

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GALLUP, INC., d/b/a THE GALLUP CORPORATION,	:	CIVIL ACTION
	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
KENEXA CORPORATION,	:	
	:	
	:	
Defendant.	:	No. 00-5523

OPINION

Stengel, J.

November 8, 2004

This is a copyright infringement action brought by Gallup, Inc. (“Gallup”) against a competitor, Kenexa Corporation (“Kenexa”). Among its several business ventures, Gallup conducts a management consulting business which provides evaluation, measurement, and education services to corporate clients. In this context, Gallup has developed a specialty in assessing employee satisfaction in the workplace. Kenexa provides human resource services, including employee satisfaction surveys, to corporate clients. Gallup contends that Kenexa copied and is using employee survey questions that Gallup developed for the same purpose. Kenexa filed a motion for summary judgment, claiming that Gallup’s copyright registration is invalid. Because a valid copyright registration is necessary for a copyright infringement action, the issue raised by Kenexa determines whether Gallup can proceed in this case. Because I find that Gallup’s copyright registration is invalid, Kenexa’s motion for summary judgment is granted.

I. BACKGROUND

This case is about Gallup’s employee engagement survey instrument, known as the “Q¹².”

The Q¹² is a survey given to a company's employees to measure their satisfaction with the workplace. The survey seeks an employee's reaction to specific issues relating to the employee's perception of his workplace, as well as an "overall employee satisfaction question." The Q¹² is the subject of First, Break All the Rules: What the World's Greatest Managers Do Differently, a book written by two of Gallup's employees.¹ In 1999, Gallup received a copyright certificate for the survey. Gallup filed the application in 1999. A copy of the Q¹², known for copyright registration purposes as the "deposit copy," was attached to the application. The 1999 application states very clearly that the Q¹² was developed in 1992 and has been in use since that time.

According to Gallup, Kenexa copied the Q¹² and is using ten of the twelve survey items,² as well as the overall satisfaction question,³ in virtually identical form in its employee engagement survey business. Gallup explains that in developing the survey, its researchers conducted thousands of focus groups across many varied industries over a period of about twenty-five years. Based on these focus groups and knowledge gathered in the extensive research, Gallup developed surveys and studied the results in order to find common factors within the data. Gallup developed the survey questions in the Q¹² through experimentation, client suggestions, and an ongoing assessment of the source of behavioral changes in organizations. Over time, a group of questions, or "core" survey items, emerged. Kenexa's

¹ The book was written by Marcus Buckingham and Curt Coffman and published in 1999 by Simon and Schuster.

² As registered, the Q¹² consists of twelve assessment questions.

³ This is a separate question on the Q¹² and carries the heading: "Overall Satisfaction."

overall employee survey methodology and the selection of the individual items were fully developed by mid-1996. At various points in time, this core survey has included up to thirty-three “items” and presently consists of twenty-eight “items” or employee satisfaction questions.

Gallup also alleges that Kenexa “raided” Gallup in order to hire former Gallup employees who have detailed knowledge of the Q¹². For example, in 1997, Kenexa acquired Human Resource Innovations (“HRI”), a company owned by two former Gallup employees, Bill Erickson (“Erickson”) and Troy Kanter (“Kanter”). Erickson worked for Gallup for fifteen years and has written hundreds of items used in surveys to measure behavior and attitudes in organizations. Kanter was employed by Gallup for four years.

On October 31, 2000, Gallup filed a complaint alleging unfair competition based on Kenexa’s “unlawful raid of Gallup’s employees,” intentional interference with contract, intentional interference with business relations based on Kenexa’s “unlawful raid” and solicitation/servicing of Gallup’s clients and prospects, unfair competition under the Lanham Act, 15 U.S.C. § 1125(a), violations of the Copyright Act, 17 U.S.C. §§ 101 et seq., and unfair competition based on Kenexa’s “deceptive conduct.”

Gallup requested sweeping relief. Specifically, Gallup asked the court to enjoin Kenexa from working with any of its current or former employees, doing business in the area of employee surveys for the next several years, using Gallup’s confidential information, and interfering with Gallup’s contractual relations with its employees and customers. Gallup also sought to enjoin Kenexa from further unfair competition, misrepresenting its products and services, and engaging in acts that are likely to cause the consuming public to believe that Kenexa’s products and services were authorized by or associated with Gallup. Gallup requested

statutory damages in the amount of \$150,000.00 for each alleged infringement as well as damages for usurpation of business, lost profits, the value of lost goodwill, and the value of property rights and copyrights infringed and appropriated. Gallup also sought exemplary and punitive damages for Kenexa's willful and intentional conduct, court costs, attorneys' fees, prejudgment interest, and equitable relief, including a request that the court order Kenexa to return all of Gallup's property and make an accounting for all fees which Kenexa received from its wrongful activities. Finally, Gallup requested a constructive trust on all fees which Kenexa received from its wrongful activities.

On November 14, 2001, the Honorable Lowell A. Reed, Jr. of the United States District Court for the Eastern District of Pennsylvania granted Kenexa's motion for partial summary judgment, dismissing Gallup's claim for unlawful raid because Gallup failed to show that such a cause of action exists in the law.⁴ Gallup, Inc. v. Talentpoint, Inc., No. 00-5523, 2001 WL 1450592, at *9-10 (E.D.Pa. Nov. 14, 2001).⁵ This case was later reassigned to the Honorable Herbert J. Hutton. On January 23, 2003, Judge Hutton granted Kenexa's unopposed motion for partial summary judgment, dismissing Gallup's claims for intentional interference with contract and intentional interference with business relations based on Kenexa's "unlawful raid." Gallup, Inc. v. Kenexa Corp., No. 00-5523 (E.D.Pa. Jan. 23, 2003). On June 24, 2003, Gallup and Kenexa stipulated and agreed to dismissing Gallup's claims for unfair competition under the Lanham Act and unfair competition based on Kenexa's deceptive conduct. At this point, only

⁴ The parties agreed that Nebraska law applied to the unlawful raid claim.

⁵ On December 5, 2001, Judge Reed ordered that Kenexa be substituted as the name of the defendant and that the caption be amended in conformity with this substitution. Gallup, Inc. v. Talentpoint, Inc., No. 00-5523 (E.D.Pa. Dec. 5, 2001).

Gallup's copyright claim remains.

A final pretrial conference was held on September 2, 2004 in open court and on the record for a trial scheduled to begin on September 13, 2004. At the pretrial conference, counsel for Gallup noted that the Q¹² was revised several times in the 1990s and reached its final form, or current form, in 1997 or 1998. Kenexa noted at the conference that information about the continuing development of the Q¹² raised an issue relating to the validity of the copyright registration. This is a crucial issue because the copyright registration is the basis of this lawsuit. Kenexa argued that because Gallup's application for copyright registration was not accompanied by a copy of the Q¹² as it existed when it was allegedly first published, the copyright infringement claim must be dismissed. This issue is now before the court on Kenexa's motion for summary judgment. After the conference, I requested a motion and briefs so that the parties could frame and argue this issue.

II. STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.Proc. 56(c). The moving party has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). After the moving party adequately supports its motion, the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file showing a genuine issue of material fact for trial. See id. at 324. In deciding a motion for summary judgment, all reasonable inferences are drawn in the light most favorable to the

nonmoving party. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992). There is a genuine issue of fact if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See id.

III. DISCUSSION

Kenexa maintains that Gallup's application for copyright registration did not include a copy of the Q¹² as it existed in 1992 and the copyright certificate is, therefore, invalid. To establish copyright infringement, Gallup must show two elements: (1) that it owns a valid copyright; and (2) that the defendant copied original elements of the work. Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222, 1231 (3d Cir. 1986). A cause of action for infringement cannot be enforced until the creator of a work actually registers the copyright in accordance with the requirements of the Copyright Act. 17 U.S.C. § 411(a)(2004). Pursuant to the Copyright Act,

the material deposited for registration shall include . . . (1) in the case of an unpublished work, one complete copy or phonorecord; (2) in the case of the published work, two complete copies or phonorecords of the best edition; (3) in the case of a work first published outside the United States, one complete copy or phonorecord as so published; (4) in the case of a contribution to a collective work, one complete copy or phonorecord of the best edition of the collective work.

Id. § 408(b). For the purpose of certainty in obtaining copyright registration, this requirement permits "bona fide" copies of the original work only. Kodadek v. MTV Networks, Inc., 152 F.3d 1209, 1212 (9th Cir. 1998); Coles v. Wonder, 283 F.3d 798, 802 (6th Cir. 2002).

In Kodadek, the plaintiff, James Kodadek ("Kodadek"), alleged that he made numerous drawings of two cartoon characters in February or March of 1991. Kodadek claimed that he gave one of the drawings to defendant Mike Judge. Kodadek asserted that he did not know what

happened to that drawing or to the remaining 1991 drawings. In 1993, defendant MTV Networks, Inc. aired a television show, “Beavis and Butthead,” featuring two cartoon characters allegedly resembling Kodadek’s 1991 drawings. After Kodadek learned of the program, he drew new sketches, in 1993, of the cartoon characters from his memory of the 1991 drawings.

In 1995, Kodadek applied for and received a copyright registration for his cartoon characters. He attempted to comply with the registration deposit requirement of 17 U.S.C. § 408(b) by submitting two of the 1993 drawings. In the portion of the registration application entitled “YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED,” Kodadek inserted “1991.” In fact, Kodadek submitted 1993 drawings based on his memory of his 1991 drawings of the characters as deposit copies with the application for copyright protection in 1995.

In February 1996, Kodadek filed a complaint with the United States District Court for the Central District of California against the producers of “Beavis and Butthead,” alleging, *inter alia*, copyright infringement. The district court granted summary judgment in favor of the defendants, and Kodadek appealed. On appeal, the Ninth Circuit Court of Appeals affirmed the district court’s grant of summary judgment, stating that “the registration deposit requirement permits ‘bona fide copies of the original work only. . . .’” Kodadek, 152 F.3d at 1211. According to the Ninth Circuit:

This means that any “copy” deposited as part of an application for a certificate of copyright registration must be virtually identical to the original and must have been produced by directly referring to the original. Once a bona fide copy is made in this manner, subsequent copies can be made by directly referring to that copy. For example, a photocopy or other electronic means of reproduction of an original drawing could suffice. Similarly, an accurate trace of an original drawing could suffice. In fact, a meticulous freehand redrawing of an original, made while the artist referred directly to the original, could suffice.

Here, Kodadek’s 1993 drawings were made from his memory of the 1991 drawings. They were not made by directly referring to the originals or bona fide copies of the originals. [The court] holds that the 1993 drawings are merely “reconstructions” and not appropriate “copies” of the 1991 drawings for purposes of obtaining a valid certificate of copyright registration. Thus, Kodadek did not properly receive a copyright registration in the 1991 drawings and his infringement action is foreclosed.

Id. at 1212.

In Coles, plaintiff Derrick Coles (“Coles”) applied for copyright registration on September 4, 1990 for a song entitled “For Your Love.” Coles indicated that the song was completed in 1982.⁶ However, the recording of the song submitted with the application, i.e., the deposit copy, was made in 1990. Coles testified in his deposition that his 1990 recording was identical to the version of the song he created in 1982, but he could not refer to the original version of the song when he made the 1990 recording because he did not possess a copy of a recording that he made at the time of the song’s creation. Coles also testified that he had not kept a written copy of the song.

In 1995, defendant Stevie Wonder (“Wonder”) released a song called “For Your Love.” Wonder made a number of recordings of the song beginning in the early 1980s, including two made in August 1982. In 1994, Wonder obtained a publishing copyright of the song. The following year, defendant Motown Record Company acquired a copyright for the song for the album “Conversation Peace.”

In 1998, Coles filed a copyright infringement action in federal court contending that Wonder unlawfully used his 1990 copyright. Relying on Kodadek, the United States District

⁶ While Coles indicated on his copyright application that the song was written in 1984, he later claimed that the song was recorded in 1982. The court stated that this discrepancy did not affect the outcome of the case. Coles, 283 F.3d at 800 n.1.

Court for the Northern District of Ohio granted summary judgment on behalf of the defendants.

On appeal, the Sixth Circuit Court of Appeals found that the district court properly granted summary judgment. Noting the similarity between Coles and Kodadek, the Sixth Circuit stated:

[H]ad Coles been able to establish that he made the 1990 recording after listening to an audio copy of his 1982 rendition of *For Your Love*, he could have met the deposit requirement and his copyright would be valid from the date listed on his application. Likewise, had he made his 1990 recording after reviewing a tear sheet or other written summary that dated from 1982, he could have satisfied the deposit requirement. Like the plaintiff in Kodadek, however, Coles did not refer to the original work in producing the recording of *For Your Love* that he then deposited with his copyright application. Thus, the 1990 recording must be viewed as a reconstruction only, not a copy, and therefore he could not receive a valid copyright registration in the 1982 version of the song.

While the rule that [the court] adopt[s] may seem harsh, it avoids the factual disputes over creation dates that are on vivid display in this case. The rule permits an artist to protect an original song against potential infringement by registering the original work with the Copyright Office immediately after its creation by depositing either a recording of the song or a written version of it with the copyright application; by retaining a copy of a recording of the original song or written version of it that dates from the time of creation for deposit with a subsequent copyright application; or by making the copy for deposit by referring to a recording or written version of the original work. Rather than put the interests of creative artists at risk, the rule protects those interests by encouraging artists to either register copyrights upon creation of a new work or, at least, to retain copies of their work. By doing so, they can protect themselves against claims of copyright infringement or, if necessary, enforce their own copyrights. Because he retained copies of *For Your Love* that dated from 1982, Stevie Wonder was able to prevail in this action even though he obtained his copyright of the song after plaintiff. Since Coles failed to retain a copy of his 1982 recording, he could not satisfy the deposit requirement of § 408. Accordingly, the district court properly granted summary judgment to defendants.

Coles, 283 F.3d at 802.

Gallup's copyright registration is flawed in ways similar to the applications in Kodadek and Coles. Gallup failed to deposit a copy of the work to be copyrighted as it existed when it was allegedly first published. Gallup's 1999 application for copyright registration states that the

Q¹² was first published on January 10, 1992.⁷ However, the final version of the Q¹², as presented in Gallup's application for copyright registration, did not exist until 1997 or 1998. The version of the Q¹² attached to the 1999 application as the "deposit copy" states:

OVERALL SATISFACTION:

On a five point scale where "5" is extremely satisfied, and "1" is extremely dissatisfied, how satisfied are you with _____ as a place to work?

GALLUP Q¹²™ ITEMS:

On a scale of 1 to 5, where 5 is strongly agree, and 1 is strongly disagree, please indicate your level of agreement with each of the following items?

1. I know what is expected of me at work.
2. I have the materials and equipment I need to do my work right.
3. At work, I have the opportunity to do what I do best every day.
4. In the last seven days, I have received recognition or praise for doing good work.
5. My supervisor, or someone at work, seems to care about me as a person.
6. There is someone at work who encourages my development.
7. At work, my opinions seem to count.
8. The mission/purpose of my company makes me feel my job is important.
9. My associates (fellow employees) are committed to doing quality work.
10. I have a best friend at work.
11. In the last six months, someone at work has talked to me about my progress.
12. This last year, I have had opportunities at work to learn and grow.⁸

Contrary to the copyright application statements, the "deposit copy" version did not exist in that form in 1992. First, the "overall satisfaction" question was not in existence in 1992.⁹ Second, in 1992, the Gallup Q¹² items were different from their final form, presumably achieved in 1997 or 1998. In 1992, the items, in no particular order, read as follows: "I know what my manager expects of me"; "We have the materials necessary to do excellent work"; "My guidance

⁷ Def.'s Mem. Supp. Summ. J., Ex. A.

⁸ Id.

⁹ Pl.'s Mem. Opp. Summ. J., Ex. 10-11.

counselor has talked with me about the things I do best”; “My manager has told me about something I have done well in the last two weeks”; “I have an SRI Associate who cares about me as a person”; “My manager encourages my training and personal growth”; “My opinions and suggestions are considered in management decisions”; “When I do my job well, it helps meet the mission of my region”; “The co-workers in my department try to do the best job they can”; “I have a ‘best friend’ at [name of client]”; “My immediate supervisor has discussed my progress with me during the last six months”; and “I feel I have professional growth opportunities in this hospital.”¹⁰

Significantly, Gallup admits that its application for copyright protection did not include copies of the Q¹² as it existed on January 10, 1992. Gallup notes “the wording of each of the Q¹²® items as presented in the document deposited with the original application for copyright registration was finalized by 1997” and “the order of the items as presented in the document deposited with the original application for copyright registration was finalized in 1998.”¹¹

Moreover, at the final pretrial conference held on September 2, 2004, counsel for Gallup stated that “[t]he Q-12 was -- reached its final wording and order, and there will be testimony on this, around 1997 and 1998” and “there was extensive deposition testimony and documents . . . which was produced a long time ago to show that we believe [the Q¹²] came into its final wording and order in late ’97 and early ’98.”¹² The evidence and Gallup’s own admission establish that

¹⁰ Id., Ex. 10-11, 13. Gallup had prepared the fifth and twelfth questions for particular clients.

¹¹ Id. at 6.

¹² N.T. Final Pretrial Conf., at 43, 46.

Gallup did not deposit an accurate copy of the version of the Q¹² as it existed on January 10, 1992. The “deposit copy” submitted with the 1999 application was neither a reproduction nor a valid copy of the work Gallop sought to protect. Accordingly, I find that Gallup’s copyright registration was invalid.

Gallup argues that a “technical defect” should not invalidate the copyright and cites to United States v. Backer, 134 F.2d 533 (2d Cir. 1943). In Backer, there was “[a]t most . . . a mistake as to the date of publication to the extent of the period from July 31st to August 7th.” Id. at 536. Despite this “useless technicality,” the court found that the copyright registration was valid.

Backer, however, is distinguishable from this case. This case does not present a simple dispute over whether the Q¹² was first published one week earlier or one week later than Gallup alleged in its application for copyright registration. In contrast to Backer, this case involves affirmative changes in the composition, wording, and form of the material. Gallup deposited with the application a copy of a much different and later version of the Q¹² and has acknowledged those differences on the record. The deposit copy is a 1997 or 1998 version that Gallup identified as the original work, not the version that existed in 1992. Simply stated, this does not satisfy the requirements of the Copyright Act. See 17 U.S.C. § 411(a)(2004).

Gallup next argues that this court can only find its copyright registration invalid if the error in registration was a result of fraud, and, according to Gallup, Kenexa has waived any claims of fraud. See Kenbrooke Fabrics, Inc. v. Holland Fabrics, Inc., 602 F.Supp. 151 (S.D.N.Y. 1984); Data Gen. Corp. v. Grumman Sys. Support Corp., 825 F.Supp. 340 (D. Mass. 1993). In Kenbrooke, the defendant challenged the validity of the copyright based on

an alleged incorrect date of publication on the certificate. The date listed on the registration was October 1, 1982, and the plaintiff established that the latest date of first publication was November 3, 1982. The court stated that such an error does not invalidate a copyright absent a showing of fraud. Kenbrooke, 602 F.Supp. at 153. Therefore, the court accepted the plaintiff's copyright certificate as valid. In Data General, the plaintiff's deposits contained several minor errors, such as incorrect copyright dates of 1982 instead of 1983 and incorrect pages. The court indicated that such innocent, inadvertent errors do not jeopardize the validity of a copyright absent fraud. Data Gen., 825 F.Supp. at 357. Accordingly, the court accepted the copyright registration as valid.

To be sure, Gallup's registration did not contain a simple misstatement or clerical error. Gallup did not merely state that the Q¹² was first published in 1992 instead of 1993. Moreover, the copy of the Q¹² Gallup deposited did not merely contain a few incorrect items. Instead, Gallup stated in its application that the Q¹² was first published in 1992 but filed a copy of a much different and later version of the Q¹². Because Gallup's copyright registration did not contain simple errors, Kenexa is not required to show fraud. Kenbrooke and Data General are not dispositive.

Finally, Gallup states that on September 13, 2004, it filed an application for supplementary registration for the Q¹². According to Gallup, the supplementary registration corrects the January 10, 1992 information and states that the Q¹² was created over time from 1993 until 1998 and first published in July 1998. Gallup argues that it can rely on the supplementary registration as a separate basis for this lawsuit.

The Copyright Act states that the Register of Copyrights may, by regulation, establish

procedures for supplemental registration to correct an error or amplify information in the original registration. 17 U.S.C. § 408(d)(2004). Section 201.5 of the Copyright Office Rules and Regulations provides that a supplemental registration authorized by the Copyright Act may be used to correct information that was incorrect at the time the basic registration was made, 37 C.F.R. § 201.5(b)(2)(i)(2004), or to reflect omitted information, or certain changes in facts that have occurred since the original registration. Id. § 201.5(b)(2)(ii). However, supplementary registration is not appropriate to reflect changes in the content of a work. Id. § 201.5(b)(2)(iii)(B); Jones v. Virgin Records, Ltd., 643 F.Supp. 1153, 1159 (S.D.N.Y. 1986).

Gallup's September 13, 2004 supplementary registration reflects changes in the content of the Q¹². Gallup indicated that its original application for copyright registration was for the January 10, 1992 version of the Q¹². However, the September 13, 2004 supplementary registration was for the final version of the Q¹² as it existed several years after 1992, after a number of changes to the wording and order of the Q¹². Because Gallup's supplementary registration reflects changes in the content of the Q¹² and was not simply an effort to correct an error, Gallup cannot rely on the supplemental registration as a substitute basis for this lawsuit.

IV. CONCLUSION

I am well aware that this case has been in litigation for four years. Gallup's complaint asserted six counts upon which it based a broad menu of legal and equitable relief. Judge Reed and Judge Hutton dismissed five of the six counts, and Gallup is left with copyright infringement as the lone basis for relief. The legal basis for this motion for summary judgment was not presented until the pretrial conference. The issues raised in the conference and in the subsequent motion and briefs concern the very basis for this copyright action. Based on the

discussion contained in this opinion, I find that Gallup's copyright registration was invalid. I, therefore, grant Kenexa's motion for summary judgment. Gallup's copyright claim is dismissed. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GALLUP, INC., d/b/a THE GALLUP	:	CIVIL ACTION
CORPORATION,	:	
	:	
Plaintiff.	:	
	:	
v.	:	
	:	
KENEXA CORPORATION,	:	
	:	
Defendant.	:	No. 00-5523

ORDER

AND NOW, this 8th day of November, 2004, upon consideration of defendant's motion for summary judgment (Doc. No. 118), and plaintiff's opposition thereto (Doc. Nos. 120-22), it is hereby ORDERED that said motion is GRANTED. The following motions are DENIED as moot: plaintiff's motion in limine to preclude defendant from presenting general third-party materials as evidence of non-originality of the Gallup Q¹² (Doc. No. 97); defendant's motion in limine to exclude evidence of item-by-item comparison (Doc. No. 98); plaintiff's motion to

strike just produced financial data (Doc. No. 104); plaintiff's motion for use of courtroom technology (Doc. No. 112); plaintiff's motion objecting to the authenticity of certain of defendant's trial exhibits (Doc. No. 116); plaintiff's motion to strike references to alleged fraud (Doc. No. 119); and plaintiff's motion to enforce court order (Doc. No. 125). This case is CLOSED.

/s/
LAWRENCE F. STENGEL, J.