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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

LESLIE A. KELLY, et al.) Case No. SA CV 99-560 GLT[JW]
)
Plaintiff,) ORDER ON CROSS-MOTIONS FOR
) PARTIAL SUMMARY JUDGMENT
vs.)
)
ARRIBA SOFT CORP., et al.)
)
Defendants.)
_____)

On apparent first impression, the Court holds the use by an Internet "visual search engine" of others' copyrighted images is a prima facie copyright violation, but it may be justified under the "fair use" doctrine. The Court finds that, under the particular circumstances of this case, the "fair use" doctrine applies, and the Digital Millennium Copyright Act is not violated.

Defendant's Motion for Partial Summary Judgment on Plaintiff's First and Second Claims for Relief is GRANTED. Plaintiff's Motion for Partial Summary Judgment is DENIED.

I. BACKGROUND

Defendant Ditto (formerly known as Arriba) operates a "visual search engine" on the Internet. Like other Internet search engines, it allows a user to obtain a list of related Web content in response

1 to a search query entered by the user. Unlike other Internet search
2 engines, Defendant's retrieves images instead of descriptive text. It
3 produces a list of reduced, "thumbnail" pictures related to the user's
4 query.

5 During the period when most of the relevant events in this case
6 occurred, Defendant's visual search engine was known as the Arriba
7 Vista Image Searcher. By "clicking" on the desired thumbnail, an
8 Arriba Vista user could view the "image attributes" window displaying
9 the full-size version of the image, a description of its dimensions,
10 and an address for the Web site where it originated.^{1/} By clicking on
11 the address, the user could link to the originating Web site for the
12 image.^{2/}

13 Ditto's search engine (in both of its versions) works by
14 maintaining an indexed database of approximately two million thumbnail
15 images. These thumbnails are obtained through the operation of
16 Ditto's "crawler," a computer program that travels the Web in search
17 of images to be converted into thumbnails and added to the index.^{3/}

19 ^{1/} This full-size image was not technically located on
20 Defendant's Web site. It was displayed by opening a link to its
21 originating Web page. But only the image itself, and not any
22 other part of the originating Web page, was displayed on the
23 image attributes page. From the user's perspective, the source
24 of the image matters less than the context in which it is
25 displayed.

26 ^{2/} Defendant's current search engine, ditto.com, operates in
27 a slightly different manner. When a ditto.com user clicks on a
28 thumbnail, two windows open simultaneously. One window contains
the full-size image; the other contains the originating Web page
in full.

^{3/} Images are briefly stored in full on Defendant's server
until the thumbnail is made; they are then deleted. Joint Stip.
¶ 32. There is no claim that Defendant provides any access to

(continued...)

1 Ditto's employees conduct a final screening to rank the most relevant
2 thumbnails and eliminate inappropriate images.

3 Plaintiff Kelly is a photographer specializing in photographs of
4 California gold rush country and related to the works of Laura Ingalls
5 Wilder. He does not sell the photographs independently, but his
6 photographs have appeared in several books. Plaintiff also maintains
7 two Web sites, one of which (www.golddrush1849.com) provides a "virtual
8 tour" of California's gold rush country and promotes Plaintiff's book
9 on the subject, and the other (www.showmethegold.com) markets
10 corporate retreats in California's gold rush country.

11 In January 1999, around thirty five of Plaintiff's images were
12 indexed by the Ditto crawler and put in Defendant's image database.
13 As a result, these images were made available in thumbnail form to
14 users of Defendant's visual search engine.

15 After being notified of Plaintiff's objections, Ditto removed the
16 images from its database, though due to various technical problems
17 some of the images reappeared a few times. Meanwhile Plaintiff,
18 having sent Defendant a notice of copyright infringement in January,
19 filed this action in April. Plaintiff argues its copyrights in the
20 images were infringed by Defendant's actions and also alleges
21 Defendant violated the Digital Millennium Copyright Act (DMCA) by
22 removing or altering the copyright management information associated
23 with Plaintiff's images.^{4/}

24 _____
25 ^{3/}(...continued)
the full-sized images during this period.

26 ^{4/} Defendant's request for judicial notice of a Nature
27 article, and Plaintiff's objection to the request, are both
28 inappropriate. The parties have already included this article as
(continued...)

1 II. DISCUSSION

2 These cross motions for summary adjudication present two
3 questions of first impression. The first is whether the display of
4 copyrighted images by a "visual search engine" on the Internet
5 constitutes fair use under the Copyright Act. The second is whether
6 the display of such images without their copyright management
7 information is a violation of the Digital Millennium Copyright Act.

8 Summary judgment is proper if there is no genuine issue of fact
9 and the moving party is entitled to a judgment as a matter of law.
10 Fed. R. Civ. Proc. 56(c). If no material historical facts are
11 disputed, the ultimate conclusion to be drawn on the issue of "fair
12 use" is for the Court and not a jury. Harper & Row, Publishers, Inc.
13 v. Nation Enterprises, 471 U.S. 539 (1985); Fisher v. Dees, 794 F.2d
14 432, 436 (9th Cir. 1986).

15 A. Fair Use

16 In order to show copyright infringement, Plaintiff must show
17 ownership of a valid copyright and invasion of one of the exclusive
18 rights of copyright holders. 17 U.S.C. § 106. Defendant does not
19 dispute the validity of Plaintiff's copyrights or his ownership of
20 them. Defendant also does not dispute it reproduced and displayed
21 Plaintiff's images in thumbnail form without authorization. Plaintiff
22 thus has shown a prima facie case of copyright infringement unless the
23 fair use doctrine applies.

24 "Fair use" is a limitation on copyright owners' exclusive right
25 "to reproduce the copyrighted work in copies." 17 U.S.C. § 106(1).

27 ^{4/}(...continued)

28 Exhibit 5 to their Joint Stipulation of Facts.

1 It is codified at 17 U.S.C. § 107, which provides:

2 Notwithstanding the provisions of sections 106 and 106A, the fair
3 use of a copyrighted work, including such use by reproduction in
4 copies or phonorecords or by any other means specified by that
5 section, for purposes such as criticism, comment, news reporting,
6 teaching (including multiple copies for classroom use),
7 scholarship, or research, is not an infringement of copyright. In
8 determining whether the use made of a work in any particular case
9 is a fair use the factors to be considered shall include--

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

18 The fact that a work is unpublished shall not itself bar a
19 finding of fair use if such finding is made upon consideration of
20 all the above factors.

21 Fair use is an affirmative defense, and defendants carry the
22 burden of proof on the issue. American Geophysical Union v. Texaco
23 Inc., 60 F.3d 913, 918 (2d Cir. 1995); Columbia Pictures Ind. v.
24 Miramax Films Corp., 11 F.Supp.2d 1179, 1187 (C.D. Cal. 1998)
25 ("[b]ecause fair use is an affirmative defense, Defendants bear the
26 burden of proof on all of its factors"). Based on an analysis of the
27 factors, the Court finds there is fair use here.

28

1 1. Purpose and Character Of The Use

2 The first factor considers the nature of the use, including
3 whether the use is commercial or educational. This, however, does not
4 end the inquiry. "Purpose and character" also involve an assessment
5 of whether "the new work merely supersedes the objects of the original
6 creation, or instead adds something new, with a further purpose or
7 different character, altering the first with new expression, meaning,
8 or message; it asks, in other words, whether and to what extent the
9 new work is transformative." Campbell v. Acuff-Rose Music, 510 U.S.
10 569, 579 (1994) (citation omitted). "[T]he more transformative the
11 new work, the less will be the significance of other factors, like
12 commercialism, that may weigh against a finding of fair use." Id. at
13 579.

14 There is no dispute Defendant operates its Web site for
15 commercial purposes. Plaintiff's images, however, did not represent a
16 significant element of that commerce, nor were they exploited in any
17 special way.^{5/} They were reproduced as a result of Defendant's
18 generally indiscriminate method of gathering images. Defendant has a
19 commercial interest in developing a comprehensive thumbnail index so
20 it can provide more complete results to users of its search engine.
21 The Ditto crawler is designed to obtain large numbers of images from
22 numerous sources without seeking authorization.^{6/} Plaintiff's images

23
24 ^{5/} The use in this case is commercial, but it is unusual and
25 less serious than many other commercial uses. If, for example,
26 Plaintiff's images were used without authorization in advertising
for Defendant's Web site, a finding of fair use would be much
less likely.

27 ^{6/} The parties argue at length about the possibility of
28 blocking the Ditto crawler from a Web site by use of a

(continued...)

1 were indexed as a result of these methods. While the use here was
2 commercial, it was also of a somewhat more incidental and less
3 exploitative nature than more traditional types of "commercial use."^{7/}

4 The most significant factor favoring Defendant is the
5 transformative nature of its use of Plaintiff's images. Defendant's
6 use is very different from the use for which the images were
7 originally created. Plaintiff's photographs are artistic works used
8 for illustrative purposes. Defendant's visual search engine is
9 designed to catalog and improve access to images on the Internet.
10 Joint Stip. ¶¶ 27-29, 32. The character of the thumbnail index is not
11 esthetic, but functional; its purpose is not to be artistic, but to be
12 comprehensive.

13 To a lesser extent, the Arriba Vista image attributes page also
14 served this purpose by allowing users to obtain more details about an
15 image. The image attributes page, however, raises other concerns. It

17 ^{6/}(...continued)

18 "robots.txt" file or other methods. Defendant posted
19 instructions on its Web site for blocking the Ditto crawler in
20 March, after Plaintiff's images had already been indexed.
Plaintiff's Web sites have never used any of these blocking
methods. Joint Stip. ¶ 34.

21 The Ditto crawler has, in the past, apparently visited sites
22 that were supposed to be blocked. Plaintiff argues this is
23 evidence of bad faith by Defendant and suggests the fair use
defense should as a result be precluded. The record shows
Defendant made efforts to correct problems of this sort when it
became aware of them, and did not act in bad faith.

24 ^{7/} Defendant also sought to promote a now-discontinued
25 software product called Arriba Express. Arriba Express allowed
26 users to "vacuum" an entire originating Web site and store it on
27 their computers simply by pointing at a thumbnail. Joint Stip.
28 ¶ 45-50, Exh. 18. The images would be stored along with all
content from the originating Web site. Arriba Express served a
function related to that of the search engine, and Defendant's
promotion of it represents a related type of "commercial use."

1 allowed users to view (and potentially download) full-size images
2 without necessarily viewing the rest of the originating Web page. At
3 the same time, it was less clearly connected to the search engine's
4 purpose of finding and organizing Internet content for users. The
5 presence of the image attributes page in the old version of the search
6 engine somewhat detracts from the transformative effect of the search
7 engine. But, when considering purpose and character of use in a new
8 enterprise of this sort, it is more appropriate to consider the
9 transformative purpose rather than the early imperfect means of
10 achieving that purpose. The Court finds the purpose and character of
11 Defendant's use was on the whole significantly transformative.

12 The Court finds the first factor weighs in favor of fair use.

13 2. Nature of the Copyrighted Work

14 The second factor in § 107 is an acknowledgment "that some works
15 are closer to the core of intended copyright protection than others,
16 with the consequence that fair use is more difficult to establish when
17 the former works are copied." Campbell, supra 510 U.S. at 586.
18 Artistic works like Plaintiff's photographs are part of that core.
19 The Court finds the second factor weighs against fair use.

20 3. Amount And Substantiality of the Portion Used

21 The third fair use factor assesses whether the amount copied was
22 "reasonable in relation to the purpose of the copying." Id. The
23 analysis focuses on "the persuasiveness of a [copier's] justification
24 for the particular copying done, and the enquiry will harken back to
25 the first of the statutory factors, for . . . the extent of
26 permissible copying varies with the purpose and character of the use."
27 Id. at 586-87.

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1 In the thumbnail index, Defendant used Plaintiff's images in
2 their entirety, but reduced them in size. Defendant argues it is
3 necessary for a visual search engine to copy images in their entirety
4 so users can be sure of recognizing them, and the reduction in size
5 and resolution mitigates damage that might otherwise result from
6 copying. As Defendant has illustrated in its brief, thumbnails cannot
7 be enlarged into useful images. Defendant's Memo of P & A, at 3. Use
8 of partial images or images further reduced in size would make images
9 difficult for users to identify, and would eliminate the usefulness of
10 Defendant's search engine as a means of categorizing and improving
11 access to Internet resources.

12 As with the first factor, the Arriba Vista image attributes page
13 presents a greater problem because it displayed a full-size image
14 separated from the surrounding content on its originating Web page.
15 Image attributes (e.g. dimensions and the address of the originating
16 site) could have been displayed without reproducing the full-size
17 image, and the display of the full image was not necessary to the main
18 purposes of the search engine.^{8/}

19 If only the thumbnail index were at issue, Defendant's copying
20 would likely be reasonable in light of its purposes. The image
21 attributes page, however, was more remotely related to the purposes of
22 the search engine. The Court finds the third factor weighs slightly
23 against fair use.

24 4. Effect of the Use On The Potential Market or Value

26 ^{8/} The newer search engine, ditto.com, appears to lessen
27 this problem by eliminating the image attributes page and
28 simultaneously opening the originating Web page along with a
full-size image.

1 The fourth factor inquiry examines the direct impact of the
2 defendant's use and also considers "whether unrestricted and
3 widespread conduct of the sort engaged in by the defendant . . . would
4 result in a substantially adverse impact on the potential market for
5 the original." Campbell, supra, 510 U.S. at 590 (citation omitted).

6 The relevant market is Plaintiff's Web sites as a whole. The
7 photographs are used to promote the products sold by Plaintiff's Web
8 sites (including Plaintiff's books and corporate tour packages) and
9 draw users to view the additional advertisements posted on those Web
10 sites. The fourth factor addresses not just the potential market for
11 a particular photo, but also its "value." The value of Plaintiff's
12 photographs to Plaintiff could potentially be adversely affected if
13 their promotional purposes are undermined.

14 Defendant argues there is no likely negative impact because its
15 search engine does not compete with Plaintiff's Web sites and actually
16 increases the number of users finding their way to those sites.

17 Plaintiff argues the market for his various products has been
18 harmed. Defendant's conduct created a possibility that some users
19 might improperly copy and use Plaintiff's images from Defendant's
20 site. Defendant's search engine also enabled users to "deep link"
21 directly to the pages containing retrieved images, and thereby bypass
22 the "front page" of the originating Web site. As a result, these
23 users would be less likely to view all of the advertisements on the
24 Web sites or view the Web site's entire promotional message. However,
25 Plaintiff has shown no evidence of any harm or adverse impact.

26 In the absence of any evidence about traffic to Plaintiff's Web
27 sites or effects on Plaintiff's businesses, the Court cannot find any
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1 market harm to Plaintiff. The Defendant has met its burden of proof
2 by offering evidence tending to show a lack of market harm, and
3 Plaintiff has not refuted that evidence. The Court finds the fourth
4 factor weighs in favor of fair use.

5 5. Conclusion--Fair Use

6 The Court finds two of the four factors weigh in favor of fair
7 use, and two weigh against it. The first and fourth factors
8 (character of use and lack of market harm) weigh in favor of a fair
9 use finding because of the established importance of search engines
10 and the "transformative" nature of using reduced versions of images to
11 organize and provide access to them. The second and third factors
12 (creative nature of the work and amount or substantiality of copying)
13 weigh against fair use.

14 The first factor of the fair use test is the most important in
15 this case. Defendant never held Plaintiff's work out as its own, or
16 even engaged in conduct specifically directed at Plaintiff's work.
17 Plaintiff's images were swept up along with two million others
18 available on the Internet, as part of Defendant's efforts to provide
19 its users with a better way to find images on the Internet.
20 Defendant's purposes were and are inherently transformative, even if
21 its realization of those purposes was at times imperfect. Where, as
22 here, a new use and new technology are evolving, the broad
23 transformative purpose of the use weighs more heavily than the
24 inevitable flaws in its early stages of development.

25 The Court has weighed all of the § 107 factors together. The
26 Court finds Defendant's conduct constituted fair use of Plaintiff's
27 images. There is no triable issue of material fact remaining to be
28

1 resolved on the question of fair use, and summary adjudication is
2 appropriate. Defendant's motion is GRANTED and Plaintiff's motion is
3 DENIED as to the copyright infringement claims.

4 B. Digital Millennium Copyright Act

5 Enacted on October 28, 1998, the Digital Millennium Copyright Act
6 (DMCA) implements two earlier World Intellectual Property Organization
7 treaties. Section 1202 of the DMCA governs "integrity of copyright
8 management information."^{9/} Section 1202(a) prohibits falsification of
9 copyright management information with the intent to aid copyright
10 infringement. Section 1202(b) prohibits, unless authorized, several
11 forms of knowing removal or alteration of copyright management
12 information.^{10/} Section 1203 creates a federal civil action for

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14 ^{9/} "Copyright management information" is defined, in relevant part, as:

15 [A]ny of the following information conveyed in connection
16 with copies . . . of a work . . . or displays of a work,
including in digital form . . . :

17 (1) The title and other information identifying the work,
including the information set forth on a notice of
copyright.

18 (2) The name of, and other identifying information about,
the author of a work.

19 (3) The name of, and other identifying information about,
the copyright owner of the work, including the information
20 set forth in a notice of copyright.

21 17 U.S.C. § 1202 (c).

22 ^{10/} Section 1202(b) provides, in relevant part,
No person shall, without the authority of the copyright
owner or the law--

23 (1) intentionally remove or alter any copyright management
24 information,

25 . . .
(3) distribute . . . copies of works . . . knowing that
26 copyright management information has been removed or altered
without authority of the copyright owner or the law,
27 knowing, or, with respect to civil remedies under section
1203, having reasonable grounds to know, that it will
induce, enable, facilitate, or conceal an infringement of

28 (continued...)

1 violations of these provisions.

2 Plaintiff argues Defendant violated § 1202(b) by displaying
3 thumbnails of Plaintiff's images without displaying the corresponding
4 copyright management information consisting of standard copyright
5 notices in the surrounding text. Joint Stip. of Facts, ¶¶ 64-69.
6 Because these notices do not appear in the images themselves, the
7 Ditto crawler did not include them when it indexed the images.^{11/} Id.
8 ¶ 70. As a result, the images appeared in Defendant's index without
9 the copyright management information, and any users retrieving
10 Plaintiff's images while using Defendant's Web site would not see the
11 copyright management information.

12 Section 1202(b)(1) does not apply to this case. Based on the
13 language and structure of the statute, the Court holds this provision
14 applies only to the removal of copyright management information on a
15 plaintiff's product or original work. Moreover, even if § 1202(b)(1)
16 applied, Plaintiff has not offered any evidence showing Defendant's
17 actions were intentional, rather than merely an unintended side effect
18 of the Ditto crawler's operation.

19 Here, where the issue is the absence of copyright management
20 information from copies of Plaintiff's works, the applicable provision
21 is § 1202(b)(3). To show a violation of that section, Plaintiff must
22 show Defendant makes available to its users the thumbnails and full-

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24 ^{10/}(...continued)
any right under [federal copyright law].

25 ^{11/} There was one exception--a version of the "Shasta
26 Rainbow" image obtained by the Ditto crawler from a third-party
27 Web site. The copyright notice for that image was incorporated
28 into the image itself (fine print along the edge of the picture).
See Joint Stip., ¶¶ 72-73. Plaintiff's allegations of DMCA
violations are inapplicable to this image.

1 size images, which were copies of Plaintiff's work separated from
2 their copyright management information, even though it knows or should
3 know this will lead to infringement of Plaintiff's copyrights. There
4 is no dispute the Ditto crawler removed Plaintiff's images from the
5 context of Plaintiff's Web sites where their copyright management
6 information was located, and converted them to thumbnails in
7 Defendant's index. There is also no dispute the Arriba Vista search
8 engine allowed full-size images to be viewed without their copyright
9 management information.

10 Defendant's users could obtain a full-sized version of a
11 thumbnailed image by clicking on the thumbnail. A user who did this
12 was given the name of the Web site from which Defendant obtained the
13 image, where any associated copyright management information would be
14 available, and an opportunity to link there.^{12/} Users were also
15 informed on Defendant's Web site that use restrictions and copyright
16 limitations may apply to images retrieved by Defendant's search
17 engine.^{13/}

18 Based on all of this, the Court finds Defendant did not have
19 "reasonable grounds to know" it would cause its users to infringe

21 ^{12/} Through Defendant's current search engine, ditto.com, the
22 user can no longer open a full-sized image without also opening
the site where its copyright management information is located.

23 ^{13/} Plaintiff argues Defendant's warnings are insufficient
24 because they do not appear with the thumbnail images on the
25 search result pages produced by the search engine. The Arriba
26 Vista Web site only offered a warning if users clicked on a link
27 to its "Copyright" page. This warning may arguably have been
28 placed in the wrong place to deter some potential copyright
infringers. But this does not necessarily mean Defendant "knew"
or "should have known" for the purposes of a DMCA violation,
especially since Plaintiff offers no evidence of any actual
copyright infringement about which Defendant "should have known."

1 Plaintiff's copyrights. Defendant warns its users about the
2 possibility of use restrictions on the images in its index, and
3 instructs them to check with the originating Web sites before copying
4 and using those images, even in reduced thumbnail form.

5 Plaintiff's images are vulnerable to copyright infringement
6 because they are displayed on Web sites. Plaintiff has not shown
7 users of Defendant's site were any more likely to infringe his
8 copyrights, any of these users did infringe, or Defendant should
9 reasonably have expected infringement.

10 There is no genuine issue of material fact requiring a trial on
11 Plaintiff's DMCA claims, and summary adjudication is appropriate. The

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