[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

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No. 20-10856

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D.C. Docket No. 9:18-cv-80843-BER

MIDLEVELU, INC.,

Plaintiff-Appellee,

versus

ACI INFORMATION GROUP,

Defendant-Appellant.

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Appeal from the United States District Court
for the Southern District of Florida

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(March 3, 2021)

Before WILLIAM PRYOR, Chief Judge, JORDAN and MARCUS, Circuit Judges.

WILLIAM PRYOR, Chief Judge:

This appeal involves a blog operator that sued a content aggregator for

copyright infringement after the aggregator copied and published the blog's

content. A jury sided with the blog operator. The main issue for us is whether the

district court should have allowed the jury to decide whether the aggregator had an implied license to copy and publish the blog's content. Although the district court employed a too narrow understanding of an implied license, we conclude that a jury could not have reasonably inferred that the blog impliedly granted the aggregator a license to copy and publish its content. The aggregator also argues that the district court erred when it instructed the jury about statutory damages, permitted the jury to consider ineligible works in awarding damages, failed to consult with the Register of Copyrights about the blog operator's alleged fraud on her office, and denied the aggregator's motion for judgment as a matter of law based on its defense of fair use. Because no reversible error occurred, we affirm.

I. BACKGROUND

MidlevelU, Inc., formerly a limited liability company and currently doing business as ThriveAP, operates a website that provides resources for midlevel healthcare providers, such as nurse practitioners and physician assistants. Erin Tolbert, a nurse practitioner, founded MidlevelU in 2012. MidlevelU generates revenue through resources it offers, including various educational programs. It also publishes a free blog designed to attract potential customers to its revenue-generating resources.

MidlevelU makes the full text of its blog articles available in an RSS—or "really simple syndication"—feed. It has used the RSS feed since the blog's

inception to allow readers to easily read its articles. MidlevelU designed its blogging platform so that its RSS feed would distribute the full text of the blog instead of only headlines and summaries of recent articles. It also coded its website to instruct search engines that they may copy and archive every page on the site. MidlevelU included a copyright notice on its website and RSS feed, with a date range from 2012 to the present year, but it did not include a copyright notice for each article.

Newstex, LLC, doing business as ACI Information Group, is a wholesale aggregator of news publications. It primarily sells collections of licensed news content to companies. In 2013, it created the Scholarly Blog Index, a curated index of abstracts and full-text articles of academic blogs.

To create the Index, Newstex compiled a repository of bibliographic information for thousands of blogs. It copied into the repository full-text content from sources its news-aggregation business had licensed. It also subscribed to RSS feeds for thousands of blogs for which it did not have a license agreement to use full-text content. Through the RSS feeds, Newstex received new articles posted to the blogs. It ran the articles through software that generated summaries of the articles. The entries in the Index for these blog articles included bibliographic information about the author and the blog, the computer-generated summary of the article, and a link to the original post. Newstex also added a tab labeled "original"

to each entry, available only to subscribers. It embedded an "iFrame" in that tab so that clicking on the tab opened a window showing the original, fully browsable web page, including the full-text content of each article—a "live snapshot"—within the Index website.

It offered Index subscriptions to academic libraries, a few of which subscribed. From 2015 to 2017, Newstex subscribed to the MidlevelU blog's RSS feed and included its content in the Index. In 2018, Newstex discontinued the Index because it was not profitable.

In early 2017, Tolbert found that excerpts of her blog articles were appearing on the Index website. To fully access the Index, Tolbert paid for a personal subscription. She searched for "MidlevelU" within the Index, which turned up 823 entries. It upset her that MidlevelU's content appeared in the Index and that the computer-generated abstracts poorly represented its content. It also upset her that the use of iFrames kept readers on the Index website instead of directing them to MidlevelU's website where they could purchase MidlevelU's products.

Meanwhile, Tolbert registered the 50 most recent MidlevelU articles for copyright protection with the United States Copyright Office. MidlevelU often republished its own articles and deleted the original versions in the process. But Tolbert did not check to see if the articles she registered were republications.

On March 7, 2017, MidlevelU emailed Newstex a cease-and-desist letter demanding that it remove MidlevelU's content from the Index immediately. MidlevelU asserted that Newstex had posted "a lengthy portion," not merely "summaries," "abstracts," or "headlines," of more than 800 MidlevelU articles. And it complained that, for paying subscribers, Newstex posted a "snapshot" of each article. Newstex removed the content from the Index that same day. It also coded links to entries on the Index for MidlevelU articles so that they would now redirect to MidlevelU's website. On March 20, 2017, Newstex informed MidlevelU that the content had been removed.

A few months later, Tolbert again searched for MidlevelU's content online. Her search results revealed that although the content was no longer available on the Index website, entries for the content still appeared in website repositories of university libraries. These entries credited ACI as the source of the information. And at least one library also credited ACI as the content's publisher and directed visitors to view MidlevelU's full-text content in ACI's website—"[s]ubscribers only."

In June 2018, MidlevelU sued Newstex for copyright infringement. In response, Newstex asserted copyright-registration invalidity, implied license, and fair use as affirmative defenses. And it asserted two counterclaims seeking declaratory judgments against MidlevelU. Newstex asked the district court to

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