

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
SITUATION MANAGEMENT SYSTEMS,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION
)	No. 06-11557-WGY
ASP CONSULTING GROUP,)	
)	
Defendant.)	
_____)	

FINDINGS AND RULINGS

YOUNG, D.J.

February 28, 2008

Situation Management Systems ("SMS") and ASP Consulting Group ("ASP") compete to provide corporations and individuals with strategies for effective communication and negotiation in the workplace. See Pl.'s Mem. Supp. Summ. J. [Doc. No. 39] at 3-4. To that end, both companies offer workshops designed to "improv[e] business and personal productivity." See Compl. [Doc. No. 1] ¶¶ 1-4. SMS brought this suit claiming that ASP infringes the copyrighted workbooks and training materials distributed in connection with three of its workshops. See Compl. ¶ 8.

After the Court denied cross-motions for summary judgment, [Doc. Nos. 36, 38], the parties agreed to treat the matter as a case stated. "In a case stated, the parties waive trial and present the case to the court on the undisputed facts in the pre-trial record." TLT Constr. Corp. v. RI, Inc., 484 F.3d 130, 135 n.6 (1st Cir. 2007). "[T]he Court must review the record, draw reasonable inferences, apply the governing law, and enter

such judgment as may be appropriate.” Heller v. Cap Gemini Ernst & Young Welfare Plan, 396 F. Supp. 2d 10, 18 (D. Mass. 2005).

Exercising jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338, this Court rules that ASP copied SMS’s materials, but that ASP is not liable for infringement because the accused works are not substantially similar to the originals.

I. BACKGROUND

The backdrop to this suit is a bitter struggle between a company and its former employees. In 2001, SMS declared bankruptcy and emerged that same year with new ownership, which restructured the company and terminated the employment of two of SMS’s former leaders, Dane Harwood and Alex Moore. Compl. ¶ 10; Pl.’s Mem. Supp. Summ. J. ¶ 8. Harwood and Moore, who had helped create SMS’s workshops, went on to become two of ASP’s founders. Id. ¶¶ 5, 9. Harwood and Moore helped develop the three accused works, *Communicating 2 Influence*, *Championing Ideas*, and *Negotiating Successful Agreements*, which are basically workbooks consisting of anywhere from eighty to hundreds of pages apiece. Pl.’s Concise State. Mat. Facts [Doc. No. 41] ¶ 9.

Comprised of text, flow charts, exercises, and surveys for self-assessment, the materials focus on developing skills associated with promoting one’s influence inside an organization, promoting ideas within a business, and successful negotiation. Id. ¶ 3. Three of SMS’s products, *Positive Power & Influence*, *Positive Negotiation Program*, and *Promoting and Implementing*

Innovation, focus on the same topics. Id. SMS alleges that these and other similarities amount to infringement.

II. COPYING

SMS seeks to prove infringement by demonstrating that ASP copied the three workbooks. In order to prove infringement by copying, a plaintiff must first demonstrate that the defendant used the plaintiff's work "as a model, template, or even inspiration" in creating its own and that the new work is substantially similar to the original. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT, § 13.01[B] (footnotes omitted), at 13-8 (2007).

SMS has satisfied the first part of the inquiry. It is undisputed that Harwood and Moore had intimate familiarity with SMS's programs because they helped write them. See Harwood Decl. [Doc. No. 43] ¶ 3. Moreover, Harwood, Moore, and at least one other ASP employee had access to SMS's works during the period when they generated the accused works. See Harwood Dep. Tr., August 22, 2007 [Doc. No. 47], 107-12. The fact that ASP's works address the same topics as SMS's is not a matter of coincidence. In addition, the speed with which SMS's former employees were able to generate ASP's new materials underscores that they did not start from scratch. For example, ASP developed *Communicating 2 Influence* in between 6 and 34 days. Harwood Dep. Tr., August 23, 2007 at 232. The Court therefore finds that the creators of ASP's programs used SMS's materials in creating their own.

Nevertheless, "the question still remains whether such

copying is actionable." NIMMER, *supra*, § 13.01[B] (footnotes omitted); see also Feist Publ'ng, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 361 (1991) (holding no actionable infringement occurred despite the undisputed fact that defendant copied 1,309 phone listings without permission because listings not copyrightable). In order for the copying to give rise to infringement liability, SMS must prove that APS's works are "substantially similar to [its own] such that liability may attach." NIMMER, *supra*, § 13.01[B].

III. SUBSTANTIAL SIMILARITY

Two works are substantially similar if a hypothetical ordinary observer would view the works as a whole and "conclude that the defendant unlawfully appropriated the plaintiff's protectable expression." T-Peg, Inc. v. Vermont Timber Works, Inc., 459 F.3d 97, 112 (1st Cir. 2006) (quoting Johnson v. Gordon, 409 F.3d 12, 18 (1st Cir. 2005)). Because substantial similarity is based only on a comparison of the copyrightable elements of a work, the Court must begin its analysis by paring away ideas, facts, and any other uncopyrightable elements. See Johnson, 409 F.3d at 19 ("[A] court must engage in dissection of the copyrighted work by separating its original, protected expressive elements from those aspects that are not copyrightable").

Below, the Court holds that much of the content of the SMS works is not copyrightable because it is devoted to discussing

concepts and processes. See 17 U.S.C. 102(b).¹ To the extent that the content could be characterized as expression, much of it is simply not original. See Feist, 499 U.S. at 348. Ultimately, the Court concludes that SMS has failed to meet its burden of proving infringement because, when viewed as a whole, excluding the non-protectable material, an ordinary observer would not find the works to be substantially similar.

A. COPYRIGHTABLE MATERIAL

1. Only expressions are eligible for copyright

"[T]he Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." Harper & Row Publishers, Inc. v. Nation Enter., 471 U.S. 539, 558 (1985). An intellectual property regime where authors could secure monopolies over ideas could hardly coexist with free expression. See id. Thus, despite what the term intellectual property might connote, "[t]he most fundamental axiom of copyright law is that no author may copyright his ideas" Feist, 499 U.S. at 344-45. While authors retain a limited monopoly over their original

¹Section 102(b) provides in full:

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).

expression, the idea/expression dichotomy ensures that "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication." Eldred v. Ascroft, 537 U.S. 186, 219 (2003).

Expression is a term that refers that refers to the copyrightable portion of work; it describes the more tangible characteristics that distinguish a work from the underlying ideas. For example, one might say that John Lennon's classic song "Imagine" is based on the idea that individuals can bring about world peace through humanistic introspection. However revolutionary the idea may have seemed at the time, the notion that imagining can be a panacea for the world's ills is not protectable. Instead, the copyrightable aspects - the expression - are Lennon's lyrics and the particular notes that comprise the melody, harmony, and accompaniment. See Golan v. Gonzales, 501 F.3d 1179, 1184 (10th Cir. 2007) ("[Expression] refers to the particular pattern of words, lines and colors, or musical notes that comprise a work.") (internal quotation marks omitted).

Even though the law is clear about the rights that inure in each, the line between idea and expression resists definition. Judge Learned Hand, a towering figure in American copyright law, once observed that "no principle can be stated as to when an imitator has gone beyond the 'idea' and borrowed from its 'expression.' Decisions must therefore be inevitably ad hoc." Peter Pan Fabrics Inc. v. Martin Weiner Corp., 274 F.2d 487, 489 (2d Cir. 1960). Nevertheless, Judge Hand formulated what has

become known as the "abstractions" test:

Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of 'his ideas' to which, apart from their expression, his property is never extended.

Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930).

The principles underlying the Learned Hand abstractions test are perhaps best explained by way of example. For instance, in *Cold Mountain*, a novel by Charles Frazier, a man who has been away at war sets off for home and a woman who is waiting for him there, but on the way he encounters many obstacles. When described at this level of generality, there is nothing copyrightable about the plot because it is merely an idea. In fact, at this level of abstraction, the plot is indistinguishable from Homer's epic tale of Ulysses's return from the Trojan Wars.²

As we include more of what Judge Hand would call "the incident" of Mr. Frazier's story, the novel takes the form of a copyrightable expression. The main character's name is W.P.

²Any author is free to borrow or co-opt Homer's plot because it is in the public domain. See Golan, 501 F.3d at 1188 (noting the "principle that works in the public domain remain there"). Indeed, Ulysses' homeward journey has served as inspiration for numerous novels, James Joyce's *Ulysses* to name one, and films, including the Joel and Ethan Cohen's *Oh Brother, Where Art Thou?*.

Inman, and he is a Confederate deserter from an army hospital.³ The love of Inman's life, and the reason for the journey that comprises much of the novel's plot, is Ada Monroe, a minister's daughter from Charleston who has moved to a rural community on Cold Mountain, North Carolina. On his way home from the military hospital near Raleigh, North Carolina, Inman faces numerous impediments, including imprisonment, starvation, and patrols charged with rounding up deserters. Meanwhile, Ada, who was raised in cosmopolitan Charleston, struggles to survive on the farm that would be the couple's home.

³Although Mr. Frazier's novel does not specify how or when Inman was injured, in the film *Cold Mountain*, Inman is wounded in the Battle of the Crater, fought just outside Petersburg, Virginia on July 30, 1864. ULYSSES S. GRANT, *PERSONAL MEMOIRS OF U.S. GRANT*, VOL II 314-15 (New York, Charles L. Webster & Co. 1886). The battle was so named because the Union Army had tunneled under the Confederate lines and planted explosives in order to blow a hole in the line, thereby creating a strategic advantage that would enable the Union to break a month-and-a-half standoff. *Id.* at 307, 310. The Army of the Potomac, under the command of Major General George G. Meade, and its Ninth Corps commanded by Major General Ambrose Burnside, successfully detonated the explosives, killing between 250 and 300 Confederates and creating a crater a little larger than half a football field. SHELBY FOOTE, *THE CIVIL WAR: A NARRATIVE* 535-36 (1974). Nevertheless, the Union squandered its strategic advantage when the first troops stopped in the crater, a maneuver that gave the Confederates time to recover and made the Union troops easy targets for soldiers firing down from the crater's edge. *Id.* at 536-37. Burnside compounded the error by failing to withdraw troops, even after it was clear that a rout was on. *Id.* at 537. The battle, which Grant characterized as a "stupendous failure," GRANT, *supra*, at 315, ended in hours of brutal hand-to-hand combat and resulted in more than four thousand casualties for the Union and "about one third that number" for the Confederates. FOOTE, *supra*, at 537.

It is appropriate to note that law clerk Alex Ewing, Esq., the creative analyst behind this opinion, is the great-great-grandson of George Washington Condrey, a sergeant in Lane's North Carolina Brigade, who believed until his dying day that he had accidentally shot Stonewall Jackson.

It is the characters, the events, and their precise sequence that distinguish Mr. Frazier's work from otherwise abstract notions of love, longing, and heroism that are found in *The Odyssey*.⁴ Ultimately, much of *Cold Mountain* is copyrightable not merely because Mr. Frazier has taken the Greek epic and added details; rather, he has supplied details that are attributable to his creative spark.

2. Expressions must be original

The second requirement for copyright eligibility is originality. See *Feist*, 499 U.S. at 348 ("Originality remains the *sine qua non* of copyright"). "Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity." *Id.* at 345. Although the quantum of creativity required is extremely low, the work must display least "a modicum of intellectual labor." *Id.* at 347 (quoting 1 NIMMER ON COPYRIGHT, § 1.08[C][1] (1980)).

It is important to note that descriptions or techniques common to a given subject are not entitled to copyright

⁴It is impossible to determine precisely when a creator has transformed an idea into an expression, but the following example may provide some guidance. No artist could hold a copyright to a piece of marble. But, using the tools of his trade, the artist may translate his creative vision onto the medium. As he chisels away, a shape begins to appear. When a form has emerged such that a passerby peering into the window of his studio would not see the slab of marble, but a sculpture, the artist has created an expression.

protection. *Scenes a faire* are one such form of noncopyrightable expression. "'*Scenes a faire*' are incidents, characters or settings which, as a practical matter, are indispensable or standard in the treatment of a given topic." Feder v. Videotrip Corp., 697 F. Supp. 1165, 1169 (D. Colo. 1988) (Carrigan, J.) (italics supplied). In Feder, a travel guide author sued a competitor alleging that the competitor had copied a video guide to Colorado ski resorts. Feder claimed to hold a copyright to a description of Aspen that characterized the city as "a glamorous, cosmopolitan playground of international renown for celebrities and the super-rich." Id. at 1170. The district court concluded that the description was not copyrightable in part because "the presence of celebrities and politicians is part of the area's '*scenes a faire*.'" Id. at 1170 (italics supplied). In other words, there is nothing original about the observation that the rich and famous flock to Aspen.

3. No author may copyright a process

Even if a work constitutes original expression, no author may claim protection over a process. See 17 U.S.C. § 102(b). Works that offer techniques for developing a skill or reaching a goal teach an uncopyrightable process. For example, in Palmer v. Braun, 287 F.3d 1325, 1327 (11th Cir. 2002), the creator of a self-help course aimed at exploring and expanding the consciousness of its participants claimed that Braun had appropriated various written materials, including a set of exercises designed to help participants "reconnect with their

existence and experience the world more directly." The exercises in each program offered "a simple and effective technique for managing beliefs." Id. at 1332. Although the exercises prescribed by each program were "virtually identical," the court reasoned that "at bottom, [the exercises were] simply a process for achieving increased consciousness. Such processes, even if original, cannot be protected by copyright." Id. at 1334.

4. The amount of copyright protection to which a work is entitled varies depending upon the amount of protected expression

Copyrights vary according to the volume of protectable material in a given work. For example, in Feist, the Supreme Court addressed the scope of copyright for a white pages directory. The Court reasoned that "choices as to selection and arrangement, so long as they are made independently by the compiler and entail a minimal degree of creativity, are sufficiently original" to qualify for protection. Feist, 499 U.S. at 348. The "entirely typical" "selection, coordination, and arrangement of Rural's white pages d[id] not satisfy the [originality requirement] for copyright protection." Id. at 362. Hence, the work was entitled only to a correspondingly "thin" copyright. See id. at 349. Although it was undisputed that Feist had copied Rural's directory, the Court held that Rural was not entitled to recover for infringement. Id. at 343, 364.

Despite SMS's suggestion to the contrary, the principles articulated in Feist apply beyond the context of factual compilations. See Pl.'s Post Arg. Br. [Doc. No. 55] at 3, The

reason a novel such as *The Sound and the Fury* is entitled to more protection than the white pages is quite simply that it contains more original expression. Benjy, Quintin, Jason, Caddy, and the rest of the Compson family did not pre-date Faulkner's conception. The plot, characters, and all of the prose are original. By contrast, the phone book in Feist was comprised of pre-existing facts that in no way could be attributed to Rural's creative genius. Hence, the phone book was entitled to only the thinnest of copyrights, which was not even enforceable against an admitted verbatim copier.

B. SMS'S WORKS ARE NOT ENTITLED TO ROBUST COPYRIGHT PROTECTION BECAUSE THEY ARE DOMINATED BY UNPROTECTABLE MATERIAL

SMS alleges that ASP has infringed materials associated with three programs, *Positive Power & Influence*, *Promoting and Implementing Innovation*, and *Positive Negotiation*. Although they are undoubtedly entitled to more protection than the white pages in Feist, they are dominated by unprotectable material. These works exemplify the sorts of training programs that serve as fodder for sardonic workplace humor that has given rise to the popular television show *The Office* and the movie *Office Space*.⁵ They are aggressively vapid – hundreds of pages filled with generalizations, platitudes, and observations of the obvious.

⁵ Programs of this ilk are by no means unique to the private sector. Even the Federal Judicial Center offers courses and materials designed to encourage more efficient and effective workplaces. See generally JOY A. RICHARDSON, *FRONTLINE LEADERSHIP, WORKING, TEAM EFFECTIVENESS, AND LEADERSHIP 2000* (Federal Judicial Center 1998).

While the workbooks' vague character may serve SMS well in the marketplace where it meets the demands of clients in different industries, they lack the "incident" that Judge Hand described as essential for differentiating the works from the underlying ideas. To the extent that the works contain expression, they are largely noncopyrightable because they are devoted to describing a process or because they are not original.

1. The works have no copyrightable structure or essence because they are devoted to discussing concepts and processes

SMS maintains that each of ASP's works infringes "structure, content and flow" of its own. Pl.'s Mem. Supp. Summ. J. at 13. In other words, SMS alleges infringement by comprehensive nonliteral similarity. NIMMER, *supra*, § 13.03[A][1], at 13-36. Comprehensive nonliteral similarity refers to similarity "not just as to a particular line or paragraph or other minor segment, but where the fundamental essence or structure of one work is duplicated in another." *Id.* (footnotes omitted). The nonliteral similarity inquiry is meant to capture what the Second Circuit has termed "inexact-copy infringement." *Id.* (quoting Tufenkian Import/Export Ventures, Inc. v. Einstein Moomjy, Inc., 338 F.3d 127, 133 n.5 (2d Cir. 2003)).

The challenge of assessing comprehensive nonliteral similarity is discerning when a work's "fundamental essence or structure" is an original expression. NIMMER, *supra*, § 13.03[A][1], at 13-36. The Learned Hand abstractions test, which is premised on the notion that works may be described at varying