

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

-----oo0oo-----

TELEVISION EDUCATION, INC.,

 Plaintiff,

 v.

CONTRACTORS INTELLIGENCE
SCHOOL, INC.; CONTRACTORS
PUBLISHER, INC.; LEONID
VORONTSOV; OKSANA VORONTSOV;
and DOES 1 through 25;

 Defendants.

CIV. NO. 2:16-1433 WBS EFB

MEMORANDUM AND ORDER RE: MOTION
FOR PRELIMINARY INJUNCTION

-----oo0oo-----

Plaintiff Television Education, Inc. brought this
action against defendants Contractors Intelligence School,
Contractors Publisher, Leonid Vorontsov, and Oksana Vorontsov
(collectively "defendants") for alleged copyright infringement.
(Second Am. Compl. ("SAC") (Docket No. 45).) Before the court is
plaintiff's Motion for a preliminary injunction. (Pl.'s Mot.
(Docket No. 49).)

1 I. Factual and Procedural Background

2 Plaintiff sells contractor's license exam preparation
3 materials to private schools and businesses. (Id., Mem. ("Pl.'s
4 Mem.") at 1 (Docket No. 19).) Plaintiff allegedly created and
5 owns copyrights to a number of test preparation manuals and
6 practice exams, and has "pending copyright applications in
7 numerous other educational courses and materials." (SAC ¶¶ 10,
8 15.) From 2011 through 2014, plaintiff executed agreements to
9 lease and sell its educational materials to Contractors
10 Intelligence School "for use in [the school's] license
11 examination preparation courses." (Id. ¶ 18.) According to
12 plaintiff, the agreements stated that Contractors Intelligence
13 School "will not 'copy, plagiarize, paraphrase, or duplicate' any
14 of the educational materials owned by Television Education . . .
15 or allow any of its employees or any other person or firm to do
16 so." (Id. ¶ 20.)

17 From 2010 to 2016, Contractors Intelligence School
18 allegedly "cop[ied]," "plagiariz[ed]," and sold "knock-offs" of
19 plaintiff's materials in violation of the parties' agreements and
20 federal copyright law.¹ (See id. at 10-17.) The "knock-offs"
21 were allegedly marketed as original works of Contractors
22 Publisher, an affiliate of Contractors Intelligence School. (Id.
23 Ex. A, Cease and Desist Letter at 2.) Plaintiff alleges that
24 defendants continue to plagiarize and create "knock-offs" of its
25

26 ¹ Plaintiff alleges defendants copied or plagiarized
27 plaintiff's B, C-33, C-36, C-8, C-10, C-15, C-20, C-27, and C-39
28 Manuals; portions of the "Math" section in plaintiff's manuals;
and plaintiff's law and trade practice tests.

1 materials despite receiving its cease and desist letter in June
2 2016. (Id. ¶¶ 57-58.)

3 On June 23, 2016, plaintiff filed this action.
4 Plaintiff first amended its complaint in September 2016 and then
5 again in April 2017. Plaintiff's second amended Complaint
6 alleges a single cause of action "for copyright infringement
7 under . . . 17 U.S.C. section 101 et seq." (Id. ¶ 1.) The court
8 previously granted, in part, plaintiff's Motion to strike various
9 affirmative defenses from defendants' Answer. (See December 12,
10 2016 Order (Docket No. 27).) Plaintiff now moves to
11 preliminarily enjoin defendants from copying or plagiarizing
12 plaintiff's materials and disseminating or using the purportedly
13 copied manuals and test. (Pl.'s Mot.)

14 II. Discussion

15 Injunctive relief is "an extraordinary and drastic
16 remedy, one that should not be granted unless the movant, by a
17 clear showing, carries the burden of persuasion." Mazurek v.
18 Armstrong, 520 U.S. 968, 972 (1997) (citation omitted). In order
19 to obtain a preliminary injunction, the moving party must
20 establish (1) it is likely to succeed on the merits, (2) it is
21 likely to suffer irreparable harm in the absence of preliminary
22 relief, (3) the balance of equities tips in its favor, and (4) an
23 injunction is in the public interest. Winter v. Nat. Res. Def.
24 Council, Inc., 555 U.S. 7, 20 (2008).

25 A. Likelihood of Success on the Merits

26 Plaintiff alleges that defendants infringed plaintiff's
27 copyrights when they used practice test questions and manuals
28 that contain material that are substantially similar or verbatim

1 copies of plaintiff's material. To state a claim for copyright
2 infringement, the plaintiff must show: "(1) ownership of a valid
3 copyright; and (2) that the defendant violated the copyright
4 owner's exclusive rights under the Copyright Act." Ellison v.
5 Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004) (citing 17 U.S.C.
6 § 501(a)).

7 1. Ownership of a Valid Copyright

8 A certificate of registration is "prima facie evidence
9 of the validity of the copyright and of the facts stated in the
10 certificate." 17 U.S.C. § 410(c). Plaintiff has sufficiently
11 demonstrated ownership of the copyrighted manuals by providing
12 certifications of registration issued by the Copyright Office.
13 (See Cohen Decl. ¶¶ 4-5, Exs. A-B.)

14 Plaintiff also claims copyright ownership over test
15 questions that defendants allegedly hacked to obtain in 2010.
16 Defendants no longer use their 2010 practice test, but plaintiff
17 argues that defendants' 2016 practice test uses several dozen
18 questions that are substantially similar or verbatim copies of
19 defendants' 2010 questions.

20 Plaintiff provides no evidence that it has a valid
21 copyright over the allegedly hacked 2010 questions. It has not
22 provided its version of the test that it claims defendants copied
23 in 2010. Plaintiff submitted both the 2010 and 2016 versions of
24 defendants' questions and a side-by-side comparison of the two
25 versions, (Cohen Decl., Exs. K-M), but provides no evidence that
26 these questions were part of plaintiff's copyrighted material.
27 This is not enough to show that the plaintiff had any copyright
28 interest in the questions at hand.

1 Because plaintiff fails to submit evidence that one of
2 its copyrights protects the questions at issue, plaintiff has not
3 shown that it is likely to succeed on the merits of its copyright
4 infringement claim for the practice test questions.

5 2. Violation of Copyright Owner's Rights

6 In order for plaintiff to prevail on its claim of
7 copyright infringement, it next must present evidence of copying
8 by defendants. Apple Computer, Inc. v. Microsoft Corp., 35 F.3d
9 1435, 1442 (9th Cir. 1994). "Copying may be shown by
10 circumstantial evidence of access and substantial similarity of
11 both the general ideas and expression between the copyrighted
12 work and the allegedly infringing work." Id. Between 2011 and
13 2016, defendants purchased and had access to copies of
14 plaintiff's B, C-8, C-10, C-15, C-20, C-27, C-33, C-36, and C-39
15 manuals. (Cohen Decl. ¶ 7.)

16 "To determine whether two works are substantially
17 similar, a two-part analysis--an extrinsic test and an intrinsic
18 test--is applied." Rice v. Fox Broad. Co., 330 F.3d 1170, 1174
19 (9th Cir. 2003). "The extrinsic test is an objective comparison
20 of the specific expressive elements, and the intrinsic test is a
21 subjective comparison that focuses on whether an ordinary,
22 reasonable audience would find the works substantially similar in
23 total concept and feel." Gold Glove Prods., LLC v. Handfield,
24 648 Fed. App'x 679, 680 (9th Cir. 2016) (citing Benay v. Warner
25 Bros. Entm't, Inc., 607 F.3d 620, 624 (9th Cir. 2010)).

26 As to the extrinsic test, the court "must distinguish
27 between the protectable and unprotectable material because a
28 party claiming infringement may place 'no reliance upon any

1 similarity in expression resulting from unprotectable elements.'"
2 Rice, 330 F.3d at 1174 (citing Apple Computer, 35 F.3d at 1446).

3 There is no valid copyright in facts. Feist Publ'ns,
4 Inc. v. Rural Telephone Serv. Co., 499 U.S. 340, 347-48 (1991).
5 "Factual compilations, on the other hand, may possess the
6 requisite originality." Id. at 348. This includes "choices as
7 to selection and arrangement, so long as they are made
8 independently by the compiler and entail a minimal degree of
9 creativity." Id. In comparing the materials, the court must
10 compare plaintiff's materials as a whole to the allegedly
11 infringing works.² See See v. Durang, 711 F.2d 141, 143 (9th
12 Cir. 1983) (per curiam).

13 In various exhibits, plaintiff points to 93 purported
14 instances of copying or paraphrasing in defendants' nine manuals
15 that consist of over 400 pages. There are several deficiencies
16 in plaintiff's claim, including the total amount of purported
17 copying, the manuals largely contain facts, and plaintiff has
18 failed to show there is a substantial amount of very close
19 paraphrasing. Plaintiff thus has not shown that it is likely to
20 succeed on the merits of its claim.

21 First, the total amount of alleged copying does not
22 rise to the level of a substantial portion of the work as a
23 whole. In Meridian, 426 F. Supp. 2d at 1115, the court found

24
25 ² While the court may consider selected similarities
26 between one manual and another infringing work, the court must
27 also compare the manuals as a whole. See Landsberg v. Scrabble
28 Crossword Game Players, Inc., 736 F.2d 485, 489 (9th Cir. 1984);
see also Meridian Project Sys., Inc. v. Hardin Const. Co., LLC,
426 F. Supp. 2d 1101, 1113-14 (E.D. Cal. 2006) (Damrell, J.)
(comparing documents as a whole).

1 that a document that had substantial similarities on 15 pages of
2 an 18-page help file did not rise to the level of copyright
3 infringement. The amount of copying here, even if the court
4 accepted each purported instance of paraphrasing as true, does
5 not appear to rise to even that level. Plaintiff provides no
6 case supporting its position that the extent of purported
7 paraphrasing here rose to the level of infringement in a similar
8 type of work.

9 Second, plaintiff cannot claim copyright protection
10 over the vast majority of ideas in the manuals because they are
11 facts, including mathematical formulas and scientific theory.
12 For example, plaintiff repeatedly points to defendants' "Planning
13 and Estimating" sections that detail geometric formulas and
14 defendants' use of a table that converts inches to feet (both as
15 a fraction and decimal). These are non-copyrightable facts.
16 Further, under the merger doctrine, "[w]hen an idea or an
17 expression are indistinguishable, or 'merged,' that expression
18 will only be protected against nearly identical copying." Apple
19 Computer, 35 F.3d at 1444. A manual could only express
20 mathematical equations, science, and the conversion of inches to
21 feet in a very limited number of ways and therefore the merger
22 doctrine likely applies. Plaintiff fails to show why the merger
23 doctrine does not apply to these purported instances of
24 paraphrasing.

25 Third, even though infringement of a factual work must
26 "amount to verbatim reproduction or very close paraphrasing,"
27 Landsberg, 736 F.2d at 488, plaintiff fails to explain how many
28 of the purported instances of infringement amount to very close

1 paraphrasing. For example, in the C-36 Plumbing Manual,
2 plaintiff argues that the Plumber Tools sections are very closely
3 paraphrased, but this appears to be an inaccurate statement.
4 Plaintiff's manual discusses the characteristics of PVC pipes,
5 such as the fact that it "resists acids and bases," but
6 defendants' manual discusses what types of projects PVC pipes are
7 useful for and the different PVC pipe sizes. (Cohen Decl., Ex.
8 II at 11; id., Ex. JJ at 9.) While both manuals discuss PVC
9 pipes, which are relevant to that licensing exam, they discuss
10 different aspects of PVC pipes.

11 Further, in the C-39 Manual, which prepares students
12 for the Roofing trade license exam, plaintiff argues defendants'
13 description of roof slope and pitch paraphrases plaintiff's
14 information. However, plaintiff only provides a brief, four-line
15 overview of how to calculate slope and pitch; whereas defendants
16 have a detailed three-page explanation of how to calculate slope
17 and pitch with other information and hypothetical related to
18 slope and pitch. (Compare id., Ex. LL at 9, with id., Ex. MM at
19 4-6.) In the C-39 Manual, plaintiff also argues that defendants
20 use the same graphic as plaintiff; however, these images actually
21 have slight differences.

22 There are, however, multiple instances of copying or
23 very close paraphrasing. For example, both C-8 Manuals state:
24 "Ramps serving an occupant load of less than 50 must be at least
25 36 inches wide. For greater occupancies, ramps must be at least
26 44 inches wide." (Compare id., Ex. Q at 35, with id., Ex. R at
27 28.) The Private Sewage Disposal Systems and Filler Metal
28 sections of defendants' C-36 Manual also very closely paraphrase

1 plaintiff's manual. (Compare id., Ex. II at 15, 33, with id.,
2 Ex. JJ at 15, 23.) However, the work must be evaluated as a
3 whole, and isolated instances of copying are insufficient to find
4 that plaintiff has a likelihood of success on its infringement
5 claim.³ See also Meridian, 426 F. Supp. 2d at 1115 (finding no
6 copyright infringement where 15 pages of an 18-page document had
7 similarities with a copyrighted document).

8 Plaintiff argues that copyright protects the selection
9 and arrangement of this information. While copyright does
10 protect the compilation of information, "[a] compilation may lack
11 the requisite creativity where . . . industry conventions or
12 other external factors dictate selection." Phantomalert, Inc. v.
13 Google Inc., Case No. 15-cv-03986-JCS, 2015 WL 8648669, at *12
14 (N.D. Cal. Dec. 14, 2015). The arrangement of these manuals is
15 based, in part, on the California State Licensing Board's
16 ("CSLB") study guides for the related examinations. (See
17 Vorontsov Decl. ¶ 6, Ex. 2.) Generally, the CSLB study guides
18 are broken down into the major categories of planning and
19 estimating, then trade-specific topics, and then health and
20 safety. (See id., Ex. 2.) Both parties acknowledge that this is
21 the general format that the manuals also follow. (See Pl.'s Mem.
22 14:2-3.)

23 Plaintiff points to various subsections that both
24

25 ³ Plaintiff's Motion also discusses several other
26 instances of near-verbatim recitation. However, the majority are
27 from prior draft versions of defendants' manuals that they no
28 longer use. (See Leonid Vorontsov Dep. 147:7-17 (Docket No. 50-
2); cf. See, 711 F.2d at 142 (finding earlier drafts irrelevant
to the question of infringement).

1 plaintiff's manuals and defendants' manuals contain, which the
2 CSLB study guides do not list. However, the arrangements of
3 plaintiff's and defendants' guides are not identical and each
4 manual contains large amounts of information that is not in the
5 other manual. While the guides are generally one page and do not
6 identically mirror the format of the manuals, the CSLB study
7 guides provide guidance for these manuals and the distinction
8 between the manuals and the study guides is not so great that
9 this alone shows substantial similarity.

10 Plaintiff lastly points to the fact that plaintiff and
11 defendants' manuals are both "bound along the left side with 19-
12 hole binding and a black binding comb" and the "practice tests
13 and update questions [are] on golden rod paper." (Pl.'s Mem.
14 14:3-6.) Plaintiff cannot copyright these non-textual
15 utilitarian features of its manuals and tests. See Harper House,
16 Inc. v. Thomas Nelson, Inc., 889 F.2d 197, 202-03 (9th Cir. 1989)
17 (holding non-textual utilitarian features of organizers, such as
18 special hinges and graph paper, were not copyrightable).
19 Plaintiff has thus not shown that it is likely to satisfy the
20 extrinsic test.

21 Plaintiff has also not shown that it is likely to meet
22 the intrinsic test. Plaintiff does not distinguish between the
23 extrinsic and intrinsic tests, but appears to argue that it is
24 likely to meet the intrinsic test because "the overall look and
25 feel of defendants' manuals is the same as [plaintiff]'s manual."
26 (Pl.'s Mem. 13:26-27.) Plaintiff's argument is largely limited
27 to pointing to the manuals' similar formats and utilitarian
28 aspects. While there do appear to be some similarities, this

1 argument, without more, fails to show how a "reasonable audience
2 would finds the works substantially similar in total concept and
3 feel." Gold Glove, 648 Fed. App'x at 680. Plaintiff has not
4 shown that it is likely that a reasonable audience or jury would
5 find these manuals are substantially similar in total concept and
6 feel.

7 Because plaintiff has not met its burden of showing the
8 likelihood of success on the merits of its copyright infringement
9 claim, preliminary injunctive relief must be denied, regardless
10 of the court's finding with respect to irreparable injury,
11 balance of the hardships, or the public interest. See Winter,
12 555 U.S. at 20 ("A plaintiff seeking a preliminary injunction
13 must establish that he is likely to succeed on the merits, that
14 he is likely to suffer irreparable harm in the absence of
15 preliminary relief, that the balance of equities tips in his
16 favor, and that an injunction is in the public interest."
17 (emphasis added)).

18 B. Irreparable Harm

19 If plaintiff's copyright infringement claim is
20 ultimately found to have merit, it does appear that defendant's
21 use of the allegedly infringing materials between now and the
22 time of trial is likely to cause harm to plaintiff which may not
23 entirely be compensable by monetary damages. Nevertheless, a
24 plaintiff's delay in seeking a preliminary injunction
25 "undercut[s] [plaintiff's] claim of irreparable harm." See
26 Garcia v. Google, Inc., 786 F.3d 733, 746 (9th Cir. 2015) (en
27 banc); Oakland Tribune, Inc. v. Chronicle Publ'g Co., 762 F.2d
28 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before


1 seeking a preliminary injunction implies a lack of urgency and
2 irreparable harm.”).

3 Here, notwithstanding plaintiff’s discovery of
4 defendants’ alleged infringement in May 2016 and plaintiff’s
5 filing of this action in June 2016, plaintiff waited until June
6 of this year to file this Motion for a preliminary injunction.
7 Plaintiff argues the delay is justified because it did not know
8 the extent of defendants’ purported infringement until recently.
9 This excuse does not justify plaintiff’s delay. Plaintiff’s
10 thirteen-month delay from the discovery of the alleged
11 infringement and almost twelve-month delay from the filing of
12 this suit weighs heavily against a finding of irreparable harm.
13 See Valeo Intellectual Prop., Inc. v. Data Depth Corp., 368 F.
14 Supp. 2d 1121, 1128 (W.D. Wash. 2005) (three month delay between
15 filing suit and seeking injunctive relief was inconsistent with a
16 finding of irreparable harm); Playboy Enters., Inc. v. Netscape
17 Commc’ns Corp., 55 F. Supp. 2d 1070, 1080, 1090 (C.D. Cal. 1999)
18 (five month delay weighed against a finding of irreparable harm
19 in a trademark case).

20 The court notes that trial on the merits is scheduled
21 to begin in nine months. Whatever harm may befall plaintiff
22 during that time is unlikely to be any different than the harm it
23 may have sustained during the year plaintiff delayed in bringing
24 this motion.

25 IT IS THEREFORE ORDERED that plaintiff’s Motion for a
26 preliminary injunction (Docket No. 49) be, and the same hereby
27 is, DENIED.
28

1 Dated: July 11, 2017



WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28