

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

ROTOPLAY, INC.,

Plaintiff,

v.

SPORTINGBET PLC,

Defendant.

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CIVIL ACTION NO. 05-2761

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT
OF SPORTINGBET PLC'S MOTION TO DISMISS OR FOR SUMMARY JUDGMENT**

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PRELIMINARY STATEMENT

In this action, plaintiff Rotoplay, Inc. (“Rotoplay”), seeks to use the Copyright Act (and two state law tort claims) to protect what only a *patent* can protect -- namely, the *idea* of a fantasy football game or fantasy baseball game. But plaintiff has no patent on these ideas and has no right to stop anyone else from using them, or from using a simple scoring system that (under the Copyright Act) is “merged” with the unprotectable idea. Moreover, plaintiff seeks to enforce these (nonexistent) rights against an entity -- a company established under the laws of England and Wales called Sportingbet Plc -- over which this Court has no jurisdiction. (A subsidiary of Sportingbet Plc, and not the defendant itself, engaged in the activities about which plaintiff complains.). Finally, plaintiff’s state law claims are squarely preempted by the Copyright Act, and its demands for statutory damages and attorney’s fees are barred by the plain language of Section 412 of the Copyright Act.

Because the Court lacks personal jurisdiction over the defendant, the Complaint should be dismissed in its entirety pursuant to Fed. R. Civ. P. 12(b)(2). Should the Court not grant that motion, the Complaint should be dismissed pursuant to Rule 12(b)(6).

INTRODUCTION AND SUMMARY

The Complaint suffers from both a threshold procedural flaw and from numerous fatal substantive flaws. As a preliminary matter, the Complaint should be dismissed for lack of personal jurisdiction because the plaintiff has sued the wrong defendant. Sportingbet Plc, a British company with its principal place of business in London, is a holding company; the websites about which Rotoplay complains (such as www.sportsbook.com) are operated by Internet Operating Entertainment Ltd. (“IOE”), a subsidiary of Sportingbet Plc, not by

Sportingbet Plc itself. The entire Complaint should therefore be dismissed for lack of personal jurisdiction over the named defendant.

Even if Rotoplay had sued the correct entity, its claims would fail for several substantive reasons. For example, plaintiff asserts “upon information and belief” (Compl. ¶ 26) that Sportingbet once infringed Rotoplay’s rights in a fantasy *baseball* game. But Rotoplay does not allege that there is any material similarity between the *current* Sportsbook.com fantasy baseball game (as of the time plaintiff filed the Complaint) and Rotoplay’s baseball game, and the current Sportsbook.com baseball game has not been modified since it was introduced in 2004.

Declaration of Shaun Dolan ¶¶ 3-4 (Oct. 6, 2005) (“Dolan Decl.”) (attached hereto as Ex. 1).

The remainder of the Complaint should likewise be dismissed. As the exhibits to the Complaint reveal, the vast majority of the allegedly infringing football game that appeared on Sportsbook.com in 2003, including the description of the rules, the prizes, and the criteria for winning, are *completely different* than those of Rotoplay.^{1/} (The allegation in the Complaint that the Sportsbook.com game copied all of the Rotoplay rules is thus contradicted by the exhibits to the Complaint.) The only aspect of the Sportsbook.com game that is allegedly copied is the *system* by which players are assigned “fantasy” points. But Rotoplay cannot use copyright law to prevent others from using that simple system, and the method of expression chosen by Rotoplay is so basic as to merge with the concept of the system. As a result, the brief appearance of that simple system on the Sportsbook.com web page cannot be deemed to infringe.

Plaintiff’s state law counts -- for conversion and unfair competition -- should also be dismissed. These are simply disguised copyright claims, which are expressly preempted by

^{1/} Out of an abundance of caution, the Sportsbook.com website changed the rules of its football game in December 2003, after receiving an objection from Rotoplay, to eliminate any argument that the game was infringing.

17 U.S.C. § 301, and, in any event, do not state a claim under state law.

Finally, the plaintiff's demand for statutory damages and attorney's fees should be stricken. Because the plaintiff waited years to register the works after first publication, and because the alleged infringement was alleged to have commenced long before the registration occurred, plaintiff is foreclosed from recovering either statutory damages or attorney's fees. *See* 17 U.S.C. § 412.

STATEMENT OF FACTS^{2/}

The Parties

Rotoplay is a Pennsylvania company that “offers online fantasy sports contests,” including the so-called Baseball Lottery and Football Lottery that are the subject of this case. Compl. ¶ 8. The plaintiff alleges that defendant Sportingbet Plc, a company established under the laws of England and Wales with its principal place of business in London, England, owns and operates certain websites, including www.sportsbook.com, and that the Sportsbook.com site at one time offered fantasy sports games that infringed plaintiff's copyrights. Compl. ¶¶ 8, 11, 23.

But the allegations about Sportingbet Plc's operations are wrong. As a review of the Sportsbook.com website's “House Rules” would have shown, the website is operated by Internet Opportunity Entertainment Limited (“IOE”), an entity organized under the laws of (and

^{2/} In deciding a motion to dismiss for failure to state a claim, the court may consider the allegations of the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of the claim. *See Lum v. Bank of America*, 361 F.3d 217, 221 n.3 (3d Cir. 2004). In deciding a motion to dismiss for lack of personal jurisdiction, the court may consider extrinsic evidence as well. *See Giusto v. Ashland Chemical Co.*, 994 F. Supp. 587, 590 (E.D. Pa. 1998).

holding bookmaking and gaming licenses from) the Antigua and Barbuda. IOE is a subsidiary of the defendant Sportingbet Plc.

Sportingbet Plc does not own or operate www.sportsbook.com or any other gaming website. Declaration of Daniel Talisman ¶ 5 (October 6, 2005) (“Talisman Decl.”) (attached hereto as Exhibit 2). Nor does Sportingbet Plc have employees to operate any websites. Sportingbet has only four employees -- its Company Secretary and three executive directors. *Id.* ¶ 1. It is simply a holding company established for the purpose of holding the shares of its subsidiary trading companies and having its shares traded on the Alternative Investment Market, a part of the London Stock Exchange. *Id.* ¶ 4. All business is conducted through Sportingbet Plc’s licensed, trading subsidiaries, such as IOE, which hold the necessary licenses to conduct the business of online sports betting and gaming. *Id.* ¶ 5.

Although IOE is a wholly-owned subsidiary of Sportingbet Plc, it is formally and actually separate from Sportingbet. The two companies have entirely distinct boards of directors, *i.e.*, no individual serves on both boards. *Id.* ¶ 7.

The Baseball and Football Lotteries

The basic games at issue in this case are simple: both Rotoplay and Sportsbook.com offer games in which contestants select professional athletes from among a list of athletes based on the contestants’ predictions about how the athletes will perform in their games each week. The athletes are assigned “points” based on their performance in the games of the week. For example, every time a football player scores a receiving touchdown, he is assigned six points. Necessarily, each game also includes “tiebreakers,” to be used if players end up with the same number of points.

Rotoplay obtained copyright registrations for aspects of its online football and baseball games. Specifically, it obtained separate registrations for the “rules,” “scoring system,” and HTML code for its football lottery. Compl. Exs. E, F, G. Oddly, the works that Rotoplay submitted to the Copyright Office to be registered for the “rules” and “scoring system,” though ostensibly distinct, are almost completely identical. *Compare* Compl. Exs. F & G (attached hereto as Exs. 3 & 4 respectively). The only difference is that the “rules” contain an additional “Welcome to Rotoplay” page at the front describing Rotoplay’s “Touchdown Challenge” and the “Football Lottery.” The HTML code that Rotoplay registered with the Copyright Office, in turn, consists of more than 40 pages of code presumably related to all aspects of its online football game, although Rotoplay asserts infringement of only two pages of the code. *Compare* Compl. Ex. E (Rotoplay HTML code) (not attached to this Memorandum due to its size) *with* Compl. Ex. I (attached hereto as Ex. 5).

Rotoplay obtained similar registrations for its baseball game. Compl. Exs. B, C, D.

The registrations are for the entirety of Rotoplay’s expression of the football and baseball games. As is apparent from the exhibits, and as discussed below, the vast majority of the material that Rotoplay has registered with the Copyright Office is not at issue in this case. For example, with respect to the football contests, Rotoplay alleges only that (a 2003 version of) the Sportsbook.com football game copied a small portion of Rotoplay’s football game scoring rules.

The Alleged Infringement

The Baseball Game

During the regular season, Sportsbook.com offers a contest based on the performance of Major League Baseball players. *See* www.sportsbook.com/contest/baseball2005.php. Rotoplay does not -- and could not -- allege that the current contest infringes its contest. *Compare* Compl.

Exs. C, D (attached hereto as Exs. 6 & 7) *with* www.sportsbook.com/contest/baseball2005.php (attached hereto, together with the rules available through that site, at Ex. 8). Instead, Rotoplay alleges, “[u]pon information and belief,” that Sportsbook once “*offered* a baseball game that had rules and scoring system that *were* identical to Rotoplay’s Baseball Lottery Rules and Baseball Lottery Scoring system.” Compl. ¶ 26 (emphasis added). In fact, the rules of the Sportsbook baseball game have been the same since the game was launched in April 2004. *See* Dolan Decl. ¶ 4. Accordingly, Rotoplay cannot state a claim over Sportsbook.com’s fantasy baseball game.

Only a Small Portion of the Sportsbook.com Football Game Is Alleged to Infringe

Plaintiff’s core allegation is that the Sportsbook.com football game uses “rules that are identical to those covered by Rotoplay’s Football Lottery Rules” (which are part of the work registered as TX 6-146-717, Compl. Ex. F), and a “scoring system that is identical to that covered by Rotoplay’s Football Lottery Scoring System” (which is part of the work registered as TX 6-146-718, Compl. Ex. G). Compl. ¶¶ 23-24.

Importantly, however, the Complaint does not, and could not, allege that the Sportsbook.com football game is, in its entirety, infringing. A review of the Exhibits to the Complaint reveals that only a portion of the Sportsbook.com game is at issue and that plaintiff does not allege infringement of many other aspects of the Rotoplay game. *Compare* Compl. Exs. F & G (attached hereto as Exs. 3 & 4) *with* Ex. H (attached hereto as Ex. 9). Indeed, contrary to the allegations of the Complaint, the material that is *not* at issue, and that is manifestly *not* similar to the material in the Rotoplay relates *directly to the rules of the Sportsbook game*. An examination of the Rotoplay game reveals how few similarities there are between Rotoplay’s copyrighted materials and the Sportsbook game:

- Nothing on the first page of the “Football Lottery Rules” work (Compl. Ex. F) is at issue in this case. That page consists entirely of a general description of two Rotoplay games: Its “Touchdown Challenge” and its “Football Lottery.”

- Nothing on the entire second page of the “Football Lottery Rules” work, or on the entire first page of the “Scoring System” work (Compl. Ex. G), is at issue in this case either. (Those two pages are identical.) Importantly, *this is the page that describes the game*. In other words, these are the *rules* of the game, the expression of which Rotoplay asserts to be infringed. But it is apparent from a simple comparison of the Rotoplay and Sportsbook games (Compl. Ex. H) that they are fundamentally dissimilar. Consider the following:

1. Introductory text and basic outline of the rules: Both games include explanatory opening paragraphs describing the basic rules and object of the contests. But those explanations are completely different from each other.

The opening paragraph for the Rotoplay game is reprinted here (Compl. Exs. F, G):

RotoPlay's Football Lottery is a unique and exciting game to play for the fantasy football season. The game works exactly like a numbered style lottery, except players are selected instead of numbers. For each contest we'll select 54 NFL players to participate in our lottery style game. You select the six players who you feel will be the top scoring performers for the contest, based on the RotoPlay scoring system. Any participant who correctly selects the top 6 players, in order, wins the Grand Prize of \$100,000! Great prizes are also awarded for correctly selecting 4, 5, or 6 (in any order) of the players who finish among the top six for each contest.

The analogous introductory text on the Sportsbook.com game (Compl. Ex. H) is completely different:

Win big cash prizes with our weekly contest. Its very simple, all you have to do is Pick 6 players from our list of NFL Players for the week. Each player will be assigned a fantasy scoring value based on how well he performs for the week. The goal is to have the players with the highest performance ranking.

At the end of the weekend, the NFL players will be ranked based on their performance, the contestant with the highest ranking set of players wins!

These differ not only in expression, but in the basic concepts expressed.

2. Cost of the game: The next part of the Rotoplay rules (Compl. Exs. F, G) relates to the cost to subscribers:



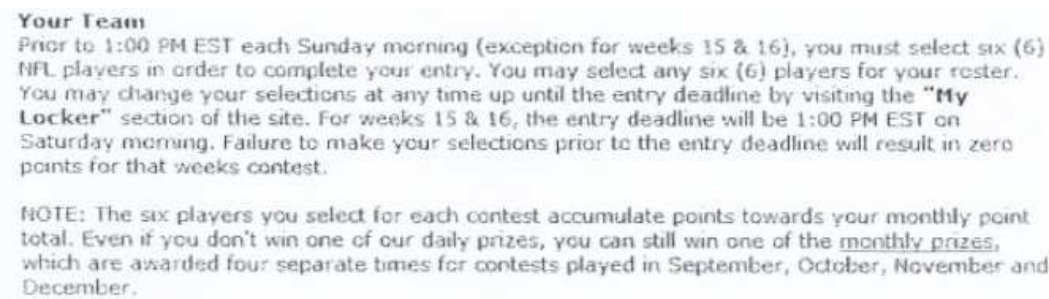
Cost

- \$9.95/season. Allows you to submit one (1) entry per contest the entire 17-week NFL regular season
- \$19.95/season. Allows you to submit three (3) entries per contest the entire 17-week NFL regular season
- Pay only once and play the entire season!

Mid-Season Discount - 50% Off Sale! We've reached the midpoint of the season. Now through December, enjoy this exciting game for only \$4.95 (1 entry per contest) or \$9.95 (3 entries per contest). Get in on the action today!

This aspect of the Rotoplay rules has no analogue in the Sportsbook.com game because the Sportsbook.com game is free.

3. Additional details to the rules: The Rotoplay game includes the following additional glosses and nuances to the Rotoplay rules of play (Compl. Exs. F, G):



Your Team
Prior to 1:00 PM EST each Sunday morning (exception for weeks 15 & 16), you must select six (6) NFL players in order to complete your entry. You may select any six (6) players for your roster. You may change your selections at any time up until the entry deadline by visiting the "My Locker" section of the site. For weeks 15 & 16, the entry deadline will be 1:00 PM EST on Saturday morning. Failure to make your selections prior to the entry deadline will result in zero points for that weeks contest.

NOTE: The six players you select for each contest accumulate points towards your monthly point total. Even if you don't win one of our daily prizes, you can still win one of the monthly prizes, which are awarded four separate times for contests played in September, October, November and December.

Again, these rules have *no analogue whatsoever* in the Sportsbook rules.

As set forth above, these three fundamental elements of the Rotoplay rules and scoring system comprise an entire page of the registered works, and are *nowhere even represented* in the Sportsbook work.

At the same time, the Sportsbook game (Compl. Ex. H) is filled with content that appears nowhere in the Rotoplay game. For example:

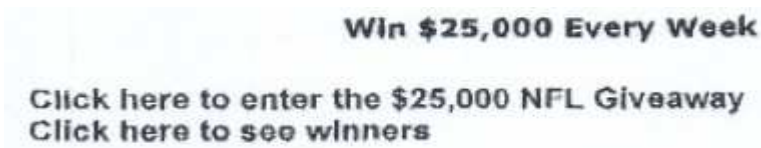
- The Sportsbook.com logo and graphic appears prominently at the top of the page:



- The next graphic is cartoon-style text announcing the “\$25K Weekly Giveaway”:



- Below that is text reading, “Win \$25,000 Every Week,” “Click here to enter the \$25,000 NFL Giveaway”:



- And none of the text on the rest of the page, all the way down to the heading “Scoring System” is similar, much less substantially similar or identical, to any portion of the copyrighted Rotoplay works.

As these excerpts show, the allegations of the Complaint are thus contradicted by the attachments to the Complaint, because the rules to the two games are not “identical,” but are fundamentally different in crucial respects. The chart below summarizes the key differences between the rules of the two games:

	Rotoplay	Sportsbook
Winning: The two games have completely different rules governing who wins.	<p>“Any participant who correctly selects the top 6 players in order wins the grand prize.”</p> <p>“Great prizes are also awarded for correctly selecting 4, 5, or 6 (in any order) of the players who finish among the top six for each contest”</p>	<p>“At the end of the weekend, the NFL players will be ranked based on their performance, the contestant with the highest ranking set of players wins!”</p> <p>“If you choose the top 6 best performing NFL players out of the 54 listed, you win the grand cash prize of \$25,000. All you have to do is pick the 6 players who outperform all the other 48 and you win the \$25,000 grand prize”</p>
Prizes: The games feature dramatically different prize amounts	<p>\$100,000 grand prize for selecting and correctly ranking <i>all six players</i></p> <p>Prizes ranging from \$10 to \$5000 for correctly selecting 4, 5, or 6 of the players</p>	<p>Awards of \$3,500, \$1,500, and \$500 for 1st, 2nd, and 3rd place</p> <p>Award of \$25,000 for the grand prize</p>
Guarantee of at least some winners	Contestants win only if they pick the right players	There are always at least three winners
Parallel Scoring	Rotoplay allows users to collect a “monthly point total” which may generate other prizes	Sportsbook does not do this

In short, the ultimate rules about who wins, the articulation of the rules, the prizes, and other aspects at the core of the games’ operation are completely different between the Rotoplay and Sportsbook games. The exhibits to the Complaint thus show that Rotoplay’s core assertion - that Sportsbook copied the Rotoplay rules in their entirety -- is incorrect.

Instead, the only aspect of the Rotoplay game that is alleged to be copied is the simple, basic expression of the points that are assigned for each achievement on the field -- that is, “the

scoring system” -- the essence of which is reprinted here:

Offensive Players
• Each passing touchdown = 4 Points
• Each rushing touchdown = 6 Points
• Each receiving touchdown = 6 Points
• Each pass completion = 1 Point
• Each rushing carry = 1 Point
• Each reception = 3 Points
• Passing yards divided by 25 (example: 250 yards passing / 25 = 10 Points)
• Rushing yards divided by 10 (example: 85 yards rushing / 10 = 8.5 Points)
• Receiving yards divided by 10 (example: 125 yards receiving / 10 = 12.5 Points)
• Each passing two-point conversion = 2 Points
• Each rushing two-point conversion = 2 Points
• Each receiving two-point conversion = 2 Points
• Bonus points for 300 or more yards passing = 5 Points
• Bonus points for 100 or more yards rushing = 5 Points
• Bonus points for 100 or more yards receiving = 15 Points
Kickers
• Each extra point = 1 Point
• Each field goal between 1-29 yards = 10 Points
• Each field goal between 30-39 yards = 15 Points
• Each field goal between 40-49 yards = 20 Points
• Each field goal from 50+ yards = 25 Points

Compl. Exs. F & G. This scoring system, as well as the tiebreaker and examples reflected in Exhibits F and G to the Complaint, is what Rotoplay claims was infringed.

The Allegedly Infringing HTML Code Consists Entirely of the Text of the Rules

Although the plaintiff obtained registration for more than 40 pages of HTML code (Compl. Ex. E), the plaintiff asserts that only *two pages* of HTML code are infringing (Compl. Ex. D). The allegedly infringing HTML simply consists of the code that causes the scoring rules to be displayed on a website; there is no genuine “programming code” at issue here.

ARGUMENT

I. THE COURT LACKS PERSONAL JURISDICTION OVER SPORTINGBET PLC

The Court should dismiss this case for lack of personal jurisdiction over the sole defendant, Sportingbet Plc. The prerequisites for the assertion of personal jurisdiction over a non-resident defendant are well established:

[T]o exercise personal jurisdiction over a defendant, a federal court sitting in diversity must undertake a two-step inquiry. First, the court must apply the relevant state long-arm statute to see if it permits the exercise of personal jurisdiction; then, the court must apply the precepts of the Due Process Clause of the Constitution.

IMO Indus. v. Kiekert AG, 155 F.3d 254, 258-59 (3d Cir. 1998). Because Pennsylvania’s long-arm statute, 42 Pa. Cons. Stat. Ann. § 5322(b), extends to the limits of what the Due Process clause permits, *Mellon Bank (East) PSFS, Nat’l Ass’n v. Farino*, 960 F.2d 1217, 1221 (3d Cir. 1992), this inquiry is collapsed into a single step. *Id.*

“The constitutional touchstone of due process analysis is ‘whether the defendant purposefully established ‘minimum contacts’ in the forum.’” *BP Chemicals Ltd. v. Formosa Chemical & Fibre Corp.*, 229 F.3d 254, 259 (3d Cir. 2000) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474, (1985)). “In order to be subject to personal jurisdiction, a defendant’s conduct in connection with the forum state must be such that he may ‘reasonably anticipate being haled into court there.’” *See General Elec. Co. v. Deutz AG*, 270 F.3d 144, 150 (3d Cir. 2001) (quoting *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 297 (1980)).

While, in the context of a motion to dismiss, the allegations of the complaint are taken as true, the plaintiff nonetheless bears the burden of establishing the facts upon which this Court may properly exercise jurisdiction over defendant. *See General Elec.*, 270 F.3d at 150 (“Once it is challenged, the burden rests upon the plaintiff to establish personal jurisdiction.”) (citation omitted); *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1302 (3d Cir. 1996) (“once a defendant has raised a jurisdictional defense, a plaintiff bears the burden of proving . . . that jurisdiction is proper.”) (citations omitted). Thus, the plaintiff must demonstrate, with reasonable particularity, sufficient contacts between the defendant and the forum state. *See Mellon Bank*, 960 F.2d at 1223; *Stevens v. Meaut*, 264 F. Supp. 2d 226, 229 (E.D. Pa. 2003). Actual proof is required: the “plaintiff must respond with actual proofs, not mere allegations.” *Giusto*, 994 F. Supp. at 590

(“In this circuit, a plaintiff may not rest upon the bare allegations of his or her pleadings in defending against a motion to dismiss brought pursuant to Rule 12(b)(2).”) (quoting *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 67 n.9 (3d Cir. 1984)).

Sportingbet Plc has *no* contacts with this forum, much less the minimum contacts that would warrant a finding of personal jurisdiction. Sportingbet Plc conducts no business within the state of Pennsylvania. Talisman Decl. ¶ 9. Rather, as explained above, Sportingbet Plc is merely a holding company, the primary purpose of which is to own shares of its subsidiary trading companies and to have its own shares traded on the Alternative Investment Market of the London Stock Exchange. *Id.* ¶ 4. Indeed, Sportingbet Plc is not licensed to engage in the businesses in which its subsidiary trading companies are engaged. *Id.* ¶ 5. Nor does it have any employees to operate such businesses. *Id.* ¶ 1, 5, 6.

Thus, the *only* connection between Sportingbet Plc and this case is the defendant’s role as a holding company. But it is well established that the mere existence of a parent-subsidary relationship does not confer personal jurisdiction over the parent based on a subsidiary’s contacts. *See Gallagher v. Mazda Motor of Am., Inc.*, 781 F. Supp. 1079, 1083 (E.D. Pa. 1992) (“the bare parent/subsidiary relationship does not allow a court to impute the jurisdictional contacts of the subsidiary to the parent”). There is thus no basis for personal jurisdiction as to Sportingbet, and the Complaint should be dismissed pursuant to Rule 12(b)(2).

II. PLAINTIFF DOES NOT AND CANNOT STATE A CLAIM FOR INFRINGEMENT OF ITS FANTASY BASEBALL GAME

The plaintiff does not allege that the version of the baseball game that is now available at www.sportsbook.com is infringing.^{3/} Rather, the plaintiff alleges that, “[u]pon information and

^{3/} Resolution of this aspect of the motion depends on facts outside of the Complaint, and as a result, this aspect of the motion is brought pursuant to Fed. R. Civ. P. 56.

belief,” Sportsbook.com *once* “offered a baseball game that had rules and scoring system that *were* identical” to Rotoplay’s baseball game. Compl. ¶ 26 (emphasis added). The plaintiff does not attach a copy of this allegedly infringing (past) game. Nor could it, because there is no such earlier version: the baseball contest now available on Sportsbook.com is in all pertinent respects identical to the game first launched in April 2004. Dolan Decl. ¶ 4. Because the plaintiff does not (and could not) assert that the *current* game is infringing, it necessarily follows that the same game (in the past) did not infringe. Thus, the allegation that Sportsbook.com infringed Rotoplay’s baseball game must be dismissed.

III. THE ALLEGED COPYING OF THE “SCORING SYSTEM” DOES NOT CONSTITUTE COPYRIGHT INFRINGEMENT

The plaintiff’s core complaint is that Sportsbook.com decided to offer a football lottery in competition with Rotoplay. Of course, the plaintiff cannot assert a copyright in the *idea* of a fantasy football contest even assuming, as the plaintiff alleges (Compl. ¶ 8), that its game was “unique in the marketplace” at the time it was launched. *See* 17 U.S.C. § 102(b) (“In no case does copyright protection for an original work of authorship extend to any idea . . . explained, illustrated, or embodied in such a work.”). It is black letter law that “business ideas, such as a game concept, cannot be copyrighted.” *Anti-Monopoly, Inc. v. General Mills Fun Group*, 611 F.2d 296, 300 n.1 (9th Cir. 1979). Thus, “copyright protection does not encompass games as such, since they consist of abstract rules and play ideas.” *Midway Mfg. Co. v. Bandai-America, Inc.*, 546 F.Supp. 125, 148 (D.N.J. 1982) (citation omitted). Accordingly, the plaintiff cannot enjoy copyright protection in the idea of a “fantasy football” style contest.

Nor can plaintiff assert copyright protection for the basic rules of the game. Because copyright protection does not extend to the system described in the copyrighted work, *see Baker v. Selden*, 101 U.S. 99 (1879), courts have concluded that the copyright law does not allow a

plaintiff to obtain the exclusive right to the rules of a game, *see Morrissey v. Procter & Gamble Co.*, 379 F.2d 675, 678 (1st Cir. 1967) (“the substance of the contest was not copyrightable”); Nimmer on Copyright § 2.18[H][3][a] (2005) (“no copyright may be obtained in the system or manner of playing a game or in engaging in any other sporting or like activity”).

When the rules of a game are sufficiently simple that there is only a limited number of ways to express them, a copyright claim may not be brought even when those rules are copied word for word. Because an idea may not be subject to copyright protection, when the expression of the idea and the idea itself are nearly inseparable, the copyright owner cannot bring a claim based on the copying of the expression. *See Kay Berry, Inc. v. Taylor Gifts, Inc.*, 421 F.3d 199, 209 (3d Cir. 2005) (“In some instances, there may come a point when an author’s expression becomes indistinguishable from the idea he seeks to convey, such that the two merge.”).^{4/} Under this so-called “merger doctrine,” the expression merges with the idea and the copying of the expression cannot be the basis for a copyright infringement claim. *Id.*

As courts have recognized, the “doctrine of merger is *particularly applicable* with respect to games ‘since they consist of abstract rules and play ideas.’” *Allen v. Academic Games League of America, Inc.*, 89 F.3d 614, 617 (9th Cir. 1996) (quoting *Midway Mfg. Co. v. Bandai-America, Inc.*, 546 F. Supp. 125, 148 (D.N.J. 1982)). Likewise, courts have recognized that the merger doctrine is significant in contests, “where most subsequent expressions of an idea of a rule are *likely to appear similar* to the words of a related rule.” *Id.* (emphasis added). Accordingly, the copying of simple rules largely dictated by functional considerations may not be the basis for a copyright infringement claim. In *Morrissey*, 379 F.2d 675, for example, the defendant had

^{4/} In *Kay Berry*, the Third Circuit found that the idea and the expression in a much more creative work -- a sculpture featuring a poem -- did not merge. 421 F.3d at 209.

allegedly copied, nearly word for word, a sweepstakes rule. As in this case, the rule at issue explained the simple rules for a contest. *Id.* at 678. Indeed, in *Morrissey*, the rule itself had multiple components and consisted principally of grammatically complete sentences, thus revealing even more original authorship than the simple listing of points that is the core of the allegedly infringed text here. *Id.*

Even though the contest rule was, on its own terms, sufficiently expressive to warrant protection, the First Circuit nonetheless refused to extend copyright protection to the rule on the ground that it was virtually inseparable from the underlying concept of the contest. *Id.* As the First Circuit explained, when “the uncopyrightable subject matter is very narrow,” and there are only “a limited number” of ways to express the concept, “to permit copyrighting would mean that a party or parties, by copyrighting a mere handful of forms, could exhaust all possibilities of future use of the substance.” *Id.* In those circumstances, the plaintiff may not sue over the similarities between his work and the defendant’s “*even if his particular expression was deliberately adopted.*” *Id.* at 679 (emphasis added).^{5/}

The same is true here. *First*, as set forth above, this is not a case where every word of the Rotoplay rules was adopted. To the contrary, the *only* aspects that are identical are the simple expression of the functional “scoring system.” The description of the rules, the prizes, the introductory material, and the graphics are completely different.

Second, the allegedly infringing component of the scoring system consists entirely of a list of points assigned to activities performed in a football game. But the selection of the

^{5/} Even assuming it was technically *possible* to word the game slightly differently, a finding of infringement is nonetheless inappropriate in these circumstances. It does not matter that there are other “possible forms” of expressing the simple idea: “It cannot be only the last form of expression which is to be condemned.” 379 F.2d at 679.

activities or the assignment of points is not copyrightable, because those activities flow directly from the nature of a fantasy football game: they include touchdowns, pass completions, two-point conversions, field goals, and other football-related activities, and are described by their commonly understood terms. As such, the selection of these concepts falls squarely within the doctrine of *scenes a faire* in copyright law. Under that doctrine, copyright protection is denied “to those expressions of idea that are standard, stock, or common to a particular topic, or that necessarily follow from common theme or setting.” *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 9 F.3d 823, 838 (10th Cir. 1993) (emphasis added); see *Dun & Bradstreet Software Services, Inc. v. Grace Consulting, Inc.*, 307 F.3d 197, 214 (3d Cir. 2002) (explaining doctrine, though finding it inapplicable on the facts presented).

Likewise, the mere assignment of points to these stock football events is at the core of the concept of a fantasy football contest. That idea may not be copyrighted. Nor may the specific points values assigned to each activity be deemed the subject of copyright protection. To begin with, many of the point values are directly related to the point values of those accomplishments in the actual football game: for example, players are assigned six points for receiving touchdowns, two points for two-point conversions, and one point for a point after touchdown. Compl. Exs. A, F, G. But even the arbitrary assignment of point values is not entitled to a broad copyright, because otherwise one company could gain a monopoly on the small range of different point values simply by copyrighting them all. See 17 U.S.C. § 102(b) (no copyright protection for “idea” or “system”).

Finally, the expression of the point system chosen by Rotoplay is extremely basic and uncreative. Rotoplay simply used short descriptive phrases that are nothing more than equations: “Each rushing touchdown = 6 points”; “Each rushing two point conversion = 2 points”; “Each

extra point = 1 point.” There is nothing artistic, poetic, or otherwise creative about Rotoplay’s expression of these simple ideas. Instead, Rotoplay presented the assignment of the points in their most elemental, abstract form, and it cannot complain that the abstract expression of the system was (briefly) used in another company’s game.

Nor can Rotoplay assert copyright protection in the tiebreakers. It is, of course, necessary for a game based on the assignment of points to include some means of breaking a tie. And the means that Rotoplay chose for breaking ties in its game flow logically and naturally from the use of a fantasy football game: first, the “Player’s team who scores the most points” wins; next, the “player’s team who holds their opponent to the least amount of points” wins; third, the “player’s team who has the best record after those days games” wins; and if there is still a tie, “a random drawing will determine which player finishes higher in the top 6.”

These are among the few logical ways to create a tiebreaker for a fantasy football game. The plaintiff clearly cannot copyright the idea of a tiebreaker, or the use of those three concepts as tiebreakers, and there are only a limited number of ways to express these simple tiebreaking mechanisms.^{6/} Thus, under the principle expressed in *Morrissey*, there is an essential limit on the copyrightability of these “simple and straightforward” game rules.

In short, if the plaintiff could obtain a copyright in its particular, simple expression of the rules of its football game, then it could, with the publication of a few variations on its simple form, obtain a monopoly on the concept of the game itself. The copied elements are only a small

^{6/} The football rule’s “example” consists of two sentences describing the operation of the first tie-breaker. The short pair of sentences plainly describes the operation of the first tie breaker, and there are only so many ways to do so. The only aspect of that short pair of sentences that does not obviously flow from the first tiebreaker itself is the choice of two particular players (Michael Vick and Peyton Manning) to illustrate the game, but that is *de minimis*.

part of the total Sportsbook game, and they are also so simple as to have few other means of being expressed. In these circumstances, the plaintiff's copyright infringement claim should be dismissed.⁷¹

IV. PLAINTIFF'S STATE LAW CLAIMS ARE PREEMPTED BY FEDERAL LAW

Rotoplay's state law claims of conversion and unfair competition are preempted by the Copyright Act. Section 301(a) of the Copyright Act broadly preempts all state law causes of action where: "(1) the subject matter of the state law claim falls within the subject matter of the copyright laws, and (2) the asserted state law right is equivalent to the exclusive right that federal law protects." *Curtins v. Star Editorial, Inc.*, 2 F. Supp. 2d 670, 674 (E.D. Pa. 1998); *see also Sullivan Assoc., Inc. v. Dellots, Inc.*, No. Civ. A.97-5457, 1997 WL 778976, at *3 (E.D. Pa. Dec. 17, 1997); *Long v. Quality Computers & Applications, Inc.*, 860 F. Supp. 191, 196 (M.D. Pa. 1994). Rotoplay's conversion and unfair competition claims plainly meet the requirements of Section 301(a) and are therefore preempted by the Copyright Act.

First, Rotoplay's works as a whole fall within the subject matter of copyright laws because they are "works of authorship" fixed in a "tangible medium of expression" within the scope of Section 102 of the Copyright Act. *Second*, as set forth in more detail below, Rotoplay's conversion and unfair competition claims turn on the protection of rights that are equivalent to

⁷¹ Rotoplay asserts that Sportingbet infringed its copyright in the HTML Code associated with the Rotoplay games. The infringing code to which Sportingbet points is only a tiny proportion -- approximately 5% -- of the registered code, which consists of 45 pages, and is simply the code that enables the display of the scoring rules on the Sportsbook website. As can be seen from Exhibits E and I to the Complaint, the only "infringing" portions of the HTML code are the text that is reflected in the code itself. Thus, the HTML code would be infringing only if the underlying text (the scoring system) were infringing -- which it is not. Notably, Rotoplay does not and could not allege that the actual *computer code* used to implement the games is identical, or even similar.

the exclusive rights protected by the Copyright Act. “A state law right is ‘equivalent to copyright’ if that right is infringed by the mere act of reproduction, performance, distribution or display.” *Sullivan*, 1997 WL 778976, at *3 (citation omitted). In other words, “where the right created by state law may be abridged by an act which standing alone would infringe on one of the section 106 rights, that state law is preempted.” *WEF Basel, A.G. v. Regional Financial Assocs., Inc.*, Civ. A. No. 92-1436, 1992 WL 114957, at *2 (E.D. Pa. May 20, 1992) (citing *Harper & Row Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 200 (2d Cir. 1983)). By contrast, “where the state law requires an act which incorporates elements beyond those which would establish a section 106 infringement, then there is no preemption.” *Id.* And this Court has made clear that “[s]imply pleading additional elements will not prevent preemption,” but the state law claim “must be based upon ‘qualitatively different’ conduct as compared to the copyright violations.” *Id.* Rotoplay’s conversion and unfair competition claims are virtually identical to claims arising out of copyright and should therefore be dismissed.

A. The Copyright Act Squarely Bars Conversion Claims Based on Allegedly Improper “Copying”

Rotoplay’s claim of conversion is preempted by the Copyright Act. A claim of conversion might survive “if the plaintiff can prove the extra element that the defendant unlawfully retained the *physical object* embodying the plaintiff’s work.” *Sullivan*, 1997 WL 778976, at *5 (quoting *United States v. Board of Trustees of the Univ. of Alabama*, 104 F.3d 1453, 1463 (4th Cir. 1997) (emphasis added)). However, a claim of conversion *will* be preempted when the harm asserted by the plaintiff amounts to nothing more than a claim arising out of the defendant’s use of a copyright. *See Sullivan*, 1997 WL 778976, at *5; *Gemel Precision Tool Co. v. Pharma Corp.*, 35 U.S.P.Q. 2d 1019, 1024 (E.D. Pa. Mar. 10, 1995); *see also* Nimmer on Copyright § 1.01[B][1][i] (“an action for conversion will lie only for wrongful

possession of the tangible embodiment of a work . . . whereas a copyright action must be brought for wrongful use of the intangible artistic property . . . contained therein”); *Peirson v. Clemens, Inc. & Southridge Inc.*, No. Civ. A.03-1145 JJF, 2005 WL 681309 (D. Del. Mar. 23, 2005).

In *Sullivan*, the plaintiff alleged that the defendants had committed conversion by possessing the plaintiff’s engineering plans and drawings and “us[ing] [the] plans and drawings to develop, construct, and market” a subdivision. 1997 WL 778976, at *5. Even though the defendants *did* have possession of the physical plans and drawings, the court found that the conversion claim was preempted. The court reasoned that the crux of the claim did not turn on the defendant’s wrongful possession of the plans and drawings, but rather on the “defendants’ use of [the] materials to create strikingly similar plans and drawings, to distribute these plans and drawings, and to create derivative works based on them” -- all of which are “identical” to the exclusive rights granted by Section 106. *Id.* (internal citation omitted). And other courts have not hesitated to find conversion claims preempted in similar circumstances -- when the gravamen of the complaint is identical to one or more of the exclusive rights under Section 106. *See, e.g., Gemel*, 35 U.S.P.Q. at 1024-25 (finding conversion claim preempted when plaintiff complained that by “gain[ing] possession of . . . copies of plaintiff’s copyrighted works” and “us[ing] the converted materials to ‘design and manufacture an identical copy or ‘derivative copy’ of” a machine because it was “identical” to a claim arising out of copyright); *U.S. ex rel. Berge v. Bd. Of Trustees of the Univ. of Alabama*, 104 F.3d 1453, 1463 (4th Cir. 1997).

Similarly, Rotoplay does not allege, as it could not, that Sportingbet is in wrongful physical possession of its property, but rather alleges that Sportingbet has wrongfully *used* its “property” by “cop[y]ing, reproduc[ing] and distribut[ing] the online fantasy sports contests and thus depriv[ing] [Rotoplay] of its right to exclusively own and possess the works.” Compl. ¶ 44.

As such, Rotoplay's conversion claim arises out of the exclusive rights granted to Rotoplay, under Section 106 of the Act, to reproduce copies, create derivative works, and distribute the contests. And in any event, Rotoplay fails to state a claim for conversion because the rights with which it claims that Sportingbet has interfered are not chattels capable of conversion.^{8/}

B. The Plaintiff's "Unfair Competition" Claim is a Disguised Copyright Claim

Plaintiff's so-called "unfair competition" claim is also a copyright claim by a different name. As this Court has explained, common-law unfair competition claims are preempted when they are premised on an allegation that the defendant copied the plaintiff's work and offered it as the defendant's own. *See Fundamental Too, Ltd. v. Universal Music Group, Inc.*, 1997 WL 381608, at *5-6, 43 U.S.P.Q. 2d 1595 (E.D. Pa. 1997). A leading commentator on copyright law explained the distinction between real passing off claims and disguised copyright claims such as the plaintiff's "unfair competition" claim as follows:

If A claims that B is selling B's products and representing to the public that they are A's, that is passing off. ***If, by contrast, B is selling B's products and representing to the public that they are B's, that is not passing off.*** A claim that the latter activity is actionable because B's product replicates A's, even if denominated "passing off," is in fact a disguised copyright infringement claim, and hence pre-empted.

Nimmer on Copyright § 101[B][1][e] (emphasis added); *see also Fundamental Too, Ltd.*, 1997 WL 381608, at *6 (paraphrasing this excerpt). As this Court noted in *Fundamental Too*, it is

^{8/} Under Pennsylvania law, "only tangible property, or intangible property rights which have merged with, or are otherwise connected to, a document, are subject to conversion." *DIRECTV, Inc. v. Kitzmiller*, No. Civ. A.03-3296, 2004 WL 692230, at *5 (E.D. Pa. 2004); *see also Famology.com, Inc. v. Perot Sys. Corp.*, 158 F. Supp. 2d 589, 591 (E.D. Pa. 2001) (dismissing conversion claim for misappropriation of internet domain names because such domains do not constitute tangible property); *Regent Nat'l Bank v. K-C Ins. Premium Fin. Co.*, No. Civ. A.96-8615, 1997 WL 710945 (E.D. Pa. Nov. 13, 1997) (dismissing claim for conversion of name, good will, and reputation on the ground that such rights do not constitute tangible property).

irrelevant that the plaintiff in this case alleges “passing off”; if the allegation of passing off is based on “unauthorized copying,” the claim is barred. *Id.*

Here, the plaintiff alleges that defendant simply copied the lottery games. The plaintiff does not (and could not) allege that defendant tells the public that it did so with the plaintiff’s permission. Indeed, as the exhibits to the Complaint reveal, the Sportsbook website is filled with Sportsbook’s *own* logos and trademarks and mentions Rotoplay nowhere. Because the plaintiff’s claim “is grounded in [Sportingbet’s] allegedly unauthorized copying and use” of the games, and not in any passing off in the traditional sense, the claim is “a disguised copyright infringement claim, and hence preempted.” *Fundamental*, 1997 WL 381608, at *6.

C. State Law May Not Protect Unprotectable “Ideas”

Conversion and unfair competition may not be used to prohibit the copying of an unpatented idea. As the United States Supreme Court has made clear, where an idea is “unpatented and uncopyrighted,” state law may not be used to “prohibit the copying of the [idea] itself or award damages for such copying.” *See Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 232-33 (1964); *see also Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237-38 (1964); *Permagrain Prods., Inc. v. U.S. Mat & Rubber Co.*, 489 F. Supp. 108, 112 (E.D. Pa. 1980) (“A product which does not fall within the scope of a patent can be copied by a competitor.”). To prohibit copying in such a circumstance “would interfere with the federal policy . . . allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.” *Compco*, 376 U.S. at 237; *SK&F Co. v. Premo Pharm. Lab., Inc.*, 625 F.2d 1055, 1064 (3d Cir. 1980) (to “impose liability upon a competitor for copying an unpatented product and thereby grant a perpetual state-protected design patent”). Accordingly, Rotoplay may not use conversion or unfair competition to circumvent this federal policy.

V. PLAINTIFF’S DEMAND FOR STATUTORY DAMAGES AND ATTORNEYS’ FEES MUST BE DISMISSED

Rotoplay’s demand for statutory damages and attorney’s fees (Compl. at 9-11) must be dismissed because that demand is barred by the express language of the Copyright Act. Under Section 412 of the Act, where a plaintiff alleges infringement of a published work, “*no award of statutory damages or of attorney’s fees*, as provided for by sections 504 and 505, shall be made for . . . any infringement of copyright commenced after first publication of the work and before the effective date of its registration, unless such registration is made within three months after the first publication of the work.” 47 U.S.C. § 412 (emphasis added). Accordingly, “the Act prohibits any award of statutory damages for any copyright infringement commenced after a work is published but before the ‘effective date of its registration.’” *See Schiffer Publishing, Ltd. v. Chronicle Books, LLC*, No. Civ. A.03-4962, 2005 WL 67077, at *3 (E.D. Pa. Jan. 11, 2005). Section 412’s prohibition extends both to acts of infringement that occur before the date of registration and to acts of infringement that occur afterwards. Nimmer on Copyright § 7.16[C][1] (“[I]f the infringement on which the suit is based commenced prior to registration . . . , the enhanced damages should be barred even if the infringement continues past the date of registration.”); *see also, e.g., Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 609 F. Supp. 1325, 1331 (E.D. Pa. 1985); *Tannock v. Review Trading Corp., Inc.*, 231 U.S.P.Q. 798, 800-01 (D.N.J. 1986); *accord Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 144 (5th Cir. 1992) (“a plaintiff may not recover an award of statutory damages and attorney’s fees for infringements that commenced after registration if the same defendant commenced an infringement of the same work prior to the registration”).

Based on the allegations and exhibits to the Complaint, Rotoplay’s claims of infringement fall squarely within Section 412’s bar on statutory damages and attorney’s fees.

First, Sportingbet Plc allegedly commenced copyright infringement of Rotoplay's works in "late 2003," long *after* first publication of the Rotoplay contests on August 31, 2001, and long *before* Rotoplay's registration of those contests on May 25, 2005. Compl. ¶ 21 & Exs. B, C, D, E, F, G. *Second*, Rotoplay did *not* register the contests within three months of their first publication, but rather waited over three and a half years after first publication to register them. Accordingly, because the alleged infringement occurred after first publication and before registration, and because Rotoplay failed to register within three months of the first publication of the work, Rotoplay is barred from recovering statutory damages or attorney's fees under the plain language of the Copyright Act.

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed with prejudice.

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