not abuse its discretion in excluding Plaintiffs’ proposed expert and because the district court did not err in granting summary judgment to Defendants, we affirm.

I.

We previously summarized the facts underlying this matter as follows:

This is a copyright dispute over the use of software code and technical drawings for an industrial control system related to plastic injection molding. . . .

The district court characterized this as a “business dispute which soured a friendship.” That friendship was between . . . Rogers and . . . Elder. Rogers was the principal and sole shareholder of [RJ Control], a Michigan company that creates industrial control systems. Elder is the sole owner of [Multiject], a Michigan business which engineers and sells various industrial accessories related to plastic injection molding. Their friendship turned into a business relationship when Elder approached Rogers seeking Rogers’s expertise and assistance in developing a control system for an injection molding machine.

In 2008, Rogers and Elder entered into an oral agreement whereby Rogers would develop a rotary turntable control system for Elder and Multiject. This turntable control system is the “brain” of the turntable, allowing the turntable to move and operate. RJ Control, through Rogers’s work, updated the control system design in 2013, labeling the newest iteration as “Design 3.” The parties dispute the invoicing for Design 3.

In March of 2014, Elder asked Rogers for copies of Design 3’s diagrams as well as the software source code “in case something happened” to Rogers. Rogers disclosed that information to Multiject, believing that Multiject and Elder would not improperly use or disclose the information to third parties. Three days after providing that information to Multiject, Elder informed Rogers and RJ Control that Elder and Multiject would no longer need Rogers’s services and would instead use [RSW] for the assembly and wiring of the control systems. Elder said that Multiject would like to continue working with Rogers as a technical

consultant for the system design and that Multiject appreciated his expertise but that “this comes down to a business decision.”

Multiject and RSW—RJ Control’s replacement—had a long-standing business relationship with each other, and Multiject was already considering switching to RSW when it asked Rogers for the design diagrams. Elder claims that Multiject was increasingly concerned with Rogers’s pricing, worrying that Rogers was charging Multiject too much relative to competitors, at least to the extent Rogers was performing manual labor rather than designing the systems. For that reason, Elder and Multiject decided to “switch out” RJ Control and Rogers for RSW, for purposes of manufacturing rotary tables.

On the same day that Elder informed Rogers that Multiject would be using RSW to assemble and wire the control systems, RSW sent Elder a quote that explicitly referenced the assembly and wiring of “RJ Table Control.” Elder, Multiject, and RSW used Design 3—both the software code and the technical drawings—in the assembly and wiring of new control systems. RSW did not make any changes in the design when it used Design 3. RSW claims that it did not know Rogers and RJ Control had separately designed Design 3 and did not know there was dispute as to whether Elder properly paid Rogers for that work; that is to say, RSW believed Multiject had permission to build the control systems using the software and technical drawings.

On February 17, 2016—nearly two years after Rogers initially supplied the software code and technical drawings to Elder—Rogers obtained two Copyright Certificates of Registration: one for the “Control System Turn Table Software: Design 3” (i.e., the software code) and another for “Control System Turn Table Schematics: Design 3” (i.e., the technical drawings).

Nearly two weeks after receiving those copyrights, RJ Control brought suit against Multiject, Elder, and RSW. Over a year later, RJ Control filed an amended complaint, adding Rogers as a plaintiff. That amended complaint brought several federal and state law claims: (1) copyright infringement, (2) trademark infringement, (3) violation of the Michigan Consumer Protection Act, (4) breach of contract, (5) unjust enrichment, (6) conversion, and (7) tortious interference with contract/business expectancy.

RJ Control I, 981 F.3d at 450–52 (footnotes omitted).

The district court granted summary judgment to Defendants on Plaintiffs’ copyright-infringement and trademark-infringement claims and declined to exercise supplemental jurisdiction over Plaintiffs’ remaining state-law claims. *Id.* at 452. Plaintiffs appealed the dismissal of its copyright-infringement claim. *Id.* We affirmed the district court’s decision related to technical drawings, but we reversed the grant of summary judgment on the software copyright claim and remanded the case to the district court. *Id.* at 456–59.

On remand, the district court entered a supplemental scheduling order establishing deadlines for expert disclosures and for filing dispositive motions and motions challenging experts. The district court did not set a trial date.

Plaintiffs timely served their expert disclosures, identifying David Lockhart of Sycamore Technical Services, LLC and Sycamore Automation and Controls as their expert. Defendants also timely served their expert disclosures. None of the parties produced expert reports with their disclosures.

In April 2021, the magistrate judge ordered Multiject to “produce the code that was used in each control produced by RSW.” R. 87, PageID 2738. Later that same month, the district court extended the discovery and motions deadlines. It did not, however, extend the expert-disclosure deadline and stated that “[a]ll other provisions of the supplemental scheduling order remain in full force and effect.” R. 89.

Multiject and Elder moved to exclude Plaintiffs’ expert on the grounds that Plaintiffs failed to properly disclose Lockhart because they did not produce an expert report. That same day, Defendants filed motions for summary judgment. The district court granted the motion to exclude and the motions for summary judgment.

The district court excluded Lockhart as Plaintiffs’ expert witness because Plaintiffs failed to comply with their obligation to produce an expert report. And the court found that Plaintiffs’ failure to comply with its disclosure obligations was neither substantially justified nor harmless. The district court then granted Defendants’ motions for summary judgment, finding that Plaintiffs had “failed to put forth any expert evidence that identifies any specific portions of the code that they claim are protectible.” R. 106, PageID 4118.

After Plaintiffs appealed, we dismissed the appeal for lack of appellate jurisdiction, holding that the district court’s decision was not final because the court had not disposed of Multiject and Elder’s amended counterclaim. *RJ Control II*, 2023 WL 2785764, at *2.

The district court then dismissed the pending counterclaim without prejudice. Plaintiffs timely appealed.

II.

We begin with some of the basics of copyright law. The U.S. Constitution authorizes Congress to “secur[e] for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8, cl. 8. With that authority, Congress has passed laws granting exclusive copyrights to “original works of authorship fixed in any tangible medium of expression.” 17 U.S.C. § 102(a). The term “original” means “the work was independently created by the author” and “possesses at least some minimal degree of creativity.” *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345 (1991) (citation omitted). Copyright protection “grants an author an exclusive right to produce his work . . . to encourage the production of works that others might reproduce more cheaply.” *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1195 (2021).

Although a copyright owner enjoys various exclusive rights, *see* 17 U.S.C. § 106, “[t]he mere fact that a work is copyrighted does not mean that every element of the work may be protected,” *Feist Publ’ns*, 499 U.S. at 348. To that end, Congress has placed limits on copyright protection: “In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.” 17 U.S.C. § 102(b). Thus, “copyrights protect ‘expression’ but not the ‘ideas’ that lie behind it.” *Google*, 141 S. Ct. at 1196; *see Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 534 (6th Cir. 2004), *abrogated on other grounds by eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). And, as we have explained, “the task of separating expression from idea in this setting is a vexing one.” *Lexmark*, 387 F.3d at 535.

The Computer Software Copyright Act of 1980 extended copyright protection to computer programs. *Google*, 141 S. Ct. at 1196. The Act defines a “computer program” as “a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result.” 17 U.S.C. § 101.

If a person improperly copies the work of a copyright owner, the copyright owner can seek relief by pursuing a copyright-infringement claim. To succeed on a copyright-infringement

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