

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

HAMILTON EXHIBITION LLC,

Plaintiff,

v.

IMAGINE EXHIBITIONS, INC. and TOM ZALLER,

Defendants.

**No. 1:19-cv-01470-LLS-OTW**

IMAGINE EXHIBITIONS, INC.

Counterclaim-Plaintiff,

v.

HAMILTON EXHIBITION LLC,  
ADVENTURELAND, LLC, and JEFFREY SELLER

Counterclaim-Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF COUNTERCLAIM DEFENDANTS’  
PARTIAL MOTION TO DISMISS COUNTERCLAIMS**

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Counterclaim Defendants Hamilton Exhibition, LLC (“Hamilton Ex”), Adventureland, LLC and Jeffrey Seller (collectively, “Counterclaim Defendants”) respectfully submit this memorandum of law in support of their motion to dismiss Counts I and IV of the Counterclaims filed by Imagine Exhibitions, Inc. (“IEI”) on August 30, 2019.

### **Preliminary Statement**

As discussed previously, following the success of *Hamilton: An American Musical* (“*Hamilton*”), the producers of *Hamilton* formed Hamilton Ex to create a museum-style exhibition (the “Exhibition”), with an immersive and interactive experience that delves deeper into the life and times of Alexander Hamilton. IEI’s Counterclaims, like Hamilton Ex’s First Amended Complaint, arise from IEI’s failed engagement as production manager for the Exhibition.

This motion addresses two of IEI’s Counterclaims—Count I for copyright infringement, and Count IV for fraudulent misrepresentation. Both claims should be dismissed.

Copyright Infringement. The Exhibition is a work of non-fiction that provides a factually accurate account of Hamilton’s life story and his contributions to the American Revolution and the founding of our nation. Each of the eleven works at issue (the “Works,” attached as Exhibits A through K to the Counterclaims) is devoted to the same historical subject.

Critically, the Second Circuit has made clear that “the protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis.” *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir. 1980). As a result, “[i]n works devoted to historical subjects,” anyone “may make significant use of prior work, so long as he does not bodily appropriate the expression of another.” *Id.* at 980.

The Counterclaims, however, do not (and cannot) allege that Counterclaim Defendants “bodily appropriate[d]” any of the works at issue. IEI does not even attempt to identify any protectable, original expression in any of the Works—as opposed to non-protectable historical

facts and interpretation—much less explain how the Exhibition infringes that original expression. Rather, they lump the Works together and then make vague, conclusory allegations that rooms in the Exhibition, such as those depicting the Battle of Yorktown and the duel between Hamilton and Burr, were derived from them. As *Hoehling* and its progeny make clear, that is far too thin a reed on which to base a copyright claim where the underlying content is American history, which is in the public domain and free for all to use.

That IEI does not allege that the Exhibition copied IEI's original expression is no accident. As IEI admits, David Korins Designs ("DKD," the set designer for *Hamilton*) was responsible for designing the Exhibition, not IEI. Indeed, throughout the Counterclaims, IEI goes out of its way to distance itself from the final Exhibition, blaming its lack of commercial success on Counterclaim Defendants' and DKD's design choices and their unwillingness to follow IEI's recommendations.

Simply put, IEI cannot copyright historical facts about Hamilton's life, and the Exhibition cannot infringe IEI's Works merely because it covers the same historical subject. The scope of copyright liability under these circumstances is extremely narrow, was clearly articulated in *Hoehling*, and IEI does not even attempt to state a copyright claim under the applicable standards. This is an objectively unreasonable claim, motivated to generate leverage in a business dispute, and IEI should be required to pay Counterclaim Defendants' attorney's fees pursuant to 17 U.S.C. § 505 for having to defend against it.

Fraudulent Misrepresentation. IEI's fraud claim is equally meritless. In this claim, IEI accuses Counterclaim Defendants of representing in the Fall of 2016 that they would be paid for their services, and then later failing to pay. From this fact alone IEI infers that Counterclaim Defendants never intended to pay IEI to begin with and therefore committed fraud. That is a

quintessential “fraud by hindsight” allegation—the kind of conclusory allegation of fraudulent intent that has been squarely and soundly rejected as insufficient to plead fraud by courts in the Second Circuit.

Pleading defects aside, IEI’s fraud theory is also directly contradicted by its own allegations, which affirmatively concede that IEI in fact received a payment of at least \$100,000 from Counterclaim Defendants for its services. While IEI may claim that it is entitled to more, that is not fraud. It is simply not plausible to infer from the fact that Counterclaim Defendants stopped paying IEI in the Fall of 2018, shortly before IEI was terminated and after a dispute admittedly arose, that Counterclaim Defendants never intended to pay IEI when the parties negotiated the terms of IEI’s engagement eighteen months earlier.

This claim should be dismissed.

### **Statement of Facts**

In the following sections, Counterclaim Defendants set forth the allegations from the Counterclaims that are relevant to this motion to dismiss.<sup>1</sup>

### **The Exhibition**

The Exhibition is a work of historical fact. IEI concedes this in the very first paragraph of its Counterclaims when it admits that the Exhibition is “based on the story of Alexander Hamilton’s life.” (Counterclaim (“CC”) ¶ 1.) It was inspired by the success of *Hamilton: An American Musical*, a “smash-hit Broadway musical that tells the story of the life of Alexander Hamilton.” (CC ¶ 16; *see also id.* ¶ 1 (admitting that the Exhibition is “based off *Hamilton*”).) IEI does not own and cannot copyright the life story of Alexander Hamilton, nor does IEI own the rights to *Hamilton: An American Musical*.

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<sup>1</sup> As they must, Counterclaim Defendants assume these allegations to be true solely for the purposes of this motion.

The Counterclaims also make clear that IEI was not responsible for the Exhibition’s design. Instead, “Counterclaim-Defendants retained [David] Korins and his firm DKD [David Korins Designs] to assist with the design of the Exhibition.” (CC ¶ 47.) This was confirmed by Zaller himself in an email dated February 4, 2017, shortly after IEI was retained, in which he described IEI’s “plan for bringing the Exhibition to reality.” (*Id.* ¶ 26.) In that email, Zaller set forth the division of labor—DKD would handle the creative aspects of preparing “the schematic and detailed design and renderings” for the Exhibition, whereas IEI’s responsibility as production manager would be to “manage the project management of the bid, and build as we will eventually end up producing and operating the tour and its movements.” (*Id.*) IEI also agreed to prepare an “initial floorplan” and later a revised ground plan (*id.* ¶¶ 26-28), but these plans are not alleged to have been used and are not among the registered Works that are the subject of its Counterclaims.

Far from contributing original design elements, IEI separates itself from the final form of the Exhibition, devoting an entire section to describing how Counterclaim Defendants “fail[ed] to heed its advice.” (CC ¶¶ 47-54.) According to IEI, Counterclaim Defendants “frequently ignor[ed] IEI’s planning advice and instead incorporat[ed] the impractical design ideas of David Korins (‘Korins’), the set designer of *Hamilton*.” (CC ¶ 7.) As a result, IEI attempts to lay the blame for the Exhibition’s cost overruns on the “design choices” made by DKD and claims that “Counterclaim-Defendants ignored guidance from IEI.” (*Id.*)

### **IEI’s Alleged Works**

IEI claims that it was its initial “idea” to develop an “Exhibition based off *Hamilton*.” (CC ¶¶ 16-20 (section heading).) Zaller presented that idea—namely to “do an exhibition on the historical story and include the show and the music”—to Counterclaim Defendants in August 2016. (*Id.* ¶ 17.) After presenting that idea, IEI was hired in late 2016 to



serve as the production manager for the Exhibition, and served in that capacity until it was terminated by Hamilton Ex on May 31, 2018. (*Id.* ¶¶ 25, 55.)

In its copyright claim, IEI alleges that, during this engagement, it “created and owns the eleven (11) original works of authorship identified in Exhibits A-K” attached to the Counterclaims. (CC ¶ 65.) IEI, however, does not identify any protectable, original expression contained in any particular Work or explain how it has been infringed.

The first seven Works (Exhibits A through G) all were allegedly created on December 7, 2016. Exhibits A through F are sketches of “2-D artwork” that were also incorporated into the pages of Exhibit G, which is a “Draft Exhibition Concept” presentation containing “text, artwork.”<sup>2</sup> Although IEI does not identify them by exhibit, it alleges generally that “[s]everal of the Works are original illustrations executed by IEI and depicting the design of specific rooms that were included in the version of the Exhibition that Counterclaim-Defendants eventually opened in Chicago on April 29, 2019, including rooms depicting the Battle of Yorktown and the infamous duel between Alexander Hamilton and Aaron Burr.” (CC ¶ 70.) Nowhere in the Counterclaims does IEI allege that any of this “2-D artwork” or “text” was copied, much less how Counterclaim Defendants copied the “design of specific rooms” from IEI. Nor does IEI try to reconcile this conclusory allegation with its mantra that DKD was responsible for the “design of the Exhibition” and that Counterclaim Defendants rejected IEI’s design choices. (CC ¶¶ 7, 26, 47.)

In fact, the only specific comparison between any of the Works and any rooms in the Exhibition is reflected in Exhibit L to the Counterclaims. In Exhibit L, IEI provides a

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<sup>2</sup> Exhibit A corresponds to page 34 in Exhibit G; Exhibit B corresponds to page 36 of Exhibit G; Exhibit C corresponds to page 9 of Exhibit G; Exhibit D corresponds to page 18 of Exhibit G; Exhibit E corresponds to page 24 of Exhibit G; and Exhibit F corresponds to page 13 of Exhibit G. Notably, Exhibit F, which is a sketch of the set from *Hamilton: An American Musical*, and Exhibit G, which has the logo from *Hamilton: An American Musical* and lyrics and other content from the musical throughout, contain intellectual property belonging to Defendants, not IEI. (CC at Ex. G.)

photograph of a room from the Exhibition about Alexander Hamilton’s famous (and fatal) duel with Aaron Burr, with two statues on a grassy landscape pointing pistols at each other and with the lyrics “I imagine death so much it feels more like a memory” from *Hamilton: An American Musical* lit up on a wall above a case containing two pistols. Below this photo from the Exhibition, Exhibit L reproduces part of the sketch from Exhibit B showing two figures pointing pistols at one another on a stage with trees in the background and a case containing two pistols in front. IEI does not and cannot explain how there is anything original about a drawing depicting Alexander Hamilton and Aaron Burr pointing guns at one another.

In addition, three of the eleven Works (Exhibits H, J, and K) are scripts. Again, although IEI does not refer to them specifically, it alleges that “[o]ther Works contain extensive detail and evidence hundreds of creative choices made by IEI with respect to elements to be displayed in each gallery room in the Exhibition, as well as explanatory text to be displayed on panels throughout the Exhibition.” (CC ¶ 71.) Notably absent from the Counterclaims is any allegation of copying or substantial similarity between these Works and the Exhibition.

Nor is there any allegation that the scripts were anything but a historically and factually accurate account of the life and times of Alexander Hamilton. Indeed, as IEI admits, “[t]hroughout the script’s drafting process, a history professor at Yale University worked with all parties to review the script for historical accuracy” and IEI hired “independent research assistants” to aid in “refining” the script. (CC ¶ 30.) The purpose of working with a Yale history professor and these independent researchers, according to IEI, was “to ensure the script’s utmost historical accuracy.” (*Id.*)

Finally, IEI prepared Exhibit I, which is an “artifact matrix” consisting of “a spreadsheet, featuring descriptions and pictures of hundreds of historical artifacts, categorized by

where they would feature in the Exhibition and which lender or vendor would provide them.” (*Id.* ¶ 32.) IEI does not allege that this “artifact matrix” was copied or is substantially similar to anything in the Exhibition.

Rather than allege copying and substantial similarity, IEI claims instead that Counterclaim Defendants “relied heavily” on “these Works” to create “derivative works” that “formed significant portions of the final version of the Exhibition.” (CC ¶ 72.) IEI does not allege what these portions are, how they are “significant,” much less how they are derivative of original, protectable content. Instead, IEI simply laundry lists a number of *ideas* that it claims to own, including “utilizing items suspended from the ceiling” to show that a hurricane had struck St. Croix, using Hamilton’s writing desk and quill “to serve as a *leitmotif*,” employing “moving pieces” to show the positions of the British and Continental Armies during the Battle of Yorktown, and working with “interactive displays” to show policy debates from the Federalist Papers. (*Id.*)

### **IEI’s Engagement And Its Termination**

As previously discussed, in late 2016, “IEI was retained to develop and provide its expertise to the Exhibition” to serve “as producer of the Exhibition.” (CC ¶ 21.) According to IEI, however, “the parties never finalized all essential terms” for this engagement. (*Id.* ¶ 23.)

Although the Counterclaims allege that the parties did not agree on “all essential terms,” IEI alleges that Counterclaim Defendants promised “throughout the fall of 2016” that IEI “would be fairly compensated for its services.” (CC ¶¶ 21, 23.) This allegedly included “a small fee of \$250,000 on the front end, and then . . . weekly operating fees and [a] share in the Exhibition’s profits on the back end.” (*Id.* ¶ 22.)

These terms were set forth in an “Exhibition Producer Agreement” between Hamilton Ex and IEI, dated as of January 1, 2017, which was signed by IEI but not Hamilton Ex. (CC ¶ 23; Ex. 1.)<sup>3</sup> IEI fails to mention, however, that the \$250,000 “front end” fee was to be paid over time, with \$50,000 due upon commencement of the work, \$50,000 due on December 15, 2017, \$50,000 due on or before March 1, 2018, \$50,000 on or before June 1, 2018, and the last \$50,000 upon the public opening of the Exhibition. (Ex. 1 ¶ 4.)<sup>4</sup>

Notably, IEI admits that it received the first \$100,000 that was due. (CC ¶ 24.) It also admits that Hamilton Ex also paid an additional \$201,750 in March 2018, but characterizes this payment as “an advancement toward development” and says it “kept none of these funds for itself,” even though IEI admittedly “still retains \$79,394.63 of these funds.” (*Id.*)

By May 2018, the relationship between Counterclaim Defendants and IEI had soured. IEI repeatedly alleges that Counterclaim Defendants would not listen to IEI or follow its advice. (CC ¶¶ 7, 47-54.) IEI admits that it was unable to secure the Museum of Science and Industry (“MSI”) as the venue to host the Exhibition in Chicago. (*Id.* ¶ 36.) And, while IEI tries to blame others, IEI admits that costs for the Exhibition it was responsible for overseeing had skyrocketed to over \$13 million. (*Id.* ¶¶ 6-7, 54.)

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<sup>3</sup> Citations in the form of “Ex. \_” are to the Declaration of Jeffrey B. Korn in Support of Counterclaim Defendants’ Partial Motion to Dismiss (“Korn Decl.”). The Court may consider these documents on this motion because they are referenced and described in the Counterclaims. *See, e.g., Am. Nat’l Theatre & Acad. v. Am. Nat’l Theatre Inc.*, 2006 WL 4882916, at \*1 (S.D.N.Y. Sept. 27, 2006) (explaining that, “[w]hen a plaintiff chooses not to attach to the complaint or incorporate by reference a document upon which it relies and which is integral to the complaint, the court may nonetheless take the document into consideration in deciding the defendant’s motion to dismiss, without converting the proceeding to one for summary judgment.”) (quotations omitted).

<sup>4</sup> The Exhibition Producer Agreement also makes clear that Hamilton Ex shall own all intellectual property resulting from IEI’s work on the Exhibition. (Ex. 1 ¶ 7). The enforceability of this provision will be the subject of later proceedings in the event IEI’s copyright claim survives this motion (which it should not).

In short, IEI had a dissatisfied client who was not able to obtain the venue of its choice and who was being asked to pay far more than IEI had originally budgeted. This was made clear in a May 17, 2018 email, in which Counterclaim Defendants wrote to IEI:

We approved a budget of \$12,500,000. We discussed that no further changes being contemplated that would negatively impact the budget without a distinct Ted [red] flag warning from [IEI] from the minute it was presented. We asked for a list of suggested ways to get down below \$12,500,000 to leave room. I asked for that weeks ago and have seen nothing. Hearing that Incoming design changes are pushing the number in the wrong direction is pretty infuriating.

(Ex. 2 (emphasis added).) IEI selectively quotes this email in paragraph 53 of its Counterclaims, omitting the text underlined above reflecting IEI's lack of responsiveness.

IEI also omits the closing sentence in this May 17 email, which puts a finer point on the problem: "Guys, I can't work like this. I don't even know what else to say." (*Id.*) IEI was terminated two weeks later. (CC ¶ 55.) Nevertheless, and despite the fact that IEI received over \$300,000, IEI now alleges that Counterclaim Defendants committed fraud by promising to IEI in 2016 that it would be paid for its services and then later refusing to pay IEI more than it had already been paid. (CC ¶ 98.)

Ultimately, the Exhibition "opened in Chicago on April 29, 2019—more than six months later than originally scheduled—and closed on August 25, 2019, months earlier than originally scheduled." (CC ¶ 59.)

### **Argument**

To survive a motion to dismiss, the Counterclaims must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2008). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*,

556 U.S. 662, 678 (2009). As discussed below, IEI's copyright and fraudulent misrepresentation counterclaims are fatally defective as a matter of law and should be dismissed.

**I. IEI'S COUNTERCLAIM FOR COPYRIGHT INFRINGEMENT (COUNT I) SHOULD BE DISMISSED.**

“Post-*Iqbal*, the courts in this Circuit considering motions to dismiss copyright claims have held that a plaintiff with a valid copyright must allege that (1) defendant has actually copied the plaintiff's work; and (2) the copying is illegal because a substantial similarity exists between the defendant's work and the protectable elements of plaintiff's.” *Ritani, LLC v. Aghjayan*, 880 F. Supp. 2d 425, 441-42 (S.D.N.Y. 2012); accord *Perry v. Mary Ann Liebert, Inc.*, 2018 WL 2561029, at \*5 (S.D.N.Y. June 4, 2018). “Since direct evidence of copying is rarely possible, copying is generally established by showing (a) that the defendant had access to the copyrighted work and (b) the substantial similarity of protectable material in the two works.” *Kregos v. Associated Press*, 3 F.3d 656, 662 (2d Cir. 1993) (citations omitted).

Where the disputed works are entirely protectable, the “standard test” for substantial similarity is whether an “ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.” *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 111 (2d Cir. 2001) (quoting *Hamil Am. Inc. v. GFI*, 193 F.3d 92, 100 (2d Cir. 1999)). As the Second Circuit has observed, however, often “a work's aesthetic appeal will be due largely to unprotected elements.” *Zalewski v. Cicero Builder Dev., Inc.*, 754 F.3d 95, 102 (2d Cir. 2014). In those cases, courts must be “more discerning” and ignore “those aspects of a work that are unprotectable” in applying the substantial-similarity test, “lest we conflate mere copying with wrongful copying.” *Id.* (quoting *Laureyssens v. Idea Group, Inc.*, 964 F.2d at 131, 141 (2d Cir. 1992)). That is, in determining infringement, the Court must consider whether the alleged “similarities are due to protected aesthetic expressions original to the allegedly

infringed work, or whether the similarity is to something in the original that is free for the taking.” *Peter F. Gaito Architecture, LLC v. Simone Development Corp.*, 602 F.3d 57, 67 (2d Cir. 2010).

The precedent in this Circuit is clear that a district court may resolve the issue of non-infringement as a matter of law on a motion to dismiss. As the Second Circuit explained, if “the district court determines that the two works are not substantially similar as a matter of law, the district court can properly conclude that the plaintiff’s complaint, together with the works incorporated therein, do not plausibly give rise to an entitlement to relief.” *Peter F. Gaito*, 602 F.3d at 64 (citations and internal quotation marks omitted). Of particular relevance here, “[c]ourts dismiss copyright infringement claims before discovery where the alleged similarity ‘concerns only noncopyrightable elements of plaintiff’s work or no reasonable trier of fact could find the works substantially similar.’” *Brown v. Time Warner, Inc.*, 287 F. Supp. 3d 380, 385 (S.D.N.Y. 2017) (quoting *Williams v. Crichton*, 84 F.3d 581, 587 (2d Cir. 1996)); *see also Bollfrass v. Warner Music Group Corp.*, 2013 WL 1300986, at \*1 (S.D.N.Y. Apr. 2, 2013) (Stanton, J.) (“Whether any similarities between two works are protectable is a question of law that can be resolved on a motion to dismiss.”). That is the case here.

**A. IEI Does Not And Cannot Allege That Counterclaim Defendants Unlawfully Copied Any Original Expression In Works Based On Historical Facts.**

“A fundamental rule of copyright law is that it protects only ‘original works of authorship,’ those aspects of the work that originate with the author himself.” *Zalewski*, 754 F.3d at 102 (quoting 17 U.S.C. § 102(a)). “Everything else in the work, the history it describes, the facts it mentions, and the ideas it embraces, are in the public domain free for others to draw upon.” *Id.*; *see also Wright v. Warner Books, Inc.*, 953 F.2d 731, 742 (2d Cir. 1991) (stating that copyright protection does not encompass “incorporated facts or real occurrences, which were held to be in the public domain”). Instead, it is only the “peculiar *expressions* of that history, those facts, and

those ideas that belong exclusively to their author.” *Zalewski*, 754 F.3d at 102. For example, the Second Circuit has explained:

[A]ny author may draw from the history of English-speaking peoples, but no one may copy from *A History of the English-Speaking Peoples*. Any artist may portray the Spanish Civil War, but no one may paint another *Guernica*. And anyone may draw a cartoon mouse, but there can be only one Mickey.

*Zalewski*, 754 F.3d at 102.

As noted above, the seminal case in the Second Circuit addressing the scope of copyright in works based on historical events and figures is *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir. 1980). In that case, A.A. Hoehling claimed that a film released by Universal about the destruction of the Hindenberg in 1937 infringed his book on the same subject. Hoehling’s book was “presented as a factual account, written in an objective, reportorial style” and his “principal claim is that both Mooney and Universal copied the essential plot of his book i.e., Eric Spehl, influenced by his girlfriend, sabotaged the Hindenburg by placing a crude bomb in Gas Cell 4.” *Id.* at 975, 977.

The Second Circuit rejected Hoehling’s claim as a matter of law, explaining:

**[T]he protection afforded the copyright holder has never extended to history, be it documented fact or explanatory hypothesis.** The rationale for this doctrine is that the cause of knowledge is best served when history is the common property of all, and each generation remains free to draw upon the discoveries and insights of the past. Accordingly, the scope of copyright in historical accounts is narrow indeed, embracing no more than the author’s original expression of particular facts and theories already in the public domain. As the case before us illustrates, **absent wholesale usurpation of another’s expression, claims of copyright infringement where works of history are at issue are rarely successful.**



*Hoehling*, 618 F.2d at 974 (emphasis added). In short, “[i]n works devoted to historical subjects, it is our view that a second author may make significant use of prior work, so long as he does not **bodily appropriate** the expression of another.” *Id.* at 980 (emphasis added).

Because Universal’s film was not “virtually identical” to Hoehling’s book, the Second Circuit held that Universal did not “bodily appropriate” his expression and rejected his claim as a matter of law. *Hoehling*, 618 F.2d at 980. As the Second Circuit observed, the “hypothesis” that “Eric Spehl destroyed the Hindenburg is based entirely on the interpretation of historical facts,” which “is not protected by his copyright and can be freely used by subsequent authors.” *Id.* at 979; *see also id.* at 978 (“[O]ur cases hold that [historical] interpretations are not copyrightable as a matter of law.”); *Kimberley v. Penguin Random House*, 2018 WL 1918614, at \*3 (S.D.N.Y. Apr. 19, 2018) (“References to historical figures and events are not protectable elements, as no claim of copyright protection can arise from the fact that plaintiff has written about such historical and factual items.” (citation omitted)).

The standards articulated by the Second Circuit in *Hoehling* govern this case. As Judge Oetken explained in *Effie Film, LLC v. Pomerance*, 909 F. Supp. 2d 273 (S.D.N.Y. 2012), “courts regularly rely on the rule of law expressed in *Hoehling* to deny copyright protection to historical works—and to construe the scope of ‘facts’ and ‘interpretations’ broadly in works that are historical in character.” *Id.* at 296. And, as in *Effie Film*, “the significance of the *Hoehling* rule here is that, to the extent that the disputed works are similar with respect to plot structure, individual scenes, settings, or features of individual characters that reflect historical facts or interpretations, those similarities do not count toward substantial similarity analysis.” *Id.* at 298.

As discussed above, the Works at issue are all devoted to a historical subject—they are sketches, scripts, and an artifact matrix “based on the story of Alexander Hamilton’s life.” (CC

¶ 1; *see also id.* ¶ 17 (alleging that IEI proposed to “do an exhibition on the historical story and include the show and the music” from *Hamilton*); CC Exs. A-K.) Indeed, in preparing these Works, IEI admits that it sought to ensure their “utmost historical accuracy.” (*Id.* ¶ 30.) This is an “admission, then, the [Works’] content is unprotected factual material” because “historical truth is not protected expression.” *Sissom v. Snow*, 626 Fed. Appx. 163, 166-67 (7th Cir. 2015) (holding that author’s statements “that her book is ‘the true story’ and ‘every part of this book is accurate,’ consisting of verif[ied] facts” were admissions that content was “unprotected factual material.”); *see also Effie Film*, 909 F. Supp. 2d at 297 (stating that when a work “presents itself as an account of actual events, this representation renders proof of infringement more difficult, because copyright protection in this circuit does not extend to facts or to true events, even if they are discovered through original research.” (citation omitted)).

Here, the Counterclaims fail to allege any similarities between the Exhibition and any *protectable* expression in the Works, much less that the Exhibition “bodily appropriate[d]” that expression. *Hoehling*, 618 F.2d at 980; *Effie Film*, 909 F. Supp. 2d at 293 (applying *Hoehling* rule to grant motion to dismiss because alleged infringer cannot be held liable for infringing “works devoted to historical subjects” so long as he does not “bodily appropriate” the expression of another to grant judgment on the pleadings). Nowhere do the Counterclaims allege that any of the sketches in Exhibits A through G were reproduced and displayed in the Exhibition. Nowhere do the Counterclaims allege that the Exhibition copied any of the text from any of the scripts in Exhibit H, J and K for any of the Exhibition’s panel displays. And nowhere do the Counterclaims allege that the “artifact matrix” in Exhibit I, which is simply a spreadsheet containing information, is similar to anything in the Exhibition. To the contrary, far from setting forth facts suggesting that Counterclaim Defendants copied the Works wholesale, IEI affirmatively alleges that

Counterclaim Defendants rejected IEI's design choices and that, instead, DKD was responsible for the "design of the Exhibition." (CC ¶¶ 7, 26, 47.)

In fact, IEI does not attempt to identify any protectable expression in the Works at all. Instead, the Counterclaims refer generally to the subjects of some of the Works—such as sketches "depicting the Battle of Yorktown and the infamous due between Alexander Hamilton and Aaron Burr" (CC ¶ 70), which are unprotectable historical events. The Counterclaims also point to some of the unprotectable ideas the Works supposedly reflect—such as suspending items from the ceiling to show the devastation caused by the St. Croix hurricane, using Hamilton's writing desk and quill "as a *leitmotif*," employing "moving pieces" to show army positions during the Battle of Yorktown, and working with "interactive displays" to show policy debates from the Federalist Papers. (*Id.* ¶ 72.) They never identify any original *expression* in any of the individual Works (which they merely lump together), nor do they allege how any such *expression* is substantially similar to anything in the Exhibition.

This, too, is fatal. The courts in this Circuit have regularly dismissed copyright claims with similarly vague allegations because "the failure to plead facts regarding how the [works] are 'substantially similar,' including identifying the protectable elements of the works as part of its claim, will result in dismissal of the copyright claim." *Ritani*, 880 F. Supp. 2d at 442; *see also Peter F. Gaito*, 602 F.3d at 69 ("[B]ecause plaintiffs have failed to allege that a substantial similarity exists between defendants' work and the protectable elements of plaintiffs', the district court properly dismissed plaintiffs' federal copyright claim."); *Perry v. Mary Ann Liebert, Inc.*, 2018 WL 2561029, at \*5 (S.D.N.Y. June 4, 2018) (dismissing complaint "for failure to plausibly plead which aspect of the Pierce Article infringed a protectable aspect of her Dissertation and how those aspects are substantially similar."); *Lambertini v. Fain*, 2014 WL 4659266, at \*2-4

(E.D.N.Y. Sept. 17, 2014) (dismissing for failure to “identif[y] with some degree of specificity how Defendant’s works are substantially similar to her own”); *Castorina v. Spike Cable Networks, Inc.*, 784 F. Supp. 2d 107, 112-13 (E.D.N.Y. 2011) (dismissing complaint because, “[u]nfortunately for Plaintiffs, they do not allege that ‘*Pros v. Joes*’ contains *any* of these artistic, potentially original choices in selection, coordination, or arrangement.”).

Finally, IEI cannot rescue its defective infringement claim by alleging that the Exhibition is somehow “derivative” of the Works. (CC ¶ 72.) “The only way for [IEI] to prove that [the Exhibition] was a derivative of [IEI’s work] would be for [IEI] to prove that [the Exhibition] illegally copies [IEI’s work] because a substantial similarity exists between [the Exhibition] and the protectable elements of [IEI’s work], *i.e.*, to prove that [the Exhibition] infringes [IEI’s] copyright.” *Mayimba Music, Inc. v. Sony Corp. of Am.*, 2014 WL 5334698, at \*21 (S.D.N.Y. Aug. 19, 2014) (collecting cases); *accord Perry*, 2018 WL 2561029, at \*8 (same). As discussed above, IEI does not and cannot allege substantial similarity under *Hoehling* or otherwise.

Notably, the Seventh Circuit addressed, and rejected, a similar argument in *Sissom v. Snow*, 626 Fed. Appx. 163 (7th Cir. 2015). There, Sissom claimed infringement on the theory that Snow had created a derivative work, alleging “Snow’s book essentially restates the same chronology of events and the conclusions that Sissom reached in hers, using the third person rather than the first.” *Id.* at 166. As the Seventh Circuit observed, “none of the material that Sissom says is taken from her book is derivative of *protectable* material.” *Id.* (emphasis in original). Rather, “[t]he middle part of Snow’s book, from the chronology of Sissom’s investigation to her own ultimate conclusions, simple restates historical events—the murder investigation and Sissom’s role in it—and adds a bit of Snow’s own commentary about those events.” *Id.* Accordingly, because Snow “merely retold historical events using his own, more succinct style of expression, he did not

appropriate any copyrightable expression,” in creating a derivative work or otherwise. *Id.* The same is true here.

**B. The *Scènes à Faire* In The Works Are Not Copyrightable As A Matter Of Law.**

It is well established that “scenes à faire,” which involve “incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic” are “not copyrightable as a matter of law.” *Effie*, 909 F. Supp. at 273 (quoting *Hoehling*, 618 F.2d at 979); *see also* *Zalewski*, 754 F.3d at 102 (“[T]he doctrine of ‘scènes-à-faire’ teaches that elements of a work that are ‘indispensable, or at least standard, in the treatment of a given topic’—like cowboys, bank robbers, and shootouts in stories of the American West—get no protection.” (quoting *Hoehling*, 618 F.2d at 979)); *Brown v. Time Warner, Inc.*, 287 F. Supp. 3d 380, 384 (S.D.N.Y. 2017) (“*scenes a faire*, sequences of events that necessarily result from the choice of a setting or situation, do not enjoy copyright protection” (citation omitted)).

This doctrine applies with special force in the historical context because, as the Second Circuit has recognized, it is “virtually impossible to write about a particular historical era” without “employing certain ‘stock’ or standard literary devices.” *Hoehling*, 618 F.2d at 979. For example, in *Effie*, the court identified in the two works at issue “a number of unprotectible scènes-à-faire, including shots of Victorian-era gardens, the winding and checking of a Victorian-style gold pocket watch, a manor staffed by servants, panoramas of the Scottish countryside, and views of the Venetian cultural scene during the occupation of that city by Austrian officials.” *Effie*, 909 F. Supp. 2d at 306.

A review of the sketches contained in Exhibits A, B, D, F and G, and the scripts contained in Exhibits H, J and K, of the Counterclaims demonstrates that they are simply *scènes à faire* depicting or describing particular historical events. For example, Exhibits A and B are

sketches showing the fatal Hamilton-Burr duel. Naturally, the drawing reflects Hamilton and Burr pointing pistols at one another. There is nothing protectable about this scene and these sketches cannot be the basis for an infringement claim as a matter of law. *See, e.g., Williams v. A & E Television Networks*, 122 F. Supp. 3d 157, 163 (S.D.N.Y. 2015) (granting motion to dismiss where “alleged similarities consist primarily of unprotectable scenes à faire.”). The Counterclaims’ Exhibit L—which is the only place in which the Counterclaims compare any of the Works to any of the galleries in the Exhibition—thus cannot support a plausible copyright claim.

**C. Counterclaim Defendants Should Be Awarded Their Reasonable Attorney’s Fees On IEI’s Copyright Infringement Counterclaim Under 17 U.S.C. § 505.**

The Copyright Act provides courts with the discretion to award reasonable attorney’s fees to a prevailing party. *See* 17 U.S.C. § 505. “The Supreme Court has made clear that defendants may be prevailing parties for the purposes of § 505.” *Bollfrass*, 2013 WL 1300986, at \*4 (citing *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 (1994)).

Although “[t]here is no precise rule or formula” district courts must apply in determining whether to award attorney’s fees, the Supreme Court has suggested a list of non-exclusive factors that courts may consider: “frivolousness, motivation, objective unreasonableness (both in factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Fogerty*, 510 U.S. at 534 & n.19. In particular, the “objective unreasonableness” of a claim or defense is given “substantial weight” in this Circuit. *Matthew Bender & Co. v. West Publ’g Co.*, 240 F.3d 116, 122 (2d Cir. 2001). A claim is objectively unreasonable if it is “clearly without merit or otherwise patently devoid of legal or factual basis.” *Jovani Fashion, Ltd. v. Cinderella Divine, Inc.*, 820 F. Supp. 2d 569, 573 (S.D.N.Y. 2011). Ultimately, “[a]lthough objective reasonableness carries significant weight,

courts must view all the circumstances of a case on their own terms, in light of the Copyright Act's essential goals." *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1989 (2016).

IEI's copyright claim should never have been filed and is objectively unreasonable. The Works are about the life story of Alexander Hamilton, which is not copyrightable. The Second Circuit in *Hoehling* and its progeny made that clear, and also made clear the very narrow circumstances in which someone may be subjected to liability for infringing such historical works. IEI has not even attempted to allege that this is such a case. IEI does not separate any protectable expression from the indisputable non-protectable elements of its Works. IEI does not allege that Counterclaim Defendants bodily appropriated IEI's expression for the Exhibition. IEI hardly describes the Works at all, and compares them to the Exhibition at only the most superficial level.

In short, IEI does not have a legitimate copyright claim—and should have known that based on clear Second Circuit precedent. Rather, IEI has a business dispute with Counterclaim Defendants and is merely seeking to exert leverage by threatening statutory damages and liability under the Copyright Act. That is a misuse of the federal copyright laws and warrants the shifting of attorney's fees for this frivolous claim.

## **II. IEI'S COUNTERCLAIM FOR FRAUDULENT MISREPRESENTATION (COUNT IV) SHOULD BE DISMISSED.**

To plead fraud under New York law, a plaintiff must allege "(1) a material misrepresentation or omission of fact (2) made by defendant with knowledge of its falsity (3) and intent to defraud; (4) reasonable reliance on the part of the plaintiff; and (5) resulting damage to the plaintiff." *Crigger v. Fahnestock and Co.*, 443 F.3d 230, 234 (2d Cir. 2006). With respect to the second and third elements, "plaintiffs must allege facts that give rise to a strong inference of fraudulent intent." *Acito v. IMCERA Grp., Inc.*, 47 F.3d 47, 52 (2d Cir. 1995). To establish the requisite inference, a plaintiff must plead facts that: (i) "demonstrate the defendant's motive and

opportunity to commit or assist in the fraud,” or (ii) “constitute strong circumstantial evidence of the defendant’s conscious misbehavior or recklessness.” *Matsumura v. Benihana Nat’l Corp.*, 542 F. Supp. 2d 245, 255 (S.D.N.Y. 2008).

IEI’s fraud claim is that, when IEI was hired, Counterclaim Defendants represented that they would “compensate IEI for the fair value” of its services, but never intended to do so. (CC ¶ 96.) The single, conclusory allegation IEI makes in an attempt to plead knowledge and fraudulent intent is that “Counterclaim-Defendants either knew these representations were false when made or acted with reckless indifference to the truth of the representations, as demonstrated by Counterclaim-Defendants’ refusal to pay for the work IEI provided.” (*Id.* ¶ 98.)

This is a classic “fraud by hindsight” allegation that has been routinely rejected as insufficient to plead fraud under New York law. *See, e.g., Rubenstein v. SI Corp.*, 2005 WL 743121, at \*3-4 (S.D.N.Y. Mar. 31, 2005) (“[Plaintiff] argues that the evidence of [defendant’s] intention not to honor the commitment at the time it was made may be inferred from its failure to do so after plaintiff acted in reliance upon it. This is not sufficient pleading as to what actually constituted fraud.”); *see also Am. Lecithin Co. v. Rebmann*, 2017 WL 4402535, at \*20 (S.D.N.Y. Sept. 30, 2017) (holding that allegations that defendants’ “intent all along was to take [Defendant’s] shares in the business” were “purely conclusory” and “fail to plead knowledge or intent to defraud with Rule 9(b) particularity”); *Randolph Equities, LLC v. Carbon Capital, Inc.*, 2007 WL 914234, at \*7 (S.D.N.Y. Mar. 26, 2007) (“Further, pursuant to Rule 9(b), [p]laintiff is required to plead facts sufficient to show that at the time [d]efendants made these representations to provide financing, they did not intend to follow through with them. [P]laintiffs have failed to do so. Their conclusory allegations based on ‘information and belief’ that [d]efendants did not intend to honor the contract are insufficient.”).



Moreover, IEI's claim that knowledge and intent to defraud may be inferred from the fact that Counterclaim Defendants' "refus[ed] to pay for the work IEI provided" is contradicted by its own allegations. As IEI concedes, IEI received a payment of at least \$100,000 from Counterclaim Defendants for its services. (CC ¶ 24.) This payment is consistent with the milestone payment structure—which contemplated payments in \$50,000 increments—for IEI's compensation set forth in paragraph 4 of the "Exhibition Producer Agreement" between Hamilton Ex and IEI, dated as of January 1, 2017, which IEI signed. (Ex. 2 ¶ 4.)

Because IEI concedes that it was actually paid at least \$100,000 (*i.e.*, the first two payments due through the end of 2017 (*see id.*)), it is not plausible to infer that Counterclaim Defendants never intended to pay IEI when they allegedly represented in the Fall of 2016 that IEI would be paid "fair value," whatever that means. To the contrary, the only plausible inference from IEI's allegations is that Counterclaim Defendants intended to pay IEI, which they in fact did, and stopped paying IEI in the Spring of 2018 only after a dispute arose between the parties. The Counterclaims concede as much when they allege that Counterclaim Defendants rejected IEI's advice, had lost the venue of their choice, and were facing significantly increased costs. (*See supra* at 8; CC ¶¶ 7, 36, 47-54.)

**Conclusion**

For the foregoing reasons, Counterclaim Defendants respectfully submit that Counts I and IV of the Counterclaims should be dismissed, with prejudice.

Dated: New York, New York  
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Respectfully submitted,

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