

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

KLEIN & HEUCHAN, INC., Plaintiff and Counter-Defendant,	}	Civ. Act. No. 8:08-cv-01227-JSM-MSS
v.	}	
COSTAR REALTY INFORMATION, INC. and COSTAR GROUP, INC., Defendants and Counter-Plaintiffs.	}	
	}	

KLEIN & HEUCHAN, INC.’S CLOSING ARGUMENT

Introduction

COSTAR REALTY INFORMATION, INC. and COSTAR GROUP, INC. (collectively “CoStar”) has asserted two claims against KLEIN & HEUCHAN, INC. (hereinafter “K&H”): (1) contributory infringement; and (2) vicarious copyright infringement. Contributory infringement requires the plaintiff to prove K&H knew or should have known of the infringing activity and also induced, caused or materially contributed to the infringing conduct. CoStar failed to prove these elements. Specifically, CoStar failed to prove that K&H knew or should have known that the activities of Bell were of an infringing nature. In order to prevail in its claim of vicarious infringement, CoStar had to prove a direct infringement, a right and ability to supervise the direct infringer, and that the defendant has directly profited from the direct infringement. CoStar failed to prove the vital element that K&H profited directly from the infringement by Scott Bell (“Bell”).

This Court’s prior ruling on CoStar’s Motion for Summary Judgment refined and limited those issues presently before the Court. *See* D.E. 94. During the Summary Judgment Proceedings the Court found that Bell directly infringed upon CoStar’s valid copyrights. *See id.*

at p.6. Further, as to CoStar's claim of contributory Infringement against K&H, the Court found that from the facts presented, a reasonable fact finder could determine that K&H believed that Bell's subscription as time limited and that the time period had not yet ended and that a material question of fact remained on the knowledge issue. *See id.* at p.6-7. As to CoStar's claim of vicarious infringement against K&H, the Court ruled that K&H had the right and ability to supervise Bell. *See id.* at 7-8. However, the Court ruled there was "no record evidence that K&H received a benefit, financial or otherwise, from Bell's infringement of copyrighted photographs." *Id.* at 8.

K&H respectfully submits that no evidence was presented at trial that K&H was aware, or should have been aware, that Bell's access to CoStar's internet materials was unauthorized. Accordingly CoStar's claim of contributory infringement must fail. Likewise, CoStar failed to present sufficient evidence that K&H profited directly from the copyright infringement of Bell. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). The only evidence presented on the benefit issue was the potential license fee not paid by K&H – the license fee it is undisputed K&H consistently determined had no value. With the facts presented, CoStar has failed to prove the necessary element of direct profit in order to hold K&H liable for vicarious copyright infringement. Moreover, even if the Court were to find a violation by contributory or vicarious infringement by K&H, the conduct and inactivity by CoStar have provided K&H with various defenses which would warrant judgment in their favor.

Discussion of Contributory Infringement

Contributory infringement requires the plaintiff to plead and prove the defendant knew or should have known of the infringing activity and also induced, caused or materially contributed to the infringing conduct. A contributory infringer is "one who, with knowledge of the

infringing activity, induces, causes or materially contributes to the infringing conduct of another.” *Casella v. Morris*, 820 F.2d 362, 365 (11th Cir. 1987) (quoting *Gershwin Publishing Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)). In the copyright context, knowledge means that either the alleged contributory infringer has actual knowledge or has reason to know of the infringing activity. *Id.*

In this instance, CoStar failed to prove that K&H knew or should have known that Mr. Bell was unauthorized to access the CoStar database. In fact, CoStar could not even establish that Mr. Bell knew he was unauthorized to access the CoStar database. To the contrary, Mr. Bell testified that he believed he held a subscription to the CoStar database provided to him by his previous employer, Coldwell Banker. Mr. Bell believed the subscription was subject to expire at a date certain and upon expiration, he would no longer be able to access the database. Mr. Bell was never given a copy of, nor was he a party to, the license agreement between CoStar and Coldwell Banker. Mr. Bell never read the terms of use when he logged into CoStar. While it turns out that Mr. Bell was mistaken as to his authorization, CoStar cannot impute knowledge on to K&H that the direct infringer did not possess. There has been no evidence or testimony introduced to suggest that K&H, knew or should have known that Mr. Bell was not authorized to access the CoStar database. The only remote evidence CoStar provided was a reference to a Pinellas County Realtor database that required a firm wide license and did not allow for individual licenses. However, it became evident during the trial that databases like Catalyst, IRIS, IMAPP and LoopNet offered similar databases without the need for a firm wide license.

As to the requirement of inducement, cause or material contribution, again, CoStar has again failed to provide any evidence in support of this element. The trial established that K&H never asked Mr. Bell to retrieve or access information specifically from the CoStar database. Of

the small amount of CoStar material forwarded by Mr. Bell to K&H associates, nothing was shown to have been requested by anyone at K&H or used by any of the recipients. Mr. Bell testified that he used CoStar for his own educational benefit and retrieved the information on his own initiative. CoStar themselves installed the software on to Mr. Bell's personal laptop and explained to him how to use the system. Mr. Bell was able to take his laptop to any location in the world that had internet access and could download information from the CoStar database. K&H provides all of its independent contractors with the same facilities. A desk, phone and internet access. Mr. Bell did not get anything more than any other independent contractor. Additionally, CoStar was unable to establish that all of the downloading performed by Mr. Bell actually occurred through an IP address belonging to K&H. Mr. Bell was accessing the CoStar database since January 17, 2007 but was not accessing it through an IP address associated with K&H until November 13, 2007.

Accordingly, CoStar has been unable to show that K&H had or should have known that the activities of Bell were of an infringing nature or that K&H induced, caused or materially contributed to the infringing conduct of Bell.

Discussion of Vicarious Infringement¹

Vicarious infringement requires the Plaintiff to plead and prove a direct infringement, a right and ability to supervise the direct infringer, and that the defendant has directly profited from the direct infringement. Vicarious infringement occurs "when the defendant profits directly from the infringement and has a right and ability to supervise the direct infringer." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005). Knowledge of the

¹ Currently pending is K&H's Motion for Judgment on Partial Findings on CoStar's Theory of Vicarious Liability. K&H incorporates the arguments contained therein.

infringement is not necessary to a finding of vicarious infringement. *Southern Bell Tel. and Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801, 811 (11th Cir. 1985).

While the Court has determined that K&H had the right and ability to supervise Bell, the only other element CoStar has been able to prove is the direct infringement by Mr. Bell. CoStar offered no evidence of any direct benefit that can be causally connected to their database by way of K&H.

The law is clear that in order to establish a direct financial benefit, the plaintiff must demonstrate an obvious and direct financial interest in the exploitation of the copyrighted material. CoStar has failed to do this. Of the four deals that Mr. Bell assisted with, none of them could be attributed to anything relating to the CoStar database. Mark Klein made it clear that he had no interest in subscribing to the CoStar database in part because the information found on the database was available elsewhere and was much more affordable. It was never established by CoStar that K&H ever suggested, requested or required Mr. Bell access the CoStar database. Mr. Bell always did that upon his own initiative. Nothing has been introduced to suggest otherwise. K&H did not benefit through increased clients, increased sales or any other type of increase in business or profit. K&H did not advertise or suggest to clients or potential clients that K&H used the CoStar system. CoStar seeks for this Court to interpret the necessary direct profit prong that would give no meaning to that element of the proof. There simply is no evidence that Bell's infringement can be in any way connected to any direct profit of K&H.

The only evidence CoStar even argues constitutes direct benefit is the CoStar license/subscription fees allegedly avoided by K&H. CoStar points to the "dance hall" theory cases in order to make this showing arguing their burden has been met. In fact, this Court in its summary judgment Order found that "avoidance of a license fee can be a direct financial

benefit.” See D.E. 94 at p.8; *Broadcast Music, Inc. v. Mirage Images, Inc.* 2005 U.S. Dist. LEXIS 42880, Cast No. 1:04-CV-387 (E.D. Tenn. Nov. 2, 2005). However, this is not a “dance hall” case and the instant facts could not be further from those presented in such a case like *Broadcast Music*.

Cases such as *Broadcast Music* involve the playing of recorded music in entertainment establishments such as nightclubs. The Plaintiffs in these suits are the owners of rights under the copyright laws to publicly perform certain music compositions. The defendants are owners and operators of establishments such as nightclubs and bars. These nightclubs are sued after it is determined that they are playing or publically performing the music compositions (or allowing the music to be played) without paying a license or royalty to the owners of such music. For example, in *Broadcast Music* the defendant had been notified in excess of twenty (20) times that the copyrighted protected works were being publically performed and no license fees were being paid. The *Broadcast Music* court found that the direct profit element had been met because it played the protected music which “enhanced the atmosphere for the enjoyment of its patrons” but played the songs for free. See *Broadcast Music*, at p. 18. Accordingly, the Court found, that the defendant nightclub owners “had a direct financial interest [in the music] and also benefitted directly from this infringement.” *Id.*

The facts and circumstances presented here are worlds apart. Given the relationship between Bell and K&H and the facts presented at trial, liability cannot be attached by K&H simply avoiding the license fee for a product never desired or utilized. This is simply not the “direct profit” required by the *Grokster* Court in laying out the elements of a vicarious claim.

In order to show a direct profit, there must be a causal relationship between the direct infringing activity and the financial benefit of the alleged vicarious infringer. See *Ellison v.*

Robertson, 357 F.3d 1072, 1079 (9th Cir. 2004). Moreover, there “must be an *obvious* and *direct* financial interest in the exploitation of copyrighted materials.” *Dongxiao Yue v. Chordiant Software, Inc.*, 2009 WL 4931679 *7 (N.D. Cal. Dec. 21, 2009). The dance hall cases such as *Broadcast Music* are the epitome of a vicarious infringement case where there is a causal relationship between the infringing activity and the financial benefit to the vicarious infringer. The nightclub owner could not operate a nightclub without the most important element of the business: **Music**. A nightclub has an obvious and direct financial interest in the exploitation of the copyrighted music. The nightclub could simply not operate if all of the patrons were drinking, dancing and mingling to silence.

Here, there is no casual relationship between the infringement by Bell and any financial benefit of K&H. CoStar alleges that K&H saved the licensing fees but the testimony was clear that K&H and its principals never saw any value in the CoStar products. There was certainly no evidence presented that access to the CoStar protected materials was necessary in order for K&H to operate its business. In fact, the opposite was presented. Mr. Mark Klein, Mr. Steven Klein and Mr. Bell himself testified that K&H did not need CoStar’s materials and didn’t find any reason to purchase a subscription. There is absolutely no obvious and direct financial interest to K&H in the unpaid license fees for a product they never wanted. Moreover, the undisputed testimony of Mr. Bell and Mr. Klein proved that Bell and K&H never benefited, directly or indirectly, in the minimal sales that Bell made while associated with K&H. Accordingly, CoStar failed to prove the necessary elements that K&H profited directly from the infringement by Bell during his association with K&H.

Discussion of Klein & Heuchan, Inc.'s Defenses

Additionally, even if the Court were to find a violation by contributory or vicarious infringement by K&H, the conduct and inactivity by CoStar have provided K&H with various defenses which would warrant judgment in their favor.

Waiver

CoStar waived its rights to claim infringement by Bell and therefore any resultant liability on the part of K&H. Waiver is available in a copyright infringement action when the holder intends to surrender its rights under the copyright. Waiver or abandonment of copyright occurs only if there is an intent by the copyright proprietor to surrender rights in his work. *Thornton v. J Jargon Co.*, 580 F.Supp. 2d 1261 (M.D. Fla. 2008)

CoStar alone controlled Bell's access to their own materials. However, when CoStar learned of the infringement by Bell, CoStar could have easily disabled Bell's password and put an end to any infringing activity. To the contrary, CoStar instead monitored Bell's access and continued to contact him by e-mail, telephone and even resetting his password. CoStar never placed Bell or K&H on notice that Bell was no longer an authorized user until April of 2008.

CoStar intended to allow Bell to continue accessing the database and had surrendered rights in the works with respect to Bell's access.

Estoppel

CoStar was the party with the most knowledge and control over access to its database. Bell and K&H had the least knowledge concerning the license agreement between CoStar and Coldwell. The Defense can rely upon estoppel when facts exist to show knowledge by the copyright holder, intention by the copyright holder, ignorance of the infringer, and detrimental reliance by the infringer. The defense of estoppel may be asserted by demonstrating that: "(1)

the copyright owner knew the facts of the infringement, (2) the copyright owner intended its conduct to be acted upon or the copyright owner acted such that the alleged infringer has a right to believe it was so intended, (3) the alleged infringer is ignorant of the true facts, and (4) the alleged infringer relies on the copyright owner's conduct to his detriment." *HGI Assocs., Inc. v. Wetmore Printing Co.*, 427 F.3d 867, 875 (11th Cir. 2005).

Knowledge

CoStar established a Fraud, Theft & Litigation Team for the purpose of detecting, preventing and prosecuting unauthorized access to the CoStar database. CoStar was aware back on February 1, 2007, that Bell was no longer with Coldwell. CoStar was aware that Bell continued to access the CoStar database after he had left Coldwell. In addition, CoStar was the only party to this lawsuit that had knowledge of the license agreement between itself and Coldwell and any resultant obligations regarding when a user is authorized or unauthorized.

Intent

CoStar had the ability to, and actually did, monitor Bell's access to the CoStar database. Rather than disable Bell's access, CoStar continued to allow him access, contacted him by e-mail and telephone, and even reset his password. All after they had known that Bell was no longer with Coldwell. CoStar presented testimony that confirms that when CoStar realizes that an unauthorized user such as Bell is gaining access to the system, that user's password is immediately disabled. CoStar did not do that in this instance. CoStar offered no plausible explanation for their inaction. The only reasonable explanation is that CoStar intended to allow Bell continued access to the CoStar database.

Ignorance

Bell was never provided a copy of the license agreement between CoStar and Coldwell. The only information regarding the CoStar/Coldwell relationship was that all associates of Coldwell were getting a subscription to the CoStar database. Nobody mentioned the terms, the expiration date, nobody explained what it meant to be an Authorized User, or the fact that one must remain with Coldwell in order to maintain the subscription. Additionally, K&H was never provided with any information that would lead K&H to believe or suspect that Bell was not an Authorized User. All the actions and inactions of CoStar led Bell and subsequently K&H to believe that Bell was permitted to access the CoStar database.

Reliance

It is obvious from the action of Bell and K&H that they relied upon the silence and inaction of CoStar. For Bell, he relied upon the silence and inaction of CoStar because he believed that he was an Authorized User and continued to access the CoStar database. K&H relied on the silence and inaction of CoStar to believe that Bell was an Authorized User.

Laches

The inexcusable delay by CoStar in bringing this cause of action has imposed undue prejudice to K&H. The defense of laches can be established by a showing by the defendant of (1) a delay in asserting a right or claim, (2) that the delay was not excusable, and (3) that there was undue prejudice to the party against whom the claim is asserted. *Ultra Images, LLC v. Franclemont* (2007 WL 4557148 (S.D. Fla.))

Delay

The testimony and evidence are clear to establish that CoStar was aware on February 1, 2007, that Bell had left Coldwell. In spite of having established a Fraud, Theft and Litigation

Team designed to identify and stop infringement, CoStar merely sat back and tracked Bell until they could identify a party better suited for litigation. CoStar waited over fourteen months to disable Bell's password and place the parties on notice that CoStar was protecting its copyright.

Delay was not Excusable

Again, given the testimony that CoStar has in place the Fraud, Theft and Litigation Team, for CoStar to sit back and do nothing for such an extended period of time is inexcusable. CoStar was able, upon realizing the status of Bell, to immediately disable Bell's password. CoStar chose not to do so. Had CoStar done this, K&H would not be involved in this lawsuit.

Detrimental Reliance

It is clear that if not for the conduct on the part of CoStar, Bell would have been aware of the true facts and would not have subjected himself, and K&H to potential liability. Because of CoStar's failure to provide Bell with documents necessary to explain his subscription, because of CoStar's failure to disable Bell's password at a reasonable time after discovering Bell was not an Authorized User, Bell and K&H were made party to this litigation. CoStar knew long before the first recorded login by Bell from K&H's IP address that Bell was not with Coldwell. Had CoStar acted reasonably, and terminated Bell's access timely, K&H would never have been made a part of this lawsuit.

Undue Prejudice

K&H is subject to undue prejudice because of the inaction of CoStar. Had CoStar acted reasonably and timely to disable Bell's access to the CoStar database, K&H would never have been named in this lawsuit. CoStar knew in February of 2007 that Bell was unauthorized yet CoStar did not disable Bell's password until April of 2008. The first recorded instance of Bell accessing CoStar through an IP address associated with K&H did not occur until November 13,

2007. The inexcusable delay by CoStar in disabling Bell's password not only led to the reliance by Bell and K&H in believing that Bell had access, it also prevented K&H from taking steps to stop Bell from accessing the CoStar database. CoStar had the facilities and staff in place to take the steps necessary to prevent this litigation as a whole. CoStar never provided any notice to Bell or K&H until April of 2008 and then the notice really only consisted of a "pay us now or get sued" threat of litigation.

Mitigation of Damages

Defenses specific to copyrights, as well as general equitable defenses, are available in copyright infringement actions. *18 C.J.S. Copyrights §113*. Mitigation is a recognized defense in the Middle District of Florida. *Tingley Systems, Inc. v. Healthlink, Inc.*, 509 F.Supp. 2d 1209 (M.D. Fla. 2007)

The first recorded history of Bell using the CoStar system occurs on January 17, 2007. The evidence provided established that CoStar became aware the Bell was no longer associated with Coldwell on February 1, 2007. However, CoStar did nothing to restrict Bell's access until April 22, 2008. Almost fourteen months had passed before CoStar took steps to disable Bell's access. CoStar has established a Fraud, Theft & Litigation Team with the primary purpose of detecting, preventing and prosecuting unauthorized access to the CoStar database. However, with knowledge of Bell's infringing activity, rather than disable Bell's access, CoStar monitored Bell's access until they were able to identify an IP address of a business that CoStar could try to "sell" its products. The first occurrence of Bell accessing CoStar by way of K&H's IP address occurs in November 13, 2007. Had CoStar disabled Bell's access upon realizing he was unauthorized, the events involving K&H would have never occurred.

Conclusion

For the reasons outlined above, CoStar failed to establish each of the elements necessary for either a contributory or vicarious claim. Moreover, even if a technical violation occurred, K&H's have proven numerous defenses which defeat CoStar's claims.

RESPECTFULLY SUBMITTED this 26th day of March, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 26, 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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