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United States District Court
Central District of California
Western Division

FAMEFLYNET, INC.,

Plaintiff,

v.

BREITBART NEWS NETWORK, L.L.C.,

Defendant.

CV 17-05416 TJH (ASx)

Order
and
Judgment
JS-6

The Court has considered Plaintiff FameFlynet, Inc.’s [“Fame”] motion for summary judgment, together with the moving and opposing papers.

Facts

Fame owns the copyrights to a multitude of photographs that primarily feature celebrities. It licenses those photos to various media outlets for profit.

On June 28, 2016, a photographer who, according to Fame, was working under contract for Fame, took a series of photographs of Johnny Manziel, the former Cleveland Browns quarterback, smoking what appeared to be marijuana. Manziel was in the public spotlight at the time because the Browns had recently released him from his contract, due, in part, to his proclivity for partying. The week Manziel was

1 photographed, his father was quoted in news media calling him a “druggie.”

2 Fame claims it owns the rights to all of the Manziel photos pursuant to its
3 contract with the photographer. Between June 28 and June 29, 2016, Fame licensed a
4 number of the photos to the *Daily Mail*, a news publication, for \$2,750.00. On June
5 29, 2016, the *Daily Mail* published an online news article on Manziel’s activities, which
6 included the Manziel photos.

7 Defendant Breitbart News Network, L.L.C. [“Breitbart”] owns and operates
8 Breitbart.com, a website that publishes news and opinion articles on matters of interest
9 to various members of the public. On June 30, 2016, Breitbart published an article
10 reporting Manziel’s possible marijuana use, including original editorial content
11 describing his recent troubles. The article, also, included a cropped version of one of
12 the Manziel photos [“the Photo”] and a hyperlink to the *Daily Mail*’s June 29 article,
13 where the Photo originally appeared. Breitbart’s article credited the Photo to Fame.

14 On July 20, 2016, Fame, allegedly, observed the Photo on Breitbart.com. The
15 next day, July 21, 2016, the United States Copyright Office issued Fame a certificate
16 of copyright registration for a compilation of photos, including the Photo.

17 On July 21, 2017, Fame filed this action against Breitbart, alleging direct
18 copyright infringement and vicarious copyright infringement for Breitbart’s use of the
19 Photo. On October 20, 2017, Breitbart filed its answer, asserting, *inter alia*, that
20 Fame’s copyright registration for the Photo was invalid because it did not specifically
21 identify the Photo, that Fame lacked standing because it sold an exclusive license to the
22 *Daily Mail*, and the affirmative defense of fair use.

23 Fame, now, moves for summary judgment.

24 **Summary Judgment**

25 When considering a plaintiff’s motion for summary judgment on a claim where
26 the plaintiff has the burden of proof at trial, as Fame has here with regard to its
27 infringement claims, the plaintiff must establish, with admissible evidence, a *prima*
28 *facie* case for its claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If

1 Fame can establish a *prima facie* case, the burden shifts to Breitbart to show that there
2 is a genuine issue of material fact to prevent the entry of summary judgment. *Celotex*,
3 477 U.S. at 324. When considering this motion, the Court must draw all reasonable
4 inferences in favor of Breitbart, the nonmoving party. *See Scott v. Harris*, 550 U.S.
5 372, 379 (2007).

6 **Standing**

7 Breitbart frames its standing challenge as an affirmative defense. Standing,
8 however, is a jurisdictional issue. *Carrico v. City and Cty. of San Francisco*, 656 F.3d
9 1002, 1005 (9th Cir. 2011). The plaintiff bears the burden of establishing the Court's
10 jurisdiction, including the plaintiff's standing. *Chandler v. State Farm Mut. Auto. Ins.*
11 *Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010). At the summary judgment stage, Fame
12 must set forth specific, uncontroverted facts to show that it has standing. *See*
13 *Barnes-Wallace v. City of San Diego*, 530 F.3d 776, 784 (9th Cir. 2008).

14 Breitbart argued that Fame lacks standing because Fame sold an exclusive license
15 for the Photo to the *Daily Mail*. After a copyright owner conveys an exclusive license,
16 only the licensee, and not the original owner, may bring an action for infringement.
17 *Righthaven L.L.C. v. Hoehn*, 716 F.3d 1166, 1170 (9th Cir. 2013). Breitbart argued,
18 in its opposition brief, that the license was exclusive because: (1) Fame's invoice to the
19 *Daily Mail* described the set of photos as "Exclusive Johnny Manziel Gets High in
20 Mexico"; (2) The *Daily Mail*'s article touted the Photo as a "picture exclusive"; and (3)
21 Fame's counsel told Breitbart's counsel that Fame had sold an exclusive license to the
22 *Daily Mail*.

23 In support of Fame's reply papers, its president, Boris Nizon, provided a
24 declaration stating that the license was governed by the Terms and Conditions of Use
25 ["the Terms"] on Fame's website. The Terms state, *inter alia*, "FameFlynet agrees to
26 grant, and you [the *Daily Mail*] agree to take, a non-exclusive, non-transferable, limited
27 license to use the contents of the Site. . ." While the language mentions a "non-
28 exclusive license," the Terms are clearly limited to the "use [of] the contents of the

1 Site.”

2 The question, then, is whether the Photo constituted “contents of the Site.”
3 Nizon’s declaration implied that it did, declaring that “[t]he only terms applicable to the
4 [Photo’s] license. . . are those contained on [Fame’s] website which were accepted by
5 *Daily Mail* as a condition of their usage of our website.” However, Fame offered no
6 evidence directly stating that the *Daily Mail* purchased the Photo through the Website.

7 Consequently, the Court will analyze the issue under two scenarios: (1) The
8 Photo was acquired by the *Daily Mail* through Fame’s website, and (2) The Photo was
9 acquired by the *Daily Mail* through a means other than Fame’s website. If the *Daily*
10 *Mail* purchased the Photo through Fame’s website, the Photo would constitute “contents
11 of the site” and it would be governed by the Terms. Because Nizon’s declaration was
12 part of Fame’s reply papers, Breitbart could have sought leave to file a sur-reply if it
13 wanted to raise any additional arguments or present any additional evidence. However,
14 it did not. Thus, the Court is left with Nizon’s uncontradicted declaration. Thus, under
15 the first scenario, the Photo’s license should be deemed to be non-exclusive.

16 If the *Daily Mail* purchased the Photo by another means, then the Photo would
17 not, necessarily, be subject to the website’s Terms. Breitbart argued that the Photo was
18 subject to the terms of the invoice, and that the invoice conveyed an exclusive license.
19 Pursuant 17 U.S.C. § 204(a), an exclusive license may be conveyed only through a
20 signed writing. *Radio Television Espanola S.A. v. New World Entm’t, Ltd.*, 183 F.3d
21 922, 929 (9th Cir. 1999).

22 The invoice, here, does not contain a traditional, inked signature. It merely
23 displays “FameFlynet, Inc.” at the top left corner of each page, along with Fame’s
24 address, and, at the bottom, Fame’s phone, fax, email, and website. The invoice, also,
25 sets forth the price and a brief description of the photo collection. The Ninth Circuit
26 has not defined “signature” for the purposes of § 204(a). Nor does the Copyright Act,
27 itself, define “signature.” *Metro. Reg’l Info. Sys., Inc. v. Am. Home Realty Network,*
28 *Inc.*, 722 F.3d 591, 601 (4th Cir. 2013).

1 In seeking a definition of “signature” for the conveyance of an exclusive
2 copyright license, the Fourth Circuit adopted the definition set forth in the E-Sign Act,
3 15 U.S.C. § 7006(5), as guidance. *Metro. Reg’l Info. Sys., Inc.*, 722 F.3d at 601. The
4 E-Sign Act, created to insure that electronic signatures are given effect in the digital
5 age, defines “electronic signature” as “an electronic sound, symbol, or process,
6 attached to or logically associated with a contract or other record and executed or
7 adopted by a person with the intent to sign the record.” 15 U.S.C. §§ 7001(a)(1);
8 7006(5). Again, there is a lack of evidence. This time, there is no evidence to establish
9 whether the invoice was sent electronically to the *Daily Mail*. However, because an
10 inference of electronic mailing would favor Fame, the Court draws that inference. *See*
11 *Scott*, 550 U.S. at 379.

12 In 2016, Judge Lew of the Central District of California, relying on *Metro. Reg’l*
13 *Info. Sys., Inc.*, concluded that an owner’s alias in the signature line of an email
14 constituted a signature under § 204(a). *Sisyphus Touring, Inc. v. TMZ Productions,*
15 *Inc.*, 208 F.Supp.3d 1105, 1113 (C.D.Cal. 2016). Here, the invoice included Fame’s
16 name, and evidences a basic intent to sell a license for the Photo. Therefore, Fame’s
17 invoice is signed, as required by § 204(a). A question remains, however, as to the type
18 of license conveyed by the invoice.

19 A signed writing that conveys an exclusive license can be as short as one line, but
20 it must evidence the intent of the copyright holder to transfer an exclusive license.
21 *Radio Television Espanola S.A.*, 183 F.3d at 927. Breitbart argued that because the
22 invoice described the photos as “Exclusive Johnny Manziel Gets High in Mexico,” it
23 evidenced an intent to sell an exclusive license. However, Nizon’s declaration stated
24 that Fame’s intent was to not convey an exclusive license for the Manziel photos, and
25 that the word “exclusive,” as used in the invoice, referred to the fact that Fame was the
26 only entity in possession of photographs of Manziel smoking. Because Breitbart raised
27 the issue in its opposition brief and Fame presented this evidence in its reply brief,
28 Fame’s evidence regarding its intent is uncontroverted. *See Barnes-Wallace*, 530 F.3d

1 at 784. Again, if Breitbart had any additional arguments or facts, it could have sought
2 leave to file a sur-reply. It did not. Thus, Fame has set forth specific, uncontroverted
3 facts to show that the invoice did not convey an exclusive license. *See Barnes-Wallace*,
4 530 F.3d at 784. Thus, under the second scenario, the Photo's license is also non-
5 exclusive.

6 Consequently, under either scenario, the license was non-exclusive. Therefore,
7 Fame has standing to proceed with its claims.

8 **Copyright Infringement**

9 Pursuant to 17 U.S.C. § 411(a), a plaintiff must possess a valid copyright
10 certificate as a prerequisite to bringing a copyright infringement suit. *Cosmetic Ideas*,
11 *Inc. v. IAC/Interactivecorp.*, 606 F.3d 612, 619 (9th Cir. 2010). Breitbart argued that
12 Fame's copyright certificate did not specifically identify the Photo and, therefore, did
13 not satisfy § 411(a). However, items in a compilation of works do not need be listed
14 individually on the copyright certificate for the certificate to be valid, provided that the
15 copyright holder owns all of the works in the compilation. *Unicolors, Inc. v. Urban*
16 *Outfitters, Inc.*, 853 F.3d 980, 989 (9th Cir. 2017). Fame provided uncontroverted
17 evidence – Nizon's declaration – that it owned the Photo and all of the other works in
18 the compilation covered by the copyright certificate. Accordingly, Fame has a valid
19 copyright certificate for the Photo and, therefore, is entitled to pursue its copyright
20 infringement claims. *See Unicolors*, 853 F.3d at 989.

21 To establish a *prima facie* case of direct copyright infringement, Fame must
22 establish that: (1) It owned the Photo; and (2) Breitbart violated one of Fame's exclusive
23 rights as the copyright holder. *See Perfect 10, Inc. v. CCBill L.L.C.*, 488 F.3d 1102,
24 1119 (9th Cir. 2007). Pursuant to 17 U.S.C. 410(c), a valid copyright certificate is
25 *prima facie* evidence that Fame owned the Photo. *See Three Boys Music Corp. v.*
26 *Bolton*, 212 F.3d 477, 488-89 (9th Cir. 2000) . Breitbart did not raise the issue of
27 whether Fame owned the Photo in the context of whether Fame established a *prima*
28 *facie* case. Further, Breitbart did not dispute that it published the Photo on its website,

1 where it currently remains displayed. Accordingly, Breitbart violated Fame's exclusive
2 right to publicly display the Photo. *See Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d
3 657, 668 (9th Cir. 2017).

4 Because Fame has established its claim for direct copyright infringement, the
5 Court need not consider the claim for vicarious copyright infringement because Fame
6 can recover for only one of those claims. *See Teutscher v. Woodson*, 835 F.3d 936,
7 954 (9th Cir. 2016).

8 **Fair Use Defense**

9 When considering a motion for summary judgment, where the nonmoving party
10 has the burden of proof at trial, as Breitbart has, here, with regard to its fair use
11 affirmative defense, summary judgment is granted when the nonmoving party fails to
12 produce evidence sufficient to establish a *prima facie* case. *See Celotex*, 477 U.S. at
13 322. However, Fame, as the moving party, has the initial burden to show that Breitbart
14 lacks evidence to establish a *prima facie* case. *See Williams v. Gerber Prods. Co.*, 552
15 F.3d 934, 938 (9th Cir. 2008). Fame has met its initial burden.

16 In determining whether a use is fair, the following, non-exhaustive, list of
17 factors, set forth in 17 U.S.C. § 107, are to be considered: (1) The purpose and
18 character of the use; (2) The nature of the copyrighted work; (3) The amount and
19 substantiality of the work used; and (4) The effect of the use on the copyright holder's
20 potential market for the work. *Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1171
21 (9th Cir. 2012). While no one factor is dispositive, the most weight will be given to
22 the first and fourth factors. *Monge*, 688 F.3d at 1171.

23 **1. Purpose and character of use**

24 In determining whether the purpose and character of the use favors fair use, the
25 Court considers whether Breitbart was reporting news, whether its enterprise was
26 commercial or non profit, and whether it transformed the Photo. *See Campbell v.*
27 *Acuff-Rose Music, Inc.*, 510 U.S. 569, 574.

28 Breitbart used the Photo to report the news that Johnny Manziel had been spotted

1 possibly smoking marijuana. Indeed, the photo *was* the news. *See L.A. News Service*
2 *v. KCAL-TV Channel 9*, 108 F.3d 1119, 1121 (9th Cir. 1997). However, news
3 reporting is not fair use *per se*; the Court must also assess whether the purpose of the
4 use was commercial and the extent to which the work was transformed. *Monge*, 688
5 F.3d at 1171.

6 Breitbart's use of the Photo was commercial; the website is, by Breitbart's own
7 admission, a commercial enterprise. Commercial use weighs against fair use.
8 *Campbell*, 510 U.S. at 585.

9 Whether Breitbart transformed the Photo depends on whether Breitbart "add[ed]
10 something new, with a further purpose or different character." *See Campbell*, 510 U.S.
11 at 574. In *Monge*, the Ninth Circuit held that a celebrity couple's wedding photos
12 were, at best, "minimally transform[ed]" by a magazine's written commentary and
13 visual flourishes, because the photos, themselves, were unchanged. *Monge*, 688 F.3d
14 at 1176. Like the magazine in *Monge*, Breitbart added its own editorial commentary
15 and made minor visual tweaks, such as cropping and adding a watermark attributing the
16 Photo to Fame. The substance of the Photo, however, remained unaltered. Like the
17 magazine in *Monge*, Breitbart's use is, at best, only minimally transformative. *See*
18 *Monge*, 688 F.3d at 1176.

19 Breitbart's use was to report news, but it was also commercial and only
20 minimally transformative. Accordingly, as in *Monge*, the purpose and character factor
21 is neutral. *See Monge*, 688 F.3d at 1177.

22 **2. The nature of the copyrighted work**

23 In determining whether the nature of the copyrighted work itself supports fair
24 use, the Court must consider whether the work was creative and whether it was
25 unpublished at the time of use. *Monge*, 688 F.3d at 1177. The unauthorized use of
26 creative works, rather than informational works, weighs against fair use. *Monge*, 688
27 F.3d at 1177. Additionally, the use of works that are unpublished, rather than
28 published, weighs against fair use. *Harper & Row Publishers, Inc. v. Nation*

1 *Enterprises*, 471 U.S. 539, 555 (1985).

2 Photographs that document events are creative, because they are “aesthetic
3 expressions” of a scene. *Monge*, 688 F.3d at 1177. Thus, the Photo was creative,
4 weighing against fair use. *See Monge*, 688 F.3d at 1177. However, the Photo was
5 published by the *Daily Mail* prior to Breitbart’s use, which supports fair use. *See*
6 *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 555 (1985).

7 Accordingly, this factor is, also, neutral.

8 **3. Amount and substantiality of the portion used**

9 The Court must, next, consider the amount and substantiality of Breitbart’s use
10 from both a quantitative and qualitative perspective. *See Monge*, 688 F.3d at 1178.
11 The quantitative inquiry considers the actual proportion of the Photo that Breitbart used.
12 *See Monge*, 688 F.3d at 1178. The qualitative inquiry considers whether Breitbart used
13 the “heart” of the Photo. *See Monge*, 688 F.3d at 1178.

14 Quantitatively, Breitbart published only one photo of the set of twenty-eight Fame
15 photos originally published by the *Daily Mail*. Further, Breitbart cropped the Photo to
16 61 percent of its original size. However, even though the Photo is one of many among
17 a set of works, it is an independent work, rather than a portion of a work, because it
18 has independent economic value. *See Monge*, 688 F.3d at 1180. Thus, quantitatively,
19 Breitbart published 61 percent of an independent work, rather than one part of a
20 compilation. *See Monge*, 688 F.3d at 1180.

21 Qualitatively, use is substantial if it appropriates the “heart” of a work. *Harper*,
22 471 U.S. at 555. Here, Breitbart used the heart of the Photo because the main subject
23 – Manziel smoking – remained unaltered in the cropped version. *See Monge*, 688 F.3d
24 at 1179.

25 However, because Breitbart used only that portion of the Photo that it needed for
26 its news reporting purposes, the amount and substantiality factor does not weigh against
27 it. *See Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 820-1 (9th Cir. 2003). Thus, this
28 factor is, also, neutral. *See Kelly*, 336 F.3d at 821.

1 **4. Effect on the potential market for copyright holder’s work**

2 The last, and most important, factor is whether Breitbart’s use would substantially
3 harm the market for the Photo. *See Monge*, 688 F.3d at 1180. The Court must
4 consider both the potential profits lost by Fame and the effect on Fame’s ability to profit
5 from the Photo in the future. *See Campbell*, 510 U.S. at 590.

6 If the commercial use of a work is “mere duplication,” then there is a
7 presumption that the use harmed the market. *Campbell*, 510 U.S. at 591. A work is
8 “merely duplication” if it was not, at least, minimally transformed. *Campbell*, 510
9 U.S. at 591. Although Breitbart used the Photo to create a profit, its use was, indeed,
10 minimally transformative. Accordingly, the Court cannot presume that the market was
11 harmed. *See Campbell*, 510 U.S. at 591. Thus, Breitbart bears the burden to establish,
12 with evidence, that it did not damage the market for the Photo. *See Campbell*, 510
13 U.S. at 591.

14 Breitbart did not present evidence to establish that its use was harmless. Rather,
15 it cited *Monge* for the proposition that photographs lose all value after the first
16 publication, and argued that it could not harm the market for the Photo if the Photo had
17 no value after the *Daily Mail* published it. *See Monge*, 688 F.3d at 1180. Breitbart’s
18 reliance on *Monge* is misplaced – *Monge* does not stand for such a general rule.
19 Rather, whether the Photo has value after its first publication is a fact-specific inquiry.
20 *Campbell*, 510 U.S. at 591. Accordingly, Breitbart failed to meet its burden of
21 establishing that it did not harm the market for the Photo. *See Campbell*, 510 U.S. at
22 591. Thus, this factor weighs against fair use.

23 **5. Balancing the factors**

24 The fourth factor – the most important to the fair use analysis – weighs against
25 Breitbart, while the remaining factors are neutral. When considered together, the factors
26 weigh against fair use.

27 Consequently, Breitbart failed to establish a *prima facie* case for its affirmative
28 defense of fair use. *See Celotex*, 477 U.S. at 323. Accordingly, summary judgment

1 will be granted in favor of Fame.

2 **Damages**

3 Fame has requested statutory damages, pursuant to 17 U.S.C. § 504(c)(1). Under
4 17 U.S.C. § 504(c)(1), statutory damages can range from a minimum of \$750.00 to
5 maximum of \$30,000.00. Fame did not request the Court to make a finding of
6 willfulness, which would have increased the statutory maximum to \$150,000.00. *See*
7 17 U.S.C. § 504(c)(2). The Court has broad discretion to award any amount between
8 the statutory minimum and maximum. *Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40
9 F.3d 1007, 1010 (9th Cir. 1994).

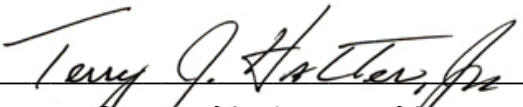
10 Fame requested \$27,500.00 in damages, ten times the amount it charged the
11 *Daily Mail*, based on, *inter alia*, Breitbart's allegedly willful infringement. Based on
12 the facts of this case, the fair amount for statutory damages is \$2,750.00.

13
14 Accordingly,

15
16 **It is Ordered** that Fame's motion for summary judgment be, and hereby is,
17 **Granted**.

18
19 **It is further Ordered, Adjudged and Decreed** that Judgment be, and hereby
20 is, **Entered** in favor of Plaintiff FameFlynet, Inc. and against Defendant Breitbart
21 News Network, L.L.C. in the amount of \$2,750.00.

22
23 Date: November 28, 2018

24
25 
26 **Terry J. Hatter, Jr.**
27 **Senior United States District Judge**
28