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Nat'l Comm'n for the Certification of Crane Operators v. Nationwide Equip. Training

United States District Court for the Southern District of Alabama, Southern Division

November 24, 2020, Decided; November 24, 2020, Filed

CIVIL ACTION NO. 1:20-cv-483-TFM-M

Reporter

2020 U.S. Dist. LEXIS 239754 *; 2020 WL 7389769

NATIONAL COMMISSION FOR THE CERTIFICATION OF CRANE OPERATORS, INC., Plaintiff, vs. NATIONWIDE EQUIPMENT TRAINING, LLC, et al., Defendants.

Core Terms

questions, examinations, certification, Nationwide, preliminary injunction, registered, verbatim, exam, candidates, training, alleges, assisting, infringed, participating, injunction, copyright infringement, twenty-six, comprises, selling, copyrighted work, online, evidentiary hearing, crane operator, fair use, accreditation, confidential, advertising, displaying, offering, teaching

Counsel: [*1] For National Commission for the Certification of Crane Operators Inc., Plaintiff: Danny J. Collier Jr., LEAD ATTORNEY, Luther Collier Hodges & Cash LLP, Mobile, AL.

Judges: TERRY F. MOORER, UNITED STATES DISTRICT JUDGE.

Opinion by: TERRY F. MOORER

Opinion

MEMORANDUM OPINION AND ORDER

Pending before the Court is *Plaintiff's Motion for Preliminary Injunction* (Doc. 2, filed September 30, 2020), and brief in support (Doc. 3, filed September 30, 2020), and *Plaintiff's Amended Motion for Preliminary Injunction* (Doc. 21, filed November 12, 2020). In both motions for preliminary injunction, Plaintiff National Commission for the Certification of Crane Operators, Inc., requests the Court enter a preliminary injunction against Defendants Nationwide Equipment Training, LLC, and Donald Childers. Docs. 2, 21. Neither Defendants Nationwide Equipment Training, LLC, or Donald Childers filed a response to either the motion for preliminary injunction or amended motion for preliminary injunction. An evidentiary hearing was held on the matter on November 18, 2020. The motions are ripe for the Court's review. Based on the motions, evidence presented at the hearing, and the arguments of counsel, the Court **ORDERS** the motion for preliminary [*2] injunction is **GRANTED** and the amended motion for preliminary injunction is **DENIED**.

I. PARTIES AND JURISDICTION

Plaintiff is National Commission for the Certification of Crane Operators, Inc. ("NCCCO"). NCCCO is a corporation organized under the laws of the District of Columbia, with its principal place of business in Virginia. Doc. 1 ¶ 2.

NCCCO brings suit against Nationwide Equipment Training, LLC ("Nationwide") and Donald Childers ("Childers") (collectively "Defendants"). Childers is alleged to be a resident of California. *Id.* ¶ 4. Nationwide is alleged to be a limited liability company; however, the citizenship of its members is not alleged. *Id.* ¶ 5.

The district court has subject matter jurisdiction over the claims in this action pursuant to [28 U.S.C. § 1331](#) (federal question jurisdiction) since NCCCO brings claims for copyright infringement, in violation of [17 U.S.C. § 501](#) of the Copyright Act of 1976.

The parties do not contest personal jurisdiction or venue, and there are adequate allegations to support both.

II. PROCEDURAL AND FACTUAL BACKGROUND

A. Procedural Background

On September 30, 2020, NCCCO filed its Complaint in which it brings claims against Nationwide and Childers for copyright infringement. Doc. 1. On [*3] the same date, NCCCO filed its motion for preliminary injunction and brief in support, in which NCCCO requests the Court enjoin Defendants from (1) reproducing or distributing any examination content from NCCCO secure examinations that are registered with the U.S. Copyright Office ("Copyrighted Works"), or any derivative work, or participating or assisting in any such activity; (2) advertising, marketing, offering, selling, licensing, leasing, or otherwise transferring displaying, or advertising the Copyrighted Works, or any derivative work, online or otherwise, or participating or assisting in any such activity; (3) displaying, teaching from, or otherwise using the Copyrighted Works, or any derivative works, to train, teach, prepare, or otherwise assist any candidate who seeks certification through any NCCCO certification program; (4) marketing, offering, selling, or advertising any products or services that use the acronyms "NCCCO" or "CCO," or the name "National Commission for the Certification of Crane Operators," or participating or assisting in any such activity; (5) reproducing, distributing, offering, selling, displaying, or otherwise using any practice examination, practice [*4] test, or training materials that are in the possession of Nationwide or Childers at any time, or participating or assisting in any such activity; (6) disposing of any practice examination, practice test, or training materials that are in the possession of Nationwide or Childers at any time, or participating or assisting in any such activity; (7) training, teaching, preparing, or otherwise assisting any candidate seeking certification through any NCCCO certification program, through an in-person class or otherwise, or participating or assisting in any such activity; (8) applying, sitting for, or otherwise taking any written or practical examination for Childers's individual certification through any NCCCO certification program; (9) coming within 1,000 feet of any NCCCO written or practical exam administration at any time; and (10) initiating any communication, verbal or written, with any candidates, certificants, or exam administrators (including chief examiners, practical examiners, and test site coordinators), or with anyone else involved in the NCCCO exam administration process, relating to any NCCCO certification examination or the content therein. Docs. 2, 3.

Defendants filed their [*5] Answer with Affirmative Defenses on October 27, 2020, and the Court entered a briefing schedule on the Motion for Preliminary Injunction and set the motion for an evidentiary hearing on November 10, 2020. Docs. 11, 15.

On November 2, 2020, counsel for Defendants filed his Motion to Withdraw. Doc. 16. The Court set the Motion to Withdraw for a telephonic hearing to be held November 10, 2020, and suspended the evidentiary hearing for, and briefing on, the motion for preliminary injunction. Doc. 19. Also on November 2, 2020, Childers filed with the Court a letter in which he requested the Court appoint him counsel in this matter and extend the time, before the Court took any action in this matter, for him to secure new counsel and recover from a needed surgery. Doc. 17. Counsel for NCCCO, counsel for Defendants, and Childers appeared via telephone for the telephonic hearing. After the telephonic hearing, the Court entered an order that granted Defendants' counsel's Motion to Withdraw, denied Childers's request to appoint counsel and extend time, and set the motion for preliminary injunction for a hearing on November 18, 2020. Doc. 22.

On November 12, 2020, NCCCO filed its amended motion [*6] for preliminary injunction, which was filed to supplement the record and seek additional relief, which was to enjoin Defendants from communicating, verbally or written, with NCCCO or any of its employees or contractors, for any reason. Doc. 21.

On November 18, 2020, this matter came before the undersigned for an evidentiary hearing on NCCCO's motion for preliminary injunction and amended motion for preliminary injunction, at which counsel for NCCCO appeared in person and Childers appeared via telephone. Docs. 24, 25, 26. Nationwide did not appear for the evidentiary hearing due to the fact that it did not secure counsel and Childers, as a non-lawyer, is not able to represent it. At the evidentiary hearing, the Court heard testimony from the parties and received physical documents from NCCCO. The matter is now ripe for the Court's review.

B. Factual Background¹

NCCCO was founded in 1995 and was organized as a non-profit organization with a mission to develop effective performance standards for safe crane operations in all segments of general industry and construction. Doc. 1 ¶¶ 12-13. NCCCO's activities focus on three primary areas: (a)

¹The facts are those generally presented in Plaintiff's Complaint. Doc. 1.

validation of operator knowledge and proficiency in [*7] safe operations; (b) development and administration of valid and reliable written and practical examinations; and (c) issuance of certifications to operators who demonstrate sufficient knowledge and proficiency in safe operations. *Id.* ¶ 14.

NCCCO currently offers twenty-eight (28) certification designations across twelve (12) difference categories. *Id.* ¶ 15. For most of NCCCO's certifications, candidates must pass both a written exam and a practical examination. *Id.* For many of NCCCO's certifications, candidates must pass two (2) written exams, a so-called "Core" and a specialty examination. *Id.* ¶¶ 16-17. The Core examination typically contains ninety (90) questions, while each specialty designation exam typically contains twenty-six (26) questions. *Id.* ¶ 19.

NCCCO estimates that it has incurred hundreds of thousands of dollars in costs to develop its examinations. *Id.* ¶ 20. NCCCO uses the services of experts and volunteers, called Subject Matter Experts ("SMEs"), who collectively research and develop each examination question under the guidance of experienced professional testing consultants. *Id.* ¶ 21. Once an examination question is prepared, it undergoes a review and acceptance process. [*8] *Id.* Accepted examination questions are generally field-tested prior to being included in an exam. *Id.* ¶ 22. Field testing permits certification candidates an opportunity to comment on the questions, which in turn, gives NCCCO an opportunity to determine whether a particular question is ambiguous or misleading and whether a question should be revised or discarded. *Id.* Only items that meet appropriate performance standards are approved to use in NCCCO's examinations. *Id.*

NCCCO goes to great lengths to protect its extensive library of examinations and examination materials. *Id.* ¶ 23. NCCCO registers its written examinations as a "secure test" with the U.S. Copyright Office, pursuant to its secure test regulations, [37 C.F.R. § 202.13](#). *Id.* ¶ 24. As secure tests, NCCCO examination questions are confidential, have not been previously released to the general public, and are not intended to be made available except during test administrations. *Id.* ¶ 25. Written examinations are administered under strict procedures to protect the confidentiality of the exams, including accounting for each exam and requiring each candidate and test administrator sign a confidentiality agreement that covers the content of the exams. [*9] *Id.* ¶ 26. Over the past twenty-five (25) years, NCCCO has registered at least 343 secure tests with the U.S. Copyright Office. *Id.* ¶ 28.

The integrity of NCCCO's written examinations is an essential element to advance NCCCO's mission to promote

operator and industry safety by ensuring only those operators who demonstrate sufficient knowledge and skill in safe equipment operation are certified. *Id.* ¶ 29. To be certified by NCCCO, candidates must demonstrate skills and knowledge that SMEs have deemed necessary for safe performance. *Id.* ¶ 30. Certifications are achieved through written and practical examinations, and by attesting to compliance with NCCCO's Code of Ethics and Substance Abuse Policy. *Id.* Certification through NCCCO or another accredited certifying body can be essential to a candidate's continued employment and job prospects. *Id.* ¶ 31.

The Occupational Safety and Health Administration ("OSHA") published construction regulations that became effective December 2018 and require crane operator certification/qualification nationwide, generally through third-party certification bodies such as NCCCO. *Id.* The California Division of Occupational Safety and Health ("Cal/OSHA") and other [*10] state and municipal jurisdictions have had similar regulations in place since as early as 2005. *Id.*

Certification programs that are administered by NCCCO have been accredited by the American National Standards Institute ("ANSI"), an independent entity that accredits certifications bodies that certify personnel to the ISO-IEC 17024 International Standard. *Id.* ¶ 32. To receive and maintain NCCCO's accreditation, it complies with certain requirements, including the requirement of Section 7.4 of the ISO-IEC 17024 International Standard that NCCCO develop policies to ensure the security of examination materials and take corrective actions when breaches occur. *Id.* ¶ 33. Failure to properly secure examination materials may result in the loss of accreditation. *Id.*

It is estimated NCCCO currently provides approximately 90% of the required crane operator certifications under OSHA. *Id.* ¶ 34.

When NCCCO's examinations questions are compromised, it must determine the number of compromised questions and/or examinations, generally reassemble SMEs to create new questions, and work through psychometricians to devise plans to introduce new items, forms, and/or examinations to be used in certification examinations. [*11] *Id.* ¶ 35.

On April 7, 2017, NCCCO filed a prior complaint against Childers and Nationwide in this Court in which NCCCO alleged Childers, who was an NCCCO-accredited Practical Examiner, materially and willfully failed to follow the procedures for practical examinations that he administered in 2016 agreed to in his contract with NCCCO. *Id.* ¶ 37. As a result of Childers's failure to properly administer examinations, more than 100 candidates for NCCCO certification had their practical examination score sheets

invalidated and other candidates had the processing of their score sheets and applications for certification substantially delayed. *Id.* ¶ 38. NCCCO's prior complaint against Childers and Nationwide also alleged intentional avoidance of audits, trademark infringement, and submission of late, insufficient, or refused payments that resulted in various warnings, sanctions, and suspensions. *Id.* ¶ 39.

As of June 29, 2017, NCCCO, Childers and Nationwide entered into a settlement agreement of the claims in the prior complaint, including a mutual release of claims and a stipulation for the entry of a permanent injunction against Childers and Nationwide. *Id.* ¶ 40. On July 10, 2017, Senior U.S. [*12] District Judge Callie V.S. Granade issued a permanent injunction against Childers and Nationwide, which amount other things, enjoined Childers and Nationwide from coming within 100 feet of an NCCCO test site, submitting any application or payment to NCCCO on behalf of any candidate, acting as a practical examiner or test site coordinator in connection with any NCCCO examination, communicating with NCCCO employees directly or indirectly in regard to NCCCO certification programs, or using any NCCCO trademark. *Id.* ¶ 41. Over the past three (3) years, NCCCO has investigated more than twenty (20) incidents that involved Childers's and Nationwide's potential violations of the permanent injunction. *Id.* ¶ 42.

In August 2020, NCCCO discovered Defendants commenced and/or continued to sell and distribute content that infringes NCCCO's copyrights after they settled the prior litigation by a permanent injunction. *Id.* ¶ 43. NCCCO alleges, on or about October 27, 2017, a person who is known the Childers purchased a "practice exam" from Defendants online for the sum of \$40, which "practice exam" infringed NCCCO's exclusive rights in, and to, copyrighted content. *Id.* ¶ 44. NCCCO further alleges, on [*13] or about November 2017, the person who is known to Childers reached out to Childers to obtain additional material to use in training candidates to take NCCCO certification exams and Childers agreed to sell additional material that infringed NCCCO's exclusive rights in, and to, copyrighted content. *Id.* ¶ 45. Specifically, NCCCO alleges Childers agreed to sell certain "practice tests" to the foregoing person in exchange for the sum of \$1,000, and on November 21, 2017, and in exchange for payment, Childers provided this person with a link to a Drop Box folder that contained a large number of "practice examinations." *Id.* ¶ 46. NCCCO alleges Childers represented to the person he had a copyright in the materials and purported to give the person permission to use the practice examinations. *Id.* ¶ 46. NCCCO alleges the person downloaded the examinations that were in the Drop Box and began using at least two (2) of them to train candidates. *Id.* ¶ 47. NCCCO alleges the person admitted, for nearly three (3) years, he has used at least two (2) of the

practice examinations, as well as the practice examination that was purchased online, to conduct various training courses for NCCCO certification [*14] candidates. *Id.* NCCCO alleges these examinations include content that infringes various of NCCCO's secure exams and were used without NCCCO's knowledge, permission, or consent. *Id.* ¶ 48.

NCCCO further alleges, in early 2018, the person known to Childers agreed to cover a Nationwide training class for Childers and was eventually paid with Defendants' consent to retain and use at least six (6) pictures of materials used in Nationwide's training curriculum that were taken during the class. *Id.* ¶ 49. NCCCO alleges those materials include content that infringes NCCCO's secure exams and were used without NCCCO's knowledge, permission, or consent. *Id.*

In early 2020, NCCCO staff discovered Nationwide was advertising certain "Simulated CCO Written Exams" for sale on its website. *Id.* ¶ 53. NCCCO discovered eight (8) practice examinations for sale at Nationwide's website's online store. *Id.* ¶ 54. On February 28, 2020, NCCCO purchased all eight (8) of Nationwide's practice examinations for the sum of \$350, after which a link to download the examinations was sent to the purchasing email address. *Id.* ¶¶ 55, 56. NCCCO downloaded all eight (8) of the practice examinations, each of which contained multiple [*15] examinations and, in total, were eighteen (18) different examinations that were formatted similarly and contained the same number of questions as NCCCO's examinations. *Id.* ¶¶ 57, 58. NCCCO reviewed the eighteen (18) practice examinations and discovered they included at least 249 questions that were verbatim, nearly verbatim, or substantially similar to questions that are contained in NCCCO registered examinations. *Id.* ¶ 59. The 249 questions include at least one (1) question from each of more than twenty (20) different NCCCO examinations and included questions specifically created by NCCCO. *Id.* ¶¶ 60, 61. Many of NCCCO's questions are based on various industry standards and regulations, such as OSHA and the American Society of Mechanical Engineers ("ASME") and NCCCO uses portions of those standards to create questions, but many of NCCCO's questions were written by a committee and are original to NCCCO. *Id.* ¶ 61.

NCCCO alleges at least five (5) of NCCCO's examinations were dramatically compromised by Defendants' copyright infringement: (1) Core 652603.3001, TXu 1-743-632, registered 12/22/2010; (2) TLL Grove 652612.1501, TXu 1-674-577, registered 9/16/2008; (3) TLL LinkBelt 652613.2501, [*16] TXu 1-674-594, registered 9/16/2008; (4) TSS Grove 652615.1401, TXu 1-673-435, registered 9/16/2008; and (5) TSS Manitex 652616.2401, TXu 1-673-440, registered 9/16/2008. *Id.* ¶ 62. Nationwide's practice examinations contained seventy-five (75) verbatim or nearly

verbatim questions from the Core 652603.3001 examination's ninety (90) total questions, which comprises 83% of the examination questions; twenty-five (25) verbatim or nearly verbatim questions from the TLL Grove 652612.1501 examination's twenty-six (26) questions, which comprises 96% of the examination questions; eighteen (18) verbatim or nearly verbatim questions from the TLL LinkBelt 652613.2501 examination's twenty-six (26) questions, which comprises 69% of the examination questions; twenty-six (26) verbatim or nearly verbatim questions from the TLL Grove 652615.1401 examination's twenty-six (26) questions, which comprises 69% of the examination questions; eighteen (18) verbatim or nearly verbatim questions from the TSS Manitek 652616.2401 examination's twenty-six (26) questions, which comprises 69% of the examination questions. *Id.* ¶¶ 63-67.

NCCCO also alleges it recently learned Defendants have "harvested" questions from [*17] NCCCO registered examinations, specifically Childers has instructed and/or compensated candidates who attend his classes to memorize a pre-determined number of test items when they complete NCCCO examinations, then recite those items to Childers. *Id.* ¶ 70. NCCCO alleges Childers also "harvested" NCCCO examination questions himself. *Id.* ¶ 72.

On May 22, 2020, NCCCO sent Defendants a formal cease and desist letter that informed Childers he appeared to be in possession of numerous examination questions that infringed NCCCO's registered copyrights, asked him to cease and desist from selling all tests, and asked him to explain the circumstances that surrounded his acquisition of NCCCO's confidential examination questions. *Id.* ¶ 77. On June 15, 2020, NCCCO sent Defendants a follow-up letter that specified which registered exams were alleged to be infringed and included the registration numbers of those works, asked for assurances that Childers would cease selling the infringing materials, and requested Childers explain how he acquired NCCCO's confidential examination questions. *Id.* ¶ 79. Childers failed or refused to confirm he would stop selling the infringing materials. *Id.* ¶ 80.

On May [*18] 28, 2020, NCCCO prepared a takedown request pursuant to the Digital Millennium Copyright Act ("DCMA") and submitted it to GoDaddy, Nationwide's website's host. *Id.* ¶ 83. On June 11, 2020, GoDaddy confirmed it had suspended "shop.nationwide-equipment-training.com." *Id.* ¶ 84.

On November 10, 2020, NCCCO General Counsel, John Zarian ("Zarian"), received an email from Childers that accused Zarian of certain actions and threatened self-harm to Childers, which was one of multiple instances of such conduct by Childers, as described in NCCCO's amended motion for

preliminary injunction. Doc. 21 at 2.

III. STANDARD OF REVIEW

"The chief function of a preliminary injunction is to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated." *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1265 (11th Cir. 2001) (quoting *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1284 (11th Cir. 1990)). The decision to grant or deny a preliminary injunction "is within the sound discretion of the district court." *Palmer v. Braun*, 287 F.3d 1325, 1329 (11th Cir. 2002) (citations omitted). The party seeking the preliminary injunction bears the burden of establishing its entitlement to relief. *Scott v. Roberts*, 612 F.3d 1279, 1289 (11th Cir. 2010).

To obtain a preliminary injunction, the moving party must establish the following prerequisites: "(1) a substantial likelihood of success on the merits; (2) that it will suffer [*19] irreparable injury unless the injunction is issued; (3) that the threatened injury outweighs possible harm that the injunction may cause the opposing party; and (4) that the injunction would not disserve the public interest." *GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 788 F.3d 1318, 1322 (11th Cir. 2015) (citing *Burk v. Augusta-Richmond Cty.*, 365 F.3d 1247, 1262-63 (11th Cir. 2004); see also *Am. Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir. 1998) (stating same four requirements). "[A] preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant clearly carries its burden of persuasion on each of these prerequisites." *GeorgiaCarry.Org*, 788 F.3d at 1322 (quoting *Suntrust Bank*, 252 F.3d at 1166); accord *Café 207, Inc. v. St. Johns Cty.*, 989 F.2d 1136, 1137 (11th Cir. 1993) ("A preliminary injunction is a drastic remedy and [the movant] bears the burden to clearly establish each of the four prerequisites."); see also *Texas v. Seatrain Int'l, S.A.*, 518 F.2d 175, 179 (5th Cir. 1975) ("[G]ranting a preliminary injunction is the exception rather than the rule" and movant must clearly carry the burden of persuasion.). The moving party's failure to demonstrate a single element may defeat the request regardless of the party's ability to establish any of the other elements. See, e.g., *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (failure to show irreparable injury); *Church v. City of Huntsville*, 30 F.3d 1332, 1342 (11th Cir. 1994) (failure to establish substantial likelihood of success on the merits).

III. DISCUSSION AND ANALYSIS

A. Substantial Likelihood of Success on the Merits

For the Court to evaluate whether NCCCO has a substantial likelihood of success [*20] on the merits of its copyright infringement claims, the Court must determine whether NCCCO established the *prima facie* elements of those claims: (1) NCCCO owns a valid copyright in the secure examinations and (2) Defendants copied *original* elements of those examinations. [Suntrust Bank, 268 F.3d at 1265-66](#) (citing [Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.](#), 499 U.S. 340, 361, 111 S. Ct. 1282, 1296, 113 L. Ed. 2d 358 (1991)).

As to the first element of NCCCO's *prima facie* case, it asserts it has copyrights in five registered examinations: (1) Core 652603.3001, TXu 1-743-632, registered 12/22/2010; (2) TLL Grove 652612.1501, TXu 1-674-577, registered 9/16/2008; (3) TLL LinkBelt 652613.2501, TXu 1-674-594, registered 9/16/2008; (4) TSS Grove 652615.1401, TXu 1-673-435, registered 9/16/2008; and (5) TSS Manitex 652616.2401, TXu 1-673-440, registered 9/16/2008. Doc. 1 ¶¶ 89, 97, 105, 113, 121. Defendants generally deny in their answer NCCCO's assertion that it has copyrights in those registered examinations; however, NCCCO has attached the Certificate of Registration from the U.S. Copyright Office for each of those secure examinations. Docs. 1 ¶¶ 89, 97, 105, 113, 121; 3-4, 3-5; 3-6; 3-7; 3-8. Therefore, the Court finds NCCCO has made out the first elements of its *prima facie* case.

As to the second element of NCCCO's *prima facie* case, [*21] to prove copying, NCCCO is required to show a "substantial similarity" between Nationwide's practice examinations and NCCCO's registered examinations such that "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." [Suntrust Bank, 268 F.3d at 1266](#) (citations omitted). "Not all copying of a work is actionable, however, for . . . 'no author may copyright facts or ideas. The copyright is limited to those aspects of the worked-termed "expression"-that display the stamp of the author's originality.'" [Id. at 1266](#) (quoting [Harper & Row Publishers, Inc. v. Nation Enters.](#), 471 U.S. 539, 547, 105 S. Ct. 2218, 2224, 85 L. Ed. 2d 588 (1985)). NCCCO asserts the eight (8) practice examinations that it purchased from Nationwide's website online store contain at least 249 questions that were verbatim, nearly verbatim, or substantially similar to questions that are contained in NCCCO registered examinations and the 249 questions include at least one (1) question from each of more than twenty (20) different NCCCO examinations, including questions specifically created by NCCCO. Doc. 1 ¶¶ 53, 54,

55, 56, 57, 58, 59, 60, 61. As to NCCCO's registered examinations, the eight (8) practice examinations contained seventy-five (75) verbatim or nearly verbatim questions from the Core 652603.3001 examination's [*22] ninety (90) total questions, which comprises 83% of the examination questions; twenty-five (25) verbatim or nearly verbatim questions from the TLL Grove 652612.1501 examination's twenty-six (26) questions, which comprises 96% of the examination questions; eighteen (18) verbatim or nearly verbatim questions from the TLL LinkBelt 652613.2501 examination's twenty-six (26) questions, which comprises 69% of the examination questions; twenty-six (26) verbatim or nearly verbatim questions from the TLL Grove 652615.1401 examination's twenty-six (26) questions, which comprises 69% of the examination questions; eighteen (18) verbatim or nearly verbatim questions from the TSS Manitex 652616.2401 examination's twenty-six (26) questions, which comprises 69% of the examination questions. *Id.* ¶¶ 63-67. NCCCO's five (5) registered examinations at issue contain both randomly selected portions of the OSHA and ASME standards and NCCCO-created questions, and the eight (8) practice examinations contained the same randomly selected standards and NCCCO-created questions. Doc. 3-1 ¶ 25. These assertions of NCCCO's are supported by the affidavit testimony of Yenny Caceres, Program Manager, Credentialing, for [*23] NCCCO. Doc. 3-1.

At the evidentiary hearing, Childers stated the practice examination questions were not the actual NCCCO registered examination questions, but were reworded, and, in the past, he completed NCCCO's examinations to form his practice examination questions.

Based on the evidence before the Court, it finds NCCCO has made out its *prima facie* case of copyright infringement and has a substantial likelihood of success on the merits.

1. Fair Use

However, in Defendants' answer, they raise the affirmative defense of fair use. Doc. 11 at 9. Defendants' use of NCCCO's secure examination questions may not constitute copyright infringement if it is protected as a "fair use." [Suntrust Bank, 268 F.3d at 1267](#). The fair-use doctrine in the Copyright Act provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use),

scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered [*24] shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

[17 U.S.C. § 107.](#)

a. Purpose and Character of the Use

NCCCO's alleges Defendants copied a substantial number of their secure examination questions and sold them through Nationwide's website online store. Childers states in his request to appoint counsel and extend time, at in-person certification seminars that he taught, he would sometimes pay for an attendee who seemed to be "struggling in life," but he also states he would make "\$2000-\$4000" profit per class. However, the Court cannot draw a direct link between the secure examination questions and the in-person certification seminars, so any evidence of a non-profit educational purpose is negligible.

b. Nature of the Copyrighted Works

The nature of the copyrighted works are secure examinations, which NCCCO's keeps confidential, are not previously released to the public, are [*25] not made available except during test administrations, and examinations are administered under strict procedure to protect their confidentiality.

c. Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole

The Court has previously stated NCCCO's alleged amount and substantiality of the portion of secure examination questions used in the eight (8) practice examinations that NCCCO purchased from Nationwide's website online store. *Supra* Section III(A), at 14.

d. Effect of the Use Upon the Potential Market for or Value of the Copyrighted Works

NCCCO alleges Defendants' use of the secure examination questions has caused a "material diminution in the value of NCCCO's intellectual property," which is based on the "loss of NCCCO's goodwill and reputation," the compromise of "the integrity and effectiveness of NCCCO's crane operator certification process and federal certification requirement," the compromise of "the integrity of the licensing process established by the various states, including Alabama, to which NCCCO provides services," and "jeopardizing NCCCO's accreditation and the accredited certifications of thousands of crane operators in the country." Doc. 3 at 18-19.

Based on the [*26] above analysis, the Court finds, on balance, Defendants' use of the secure examination questions is not a "fair use."

B. Irreparable Injury

Irreparable injury may be presumed once a plaintiff has made out a *prima facie* case of copyright infringement. *See Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 451, 104 S. Ct. 774, 793, 78 L. Ed. 2d 574 (1984) ("[A]lthough every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter. A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that it should become widespread, it would adversely affect the potential market for the copyrighted work."). "[H]owever, the Supreme Court has made clear that there is no presumption of irreparable injury when the alleged infringer has a bona fide faire-use defense." *Suntrust Bank*, 268 F.3d at 1276 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 n.10, 114 S. Ct. 1164, 1171 n.10, 127 L. Ed. 2d 500 (1994)). Finally, "harms that may be remedied through the award of monetary damages are not considered 'irreparable.'" *Id.* at 1276 (citing *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987)).

Here, the Court found NCCCO made out its *prima facie* case of copyright infringement and Defendants' use of the secure examination questions was not a "fair use." While Childers argues NCCCO's injuries are purely monetary, [*27] NCCCO has alleged goodwill and reputation damage, beyond monetary damage, as previously discussed. *Supra* Section III(A)(1)(d), at 16; *see also* Doc. 24 ("[NCCCO's] claim of injury is solely monetary."). To allow Defendants to continue to use the secure examination questions would "in effect, make any copyright holder an involuntary licensor of the copyright to any entity that could be relied on to pay damages." *Paramount Pictures Corp. v. Carol Publ'g Grp.*,

11 F. Supp. 2d 329, 338 (S.D.N.Y. 1998). Defendants have not rebutted the presumption in favor of NCCCO's copyright infringement claims.

Therefore, the Court finds NCCCO has been irreparably harmed by Defendants' actions.

C. Balance of Harm

For the third element, the Court must determine whether the threatened injury to NCCCO, if Defendants are allowed to continue to infringe the copyrighted works, outweighs possible harm that the injunction may cause Defendants. The Court's review of Defendants' filings shows the only harm they allege tends to be monetary. However, the Court must balance the harm to Defendants with the harm to NCCCO, which includes both monetary and reputational aspects. If the Court does not enjoin Defendants' conduct now, the Court would likely not be able to provide adequate relief to NCCCO if Defendants [*28] are allowed to continue to infringe the copyrighted works. Therefore, the Court finds, on balance, the threatened injury to NCCCO outweighs the harm that an injunction may cause Defendants.

D. Public Interest

Lastly, the Court must determine whether the injunction would disserve the public interest. "[A] preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant clearly carries its burden of persuasion on each of these prerequisites." *GeorgiaCarry.Org, 788 F.3d at 1322* (quoting *Suntrust Bank, 252 F.3d at 1166*). NCCCO argues an injunction would serve the public interest because it would allow NCCCO to continue to promote safety, as well as ethical and professional conduct, in crane and crane-related industries. NCCCO's arguments as well as the preservation of copyright ownership interests, on balance, favors the public interest in this matter.

IV. CONCLUSION

Based on the Court's analysis, NCCCO has carried its burden of persuasion for an injunction to issue. Accordingly, NCCCO's motion for a preliminary injunction (Doc. 2) is **GRANTED**, and its amended motion for preliminary injunction (Doc. 21) is **DENIED** because the Court finds the additional request to enjoin Defendants from "[a]ny communication, verbal [*29] or written, with NCCCO or any of its employees or contractors, for any reason" an overly broad restraint on speech that is not specifically tailored to

remediate the behavior that is related to the copyright infringement claims in this matter. Therefore, Defendants are hereby **PRELIMINARILY ENJOINED** from the following actions:

- (1) reproducing or distributing any examination content from NCCCO secure examinations that are registered with the U.S. Copyright Office ("Copyrighted Works"), or any derivative work, or participating or assisting in any such activity;
- (2) advertising, marketing, offering, selling, licensing, leasing, or otherwise transferring displaying, or advertising the Copyrighted Works, or any derivative work, online or otherwise, or participating or assisting in any such activity;
- (3) displaying, teaching from, or otherwise using the Copyrighted Works, or any derivative works, to train, teach, prepare, or otherwise assist any candidate who seeks certification through any NCCCO certification program;
- (4) marketing, offering, selling, or advertising any products or services that use the acronyms "NCCCO" or "CCO," or the name "National Commission for the Certification of Crane [*30] Operators," or participating or assisting in any such activity;
- (5) reproducing, distributing, offering, selling, displaying, or otherwise using any practice examination, practice test, or training materials that are in the possession of Nationwide or Childers at any time, or participating or assisting in any such activity;
- (6) disposing of any practice examination, practice test, or training materials that are in the possession of Nationwide or Childers at any time, or participating or assisting in any such activity;
- (7) training, teaching, preparing, or otherwise assisting any candidate seeking certification through any NCCCO certification program, through an in-person class or otherwise, or participating or assisting in any such activity;
- (8) applying, sitting for, or otherwise taking any written or practical examination for Childers's individual certification through any NCCCO certification program;
- (9) coming within 1,000 feet of any NCCCO written or practical exam administration at any time; and
- (10) initiating any communication, verbal or written, with any candidates, certificants, or exam administrators (including chief examiners, practical examiners, and test site coordinators), [*31] or with anyone else involved in the NCCCO exam administration process, relating to any NCCCO certification examination or the content therein.

DONE and **ORDERED** this 24th day of November 2020.

/s/ Terry F. Moorer

TERRY F. MOORER

UNITED STATES DISTRICT JUDGE

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