IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

TD AMERITRADE, INC., *et al.*, Plaintiffs, v. JAMES RICHARD MATTHEWS, Defendant.	Case No. 3:16-cv-00136-SLG

ORDER RE MOTION FOR SUMMARY JUDGMENT ON MATTHEWS' COUNTERCLAIMS

Before the Court at Docket 196 is Plaintiffs TD Ameritrade, Inc., TD Ameritrade Holding Corporation, TD Ameritrade IP Company, Inc., and TD Ameritrade Services Company, Inc.'s (collectively, "TD Ameritrade") *Motion for Summary Judgment in Favor of TD Ameritrade on Matthews' Counterclaims Because He Does Not Own the Asserted Copyright*. Defendant James Matthews responded at Docket 211, to which TD Ameritrade replied at Docket 223. Mr. Matthews filed a request to file a surreply at Docket 228, which TD Ameritrade opposed at Docket 231. Oral argument was not requested and was not necessary to the Court's determination. The underlying facts of this case are set forth in the Court's orders on TD Ameritrade's first, second, and third motions to dismiss; the Court assumes the parties' familiarity with them and they are not

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repeated here.[1]

LEGAL STANDARD

Federal Rule of Civil Procedure 56(a) directs a court to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The burden of showing the absence of a genuine dispute of material fact lies with the moving party.[2] If the moving party meets this burden, the non-moving party must present specific factual evidence demonstrating the existence of a genuine issue of fact.[3] The non-moving party may not rely on mere allegations or denials.[4] Rather, that party must demonstrate that enough evidence supports the alleged factual dispute to require a finder of fact to make a determination at trial between the parties' differing versions of the truth.[5]

When considering a motion for summary judgment, a court views the facts in the light most favorable to the non-moving party and draws "all justifiable inferences" in the non-moving party's favor.[6] To reach the level of a genuine dispute, the evidence must be such "that a reasonable jury could return a verdict

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[1] *See* Docket 62 (Order re Motion to Dismiss); Docket 97 (Order re Pending Motions); Docket 108 (Order re Motion to Dismiss).

[2] *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

[3] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986).

[4] *Id*.

[5] *Id.* (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)).

[6] *Id*. at 255 (citing *Adickes v. S.H. Kress & Co*., 398 U.S. 144, 158–59 (1970)).

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for the non-moving party."[7] If the evidence provided by the non-moving party is "merely colorable" or "not significantly probative," summary judgment is appropriate.[8]

DISCUSSION

Mr. Matthews asserts counterclaims for copyright infringement pursuant to the Copyright Act[9] and for violations of the Digital Millennium Copyright Act[10] ("DMCA").[11] To state a prima facie case of direct copyright infringement under the Copyright Act, a party must satisfy two requirements: "(1) they must show ownership of the allegedly infringed material and (2) they must demonstrate that the alleged infringers violate at least one exclusive right granted to copyright holders under 17 U.S.C. § 106."[12] Likewise, the ownership of a copyright is a precondition to DMCA claims.[13]

"[T]he registration of the copyright certificate itself establishes a prima facie

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[7] *Id.* at 248.

[8] *Id*. at 249.

[9] 17 U.S.C. § 101 *et seq.*

[10] 17 U.S.C. §§ 1201, 1202, 1203.

[11] Docket 98 at 19–21, ¶¶ 109–24 (First Counterclaim); Docket 98 at 21–26, ¶¶ 125–36 (Second Counterclaim); Docket 98 at 26–27 , ¶¶ 137–42 (Third Counterclaim).

[12] *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001).

[13] *See MDY Indus., LLC v. Blizzard Ent., Inc.*, 629 F.3d 928, 944–46 (9th Cir. 2010) ("[W]e believe that § 1201 is best understood to create two distinct types of claims. First, § 1201(a) prohibits the circumvention of any technological measure that effectively controls access to a *protected work* and grants *copyright owners* the right to enforce that prohibition. . . . Section 1201(b)(1)'s prohibition . . . entitles *copyright owners* to protect their *existing* exclusive rights under the Copyright Act." (emphasis added)); 17 U.S.C. § 1202(b)(1) ("No person shall, without the authority of the *copyright owner* . . . intentionally remove or alter any copyright management information[.]" (emphasis added)).

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presumption of the validity of the copyright in a judicial proceeding . . . ."[14] But the statutory presumption of validity can be rebutted.[15] To rebut a presumption of validity, an alleged infringer "must simply offer some evidence or proof to dispute or deny [the] prima facie case . . . ."[16]

TD Ameritrade moves for summary judgment on each of Mr. Matthews' counterclaims on the ground that Mr. Matthews does not own a valid copyright. TD Ameritrade contends that Mr. Matthews "is not a valid copyright owner" because his "'software routines' are derivative works adapted from TD Ameritrade's materials," in particular its thinkScript User Manual, and because "the Client Agreement expressly prohibits creating derivative works based on TD Ameritrade's software."[17]

TD Ameritrade has not registered its thinkScript User Manual or the code contained therein. However, the Copyright Act provides that "registration is not a condition of copyright protection."[18] Instead, registration is "[p]ermissive," and the registration provisions of the Copyright Act merely "establish[] a condition—copyright registration—that plaintiffs ordinarily must satisfy before filing an

[14] *North Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992).

[15] *Ent. Rsch. Grp., Inc. v. Genesis Creative Grp. Inc.*, 122 F.3d 1211, 1217 (9th Cir. 1997).

[16] *Desire, LLC v. Manna Textiles, Inc.*, 986 F.3d 1253, 1259 (9th Cir. 2021) (quoting *United Fabrics Int'l, Inc. v. C&J Wear, Inc.*, 630 F.3d 1255, 1257 (9th Cir. 2011)).

[17] Docket 196 at 6 (Mot.).

[18] 17 U.S.C. § 408(a); *see also Fourth Estate Public Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 887 (2019) ("[A]n owner's rights exist apart from registration . . . .").

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infringement claim and invoking the Act's remedial provisions."[19]

A copyright owner holds the "exclusive right 'to prepare derivative works based upon the copyrighted work.'"[20] "A 'derivative work' is a work based upon one or more preexisting works" that "recast[s], transform[s], or adapt[s]" the preexisting work.[21] Mr. Matthews does not deny TD Ameritrade's assertions that significant portions of his registered work are based on TD Ameritrade's materials in the thinkScript User Manual and that TD Ameritrade authored the User Manual. In fact, Mr. Matthews admitted at his deposition that he included the User Manual in his copyright application, copied lines of code and block structures from the User Manual, and based portions of his registered work on modifications of TD Ameritrade's User Manual and other TD Ameritrade materials.[22] Rather, Mr.

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[19] 17 U.S.C. § 408(a); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 158 (2010) ("This provision is part of the Act's remedial scheme.").

[20] *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 237 (9th Cir. 2019) (quoting 17 U.S.C. § 106(2)). Both the Supreme Court and Ninth Circuit have referred to parties as owners of copyrights in the absence of registration. *See Reed Elsevier, Inc.*, 559 U.S. at 157 ("Subject to certain exceptions, the Copyright Act [] requires copyright holders to register their works before suing for copyright infringement. . . . This scheme gives copyright owners 'the exclusive rights' (with specified statutory exceptions) to distribute, reproduce, or publicly perform their works. . . . When [] infringement occurs, a copyright owner 'is entitled, subject to the [registration] requirements of section 411, to institute an action' for copyright infringement." (emphasis omitted)); *In re World Auxiliary Power Co.*, 303 F.3d 1120, 1123 (9th Cir. 2002) ("The three companies owned copyrights in the drawings, technical manuals, blue-prints, and computer software used to make the modifications. . . . The companies did not register their copyrights with the United States Copyright Office."); *see also* 17 U.S.C. § 201(a) ("Copyright in a work protected under this title vests initially in the author or authors of the work.").

[21] 17 U.S.C. § 101; *see also U.S. Auto Parts Network, Inc. v. Parts Geek, LLC*, 692 F.3d 1009, 1015–16 (9th Cir. 2012).

[22] *See* Docket 196-1 at 35 ("Q: And those are all things we discussed in the manual, correct? A: They're all – Q: Entries in the manual? A: Yes. Yes."); Docket 196-1 at 14 ("Q: You understand that you submitted [the User Manual] as part of your deposit? A: I do."); Docket 196-1 at 32 ("Q: I think you're on page 6 of [the User Manual] right now? A: Yes. Q: And under the zero base on page 6, do you see the plot VOL equals volume language? A: Yes. Q: And that's the same language in line 4 of [Matthews' study], correct? A: Yes."); Docket 196-1 at 28 ("Q: Could you turn to page 26 of [the User Manual]? A: Yes. Q: And do you see in the second paragraph, the second line, it says you can use a switch statement? A: Yes. . . . Q:

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