

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Chris Gregerson	)	No.: 06-cv-01164 (ADM/AJB)
	)	
Plaintiff	)	
	)	
vs.	)	<b>PLAINTIFF'S PROPOSED</b>
	)	<b>FINDINGS OF FACT</b>
Vilana Financial, Inc., a Minnesota	)	<b>AND CONCLUSIONS OF LAW</b>
Corporation; and Vilana Realty,	)	
Inc., a Minnesota Corporation	)	
	)	
Defendants	)	
	)	

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The Plaintiff respectfully submits his proposed Findings of Fact and Conclusions of law.

**I. FINDINGS OF FACT**

**A. The Plaintiff's photographs**

1. Plaintiff Chris Gregerson ("Gregerson") started a website with the web address "www.phototour.minneapolis.mn.us" in approximately 1998. It evolved into a stock photography business which is now also located at the address "www.cgstock.com".

2. Gregerson's website licenses photographs for publication by others (a stock photo service). Each photo on his website has a copyright notice underneath, and a link to Gregerson's licensing terms. This includes the two photos at issue in this case, the Skyline photo (#2891) and the Kenwood photo (#2258). Pl's Trial Ex. P1, P2.

3. Gregerson created the Skyline photo (image #2891) on Jan. 8th, 2004, and has a certificate of copyright registration effective June 23rd, 2005. Gregerson created image #2258 (the Kenwood photo) on August 20th, 2002, and has a certificate of copyright registration effective March 4, 2004. Pl's Trial Ex. P25.

4. Both images were published on Gregerson's website, and they had the text "[www.phototour.minneapolis.mn.us](http://www.phototour.minneapolis.mn.us)" stamped in the lower-left corner. They both also had a copyright notice with the name "Chris Gregerson" embedded in the jpeg file's "Comment" field. Pl's Trial Ex. P3, P4.

**B. Vilana Financial/Vilana Realty's publication of the photographs**

5. Vilana Financial, Inc. and Vilana Realty, Inc. ("Vilana") are owned by Andrew Vilenchik, who is the sole corporate officer of both corporations.

6. Vilana published an advertising brochure sometime in early 2005 that contained the Skyline photo and the Kenwood photo on the inside at up to ¼ page size. Pl's Trial Ex. P17. The number of copies printed is estimated to be up to 30,000 copies. Andrew Vilenchik was personally involved in the creation of the brochure.

7. The Plaintiff's copyright for the Kenwood image (#2258) was already registered by the time this infringement occurred. Pl's Trial Ex. P25.

8. Vilana also published the Plaintiff's Skyline image in a Qwest Dex 2005 phone book advertisement. Pl's Trial Ex. P5. The ad was on the inside cover and the photo was up to ¼ page in size. The estimated press run was 550,000 copies.

9. Vilana also published the Skyline image in a full-page Zerkalo Newspaper ad. The photo was up to ¼ page in size. Pl's Trial Ex. P13.

10. The Zerkalo newspaper had a circulation of 5,000 copies per issue, and the advertisement with the Skyline photo appeared in six issues.

11. Vilana published the Skyline image in two web ads on Zerkalo's homepage which appeared for a total period of one year. Pl's Trial Ex. P12. The larger ad does not contain the Plaintiff's digitally embedded copyright notice. Id.

12. Vilana provided an ad with the Skyline photo to bestredyp.com, where it was published for a period of one year. Pl's Trial Ex. P15.

13. In each use of the Skyline and Kenwood photo, the text reading “[www.phototour.minneapolis.mn.us](http://www.phototour.minneapolis.mn.us)” in the lower-left of the photo has been cropped away. The photos otherwise match the images as they were published on the Plaintiff's website exactly.

14. Vilana never requested permission from the Plaintiff to use his photos, or notified the Plaintiff of the use.

### **C. Gregerson's discovery of the infringement**

15. Gregerson discovered Vilana's use of the Skyline photo (#2891) in the Dex phone book in May of 2005 when he looked through the new phone directory. It is a unique image that was immediately recognizable to the Plaintiff as his own work.

16. Gregerson calculated the fee due for Vilana's use of the skyline photo in the phone book only (the only use Gregerson was yet aware of). He mailed a letter to Vilana explaining the fee and how it was calculated, and showing his website where the photo appears. Pl's Trial Ex. P21. The letter stated that if not paid in 10 days, the fee to retroactively authorize Vilana's use of the photo would go from three times to

ten times the fair-market rate for use authorized in advance, and Gregerson would file suit for that amount (consistent with Gregerson's published pricing policy, Pl's Trial Ex. P18, P49).

17. Gregerson did not receive a reply from Vilana by the 10 day deadline before he was to file suit for the higher fee. Gregerson contacted Andrew Vilenchik by telephone, and Mr. Vilenchik asserted the photo was purchased from someone named "Michael Zubitskiy" for \$850.

18. Gregerson offered to produce his high-resolution version of the photo, to establish he was the rightful owner of the image. Mr. Vilenchik did not deny Gregerson owned the photo, but stated he did not want to pay twice for the same photo, and Gregerson should proceed to file a claim if he wished to.

19. The Plaintiff searched for "Michael Zubitskiy" in the phone book and on the web, and finding nothing, he called Mr. Vilenchik back to request the contact information for "Michael Zubitskiy". Mr. Vilenchik refused to provide any information and demanded Gregerson not call again or face a suit for harassment.

20. Gregerson filed a conciliation court claim seeking the jurisdictional limit of \$7,500 (reduced from \$18,160 for jurisdiction). Def's Trial Ex. D4.

21. The day before the hearing, Mr. Vilenchik contacted Gregerson. Gregerson asked Mr. Vilenchik where else the photo had been used. Vilenchik denied the photo was used anywhere else.

22. At the conciliation court hearing, Vilana produced the Zubitskiy photo agreement and their counsel, Morgan Smith, successfully argued that Gregerson's

claim should be dismissed based on exclusive federal jurisdiction of copyright claims.

**D. Gregerson's webpage about Vilana Financial and Mr. Vilenchik**

23. Gregerson published a webpage in September, 2005, in a section of his website labeled “essays” where he described Vilana's failure to pay the licensing fee for the Skyline photo and characterized Andrew Vilenchik's conduct as in bad faith.

24. The webpage included photographic evidence, and Gregerson's arguments and rhetoric accusing Vilana of violating Gregerson's copyright. It did not promote any goods or services. It allowed visitors to post their own comments.

25. After two weeks, Gregerson received information from a third party (Sam Dorfman) that his Skyline photo was also being used in advertisements by Vilana in a Russian newspaper called “Zerkalo” and on Zerkalo's website. This was the first time Gregerson learned Vilana's infringement involved more than the Qwest Dex phone book advertisement. Gregerson just moved to Wisconsin, and did not read Russian newspapers, and would almost certainly not have discovered the Zerkalo ads on his own. The webpage thus was an effective communication tool between Gregerson and potential witnesses who with relevant information about the dispute.

26. In October of 2005, Gregerson replied to a letter from Vilana Financial's counsel offering to remove any false statements from his webpage and print a retraction if they provided verifiable information that something on the webpage was false. Gregerson also offered to assume responsibility for any damages caused if Vilana provided evidence of damages. Pl's Trial Ex. P34. Gregerson did not receive an answer to his letter.

27. On October 24th, 2005, Vilana Financial, Inc. sued Gregerson for defamation in state court (later removed to this court, and then withdrawn). Vilana obtained an Ex parte TRO against Gregerson's webpage on October 24th, 2005, which was dissolved on October 31st, 2005.

28. In December of 2005, a reader of Gregerson's webpage called Gregerson and alleged that the Zubitskiy photo agreement was forged, prompting Gregerson to make specific discovery requests to Vilana regarding "Michael Zubitskiy" (how Vilana came into contact with him and how he was paid). Vilana's discovery responses failed to establish that "Michael Zubitskiy" was a real person.

29. After Gregerson's investigator could not find anyone named "Michael Zubitskiy", Gregerson filed a complaint with the Minnesota Department of Commerce, Market Assurance Division, alleging Vilana Financial forged the Zubitskiy Photo Agreement. Gregerson also alleged that Vladimir Kazaryan provided a fraudulent notarization for the document. Gregerson described this complaint on his webpage and provided a link to the Department of Commerce. Def's Trial Ex. D5.

30. Comments by visitors accumulated on Gregerson's webpage, mostly critical of Vilana and Andrew Vilenchik and offering encouragement to Gregerson. As the litigation proceeded, Gregerson posted updates on the legal proceedings, additional evidence, and some of his legal briefs.

**E. Defendant's claim of a third-party source for the Kenwood photo**

31. Andrew Vilenchik denies that he obtained the images from the Plaintiff's website, but rather from a Russian-speaking man he met in the sauna of the Lifetime

Fitness gym in early March of 2004. Mr. Vilenchik said the stranger was named “Michael Zubitskiy”, had offered to provide photos, and agreed photograph “houses and buildings” after which he would contact Vilenchik. Pl's Trial Ex. P29 at Interrogatory 11, p. 7.

32. Andrew Vilenchik claims he had his second and last meeting with “Micheal Zubitskiy” on March 19th, 2004, when Zubitskiy produced a CD-ROM with several photos, which Vilenchik purchased for \$850 in cash. Vilenchik claims to have no contact information for Zubitskiy (Id. at Interrogatory 17, p. 9), that he is no longer in possession of the CD-ROM (Id. at Interrogatory 6, p. 5) and has no copies of the photos he obtained from Zubitskiy (Id. at Request for documents 2, p. 12).

33. Lifetime Fitness has no record of a member named “Michael Zubitskiy”. Pl's Trial Ex. P37.

34. Michael Walker, a former Vilana employee, saw the Zubitskiy photo agreement in June of 2005 in the printer tray at Vilana Financial's offices. At the time he saw the document, it had no signature or notarization, yet was dated 2004.

35. Vilenchik represented he believed Michael Zubitskiy was the true photographer of the photos on the CD-ROM, and Zubitskiy took them in March, after their first meeting in the sauna. After Vilana's use of the second photo (the Kenwood photo), Vilana stated they obtained it from the Zubitskiy CD-ROM; the Kenwood photo shows a lawn and trees in summer, and could not reasonably be mistaken for a photo created in the month of March in Minnesota.

36. The Zubitskiy photo agreement was notarized by Vladimir Kazaryan

with a date of March 19th, 2004. Vladimir Kazaryan surrendered his commission as a notary to the Department of Commerce following an inquiry into his notarization of the Zubitskiy photo agreement after Gregerson alleged Zubitskiy did not exist. Pl's Trial Ex. P48.

37. Vladimir Sivriver, who has known Andrew Vilenchik socially and had business relations with him for several years, testified Vilenchik's was "highly deceptive". Michael Walker and Vladimir Kazaryan gave negative opinions of Mr. Vilenchik's character for truthfulness and honesty.

38. Vilana made no effort to locate "Michael Zubitskiy" (other than a report generated in response to Gregerson's background check showing no "Micheal Zubitskiy" in the United States). Pl's Trial Ex. P29, Interrogatory 13, p.8.

#### **F. Spoilation of evidence**

39. Vilana has never produced the photos they claim to have lawfully purchased from a third party, despite the Plaintiff's discovery request . Pl's Trial Ex. P29, Request for Production No.2, p. 12. Had Vilana produced the photos, they might show the Plaintiff's website address was on the photo and/or that Vilana removed the Plaintiff's digitally-embedded copyright notice ("Copyright Management Information").

40. When Gregerson asked Vilana directly how many photos they published from the alleged "Michael Zubitskiy", Vilana stated they only used a single photo. Pl's Trial Ex. P29, Interrogatory 8, p. 5. When Gregerson discovered a second photo of his was used, Vilana stated it also came from Zubitskiy. P32, interrogatory 9, p. 2.

41. Vilana never produced the name, or any contact information, for the company that printed the brochure using both of the Plaintiff's photos, despite a discovery request from the Plaintiff. Pl's Trial Ex. P32, Interrogatory 12, p 3. If Vilana had identified them, Gregerson could have obtained the photos Vilana sent the printer to establish Vilana removed the Plaintiff's embedded copyright notice ("Copyright Management Information").

**G. Defendant's Concealment of their infringement**

42. The evidence shows only one source for the Plaintiff's photos, the Plaintiff's website, which is easily locatable and accessible to anyone with Internet access. No other source for the Plaintiff's photos has been shown, and the defendants thus obtained the photos, including the Kenwood photo, from the Plaintiff's website.

43. The defendants falsely stated the photo(s) were taken by "Michael Zubitskiy" and they lawfully purchased the rights to them.

44. The defendants fabricated "Michael Zubitskiy" and forged the Zubitskiy photo agreement, arranging for Vladimir Kazaryan to provide a fraudulent notarization. Andrew Vilenchik gave false interrogatory answers and testimony, and the notary Vladimir Kazaryan provided false testimony.

45. Vilana concealed their infringement of the Kenwood photo from the Plaintiff, stating in discovery they "...used a single photograph from Mr. Zubitskiy." Pl's Trial Ex. P29, Interrogatory 8, p. 5.

46. Andrew Vilenchik created this cover-up because he knew his use of the Plaintiff's photos was unlawful.

**H. Actual damages for photo #2891 (the Skyline photo)**

47. The fair-market value for all uses by the defendants of the Plaintiff's skyline photo, if the use had been authorized in advance, would be \$4,4620.00. Pl's Trial Ex. P24. The Plaintiff has a published policy, in effect when the infringement occurred, of charging ten-fold the market rate for any use not authorized in advance and not paid for within 10 days. Pl's Trial Ex. P18, P49, and P21.

48. The defendants did not obtain permission to use the Skyline photo in advance and did not make payment to the Plaintiff within ten days.

49. The Plaintiff's damages for all infringement of the Skyline photo by the defendants comes to \$44,620.00.

**I. Statutory damages for photo #2258 (the Kenwood photo)**

50. The defendant's knowingly infringed the Plaintiff's Kenwood photo and concealed that infringement, forging the Zubitskiy sales agreement and providing false interrogatory answers and testimony.

**J. Counterclaim - deceptive trade practices**

51. Gregerson's webpage about Vilana has not been shown to contain any statements by Gregerson that are "False or misleading representations of fact".

**K. Counterclaim - tortuous interference with prospective contractual relations**

52. The publication of false statements by Gregerson on his webpage has not been shown, much less the deliberate publication of false statements.

53. No specific statements by Gregerson have been linked to loss of prospective contractual relations by Vilana.

## **L. Counterclaim - Appropriation of name and likeness**

54. Gregerson's webpage about Vilana Financial and Andrew Vilenchik includes Andrew Vilenchik's name. Mr. Vilenchik also self-published his own name on the webpage, with comments he wrote. Pl's Trial Ex. P44.

55. Gregerson published a photo of Andrew Vilenchik on the page, with a caption identifying him. This was without Vilenchik's s permission and remained after Vilenchik requested it's removal<sup>1</sup>.

56. The subject of the webpage is of social interest, demonstrated by the large number of comments visitors have posted, and is newsworthy (as reflected by other websites writing about the dispute, Pl's Trial Ex. P47).

## **II. CONCLUSIONS OF LAW**

### **A. Actual Damages for the Skyline Photo (#2891)**

In assessing damages, a jury can consider a hypothetical lost license fee. *McRoberts Software, Inc. v. Media 100, Inc.*, 329 F.3d 557, 566 (7th Cir. 2003). When the Court is confronted with imprecision in calculating damages, it should err on the side of guaranteeing the plaintiff a full recovery. *Sygma Photo News, Inc. v. Hight Society Magazine*, 778 F.2d 89, 95 (2nd Cir. 1985). The evidence supports the Plaintiff's hypothetical lost licensing fee for the defendant's use of the Skyline photo is \$44,620.00.

### **B. Statutory Damages for the Kenwood Photo (#2258)**

The evidence supports that the defendant's infringement of Plaintiff's Kenwood photo was willful, and the defendants concealed it with false discovery responses, a

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<sup>1</sup> Gregerson later removed Vilenchik's photo.

forged sales agreement with a fictional photographer, and false testimony. The Plaintiff is entitled to statutory damages for willful infringement under 17 USC § 504(c)(2), and “...the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000”.

The defendant's conduct forced the Plaintiff to bring suit and uncover the infringement despite their false sworn discovery responses and withholding of evidence. The Plaintiff was required to depose witnesses and subpoena records to expose the defendant's cover-up. The defendant's elaborate attempts to evade responsibility for their willful infringement, including the abuse of the legal process, requires statutory damages significant enough to deter others from trying the same strategy. Damages must also be enough to reform defendants who have been impervious to rehabilitation thus far.

Statutory damages under the Copyright Act serve two purposes, compensatory and punitive. *Richard Feiner and Co., Inc. v. Passport Intl Prods., Inc.*, No. 97 Civ. 9144 (RO), 1998 WL 437157, at \*2 n.13 (S.D.N.Y. July 31, 1998). *Stevens v. Aeonian Press Inc.*, 64 U.S.P.Q.2d 1920 (S.D.N.Y. 2002) states:

“...The Court must...further the Copyright Acts objectives of compensating copyright owners for past infringement and deterring future infringement, even for 'uninjurious and unprofitable invasions of copyright'. *F. W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 73 S. Ct. 222, 225 (1952); *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398, 403 (S.D.N.Y. 2002). Thus, statutory damages awards frequently greatly exceed the actual damages shown. In *Fitzgerald Pub. Co., Inc. v. Baylor Pub. Co., Inc.*, 807 F.2d 1110 (2d Cir. 1986), for example,...the expectation of the Second Circuit

was that the district court would award statutory damages in excess of fifty times the actual damages proven.”

Internal emphasis added. The extensive misconduct by the defendants in this case, and the fact they committed more than one infringement, warrants statutory damages for willful infringement of the Plaintiff's Kenwood photo in the amount of \$80,000.00.

### **C. Andrew Vilenchik is Personally Liable**

Andrew Vilenchik was personally involved in the infringement of the Plaintiff's photographs, and knew it to be infringement. His direct involvement meets the 8<sup>th</sup> circuit's “personal liability” standard for “An individual, including a corporate officer...who personally participates in that [infringing] activity”. Pinkham v. Sara Lee Corporation, 983 F.2d 824 (8<sup>th</sup> Cir. 1992).

This standard for personal liability for corporate officers who participate in infringement exists in other circuits as well. “An individual, including a corporate officer, who has the ability to supervise infringing activity and has a financial interest in that activity, *or who personally participates in that activity* is personally liable for the infringement.” Southern Bell Tel. & Tel. v. Assoc. Telephone Dir., 756 F.2d 801,811 (11<sup>th</sup> Cir. 1985) (citations omitted, emphasis added). “An officer or director of a corporation who knowingly participates in the infringement can be held personally liable, jointly and severally, with the corporate defendant”. See, e.g., Samet & Wells, Inc. v. Shalom Toy Co., 429 F.Supp. 895, 903-04 (E.D.N.Y. 1977), *aff'd* without opinion, 578 F.2d 1369 (2<sup>d</sup> Cir. 1978). The Third Circuit has held that “[a]n officer or director of a corporation who knowingly participates in [copyright] infringement can be held

personally liable, joint and severally, with the corporate defendant ." Columbia Pictures Indust., Inc. v. Redd Horne, Inc., 749 F.2d 154, 160 (3d Cir.1984).

Andrew Vilenchik participated in the infringing conduct and it's concealment, testified at trial and was afforded due process. It is not in the public interest for him to be allowed to discard his two corporate entities, potentially under-capitalized "dummy" operations, once the copyright owner has successfully sued. Andrew Vilenchik shares personal liability with the two corporate defendants.

**D. Statutory damages for removal of the Plaintiff's Copyright Management Information under 17 U.S.C. § 1203(c)(3)(B).**

The Plaintiff in this case had embedded a digital copyright notice in his photos. Pl's Trial Ex. P3, P4. The Digital Millennium Copyright Act protects the rights of copyright owners by establishing severe penalties for those that interfere with a copyright owner's attempt to protect their copyrights. 17 U.S.C. § 1202 prohibits the removal of any electronic copyright notice embedded in a digital image, to help copyright owners protect their works and prevent their copyright notice from being removed.

The defendants removed the website address the Plaintiff had stamped in the lower-left corner of his photos, and it's reasonable to assume they also removed the digitally-embedded copyright notice. Direct evidence is not available due to spoliation by the defendants, who never produced the photos in question. This, and the defendant's pattern of dishonest conduct in this case, makes it more likely than not they removed the digitally-embedded copyright notice when they removed the Plaintiff's website address.

The Plaintiff is entitled to statutory damages for the removal of his Copyright

Management Information. The DMCA provides for statutory damages in an amount not less than \$2,500 per violation. 17 U.S.C. § 1203(c)(3)(B) states:

“At any time before final judgment is entered, a complaining party may elect to recover an award of statutory damages for each violation of section 1202 in the sum of not less than \$2,500 or more than \$25,000.”

The defendants distributed the plaintiff's Skyline photo to four different parties and the Kenwood photo to one party. The Plaintiff is awarded statutory damages under the DMCA of \$25,000 per photo the defendants distributed, \$50,000 total.

**E. Gregerson did not make any false statements or intentionally and wrongfully interfere with Vilana's prospective contractual relations.**

Provided a forum to criticize Vilana is not, in itself, actionable. No liability may be imposed against Gregerson for comments posted by third parties on his website. See 47 U.S.C. § 230(e)(3); Green v. America Online, 318 F.3d 465, 471 (3d Cir. 2003).

Publishing criticism is protected, including true statements of fact. To prevail on their counterclaim of deceptive trade practices, Vilana must show Gregerson published false or misleading statements of fact about Vilana. This was not shown at trial.

The counterclaim for tortious interference with prospective business relations requires “...the defendant *intentionally* committed a wrongful act” Hunt v. University of Minn. 465 N.W. 2d 88,95 (Minn. Ct. App. 1991) (emphasis added). Vilana would have to show Gregerson published false statements intentionally, and they specifically interfered with prospective business relations. This was also not shown at trial.

**F. Gregerson did not appropriate Andrew Vilenchik's name and likeness for his**

**own benefit.**

The first amendment permits the use of a name or likeness when in the context of, and reasonably related to, a matter that is newsworthy or of legitimate public concern. Andrew Vilenchik, as the owner and operator of a local corporation, willfully violating the legal copyright of a local photographer, is reasonably of interest to the local community. The subsequent litigation over free speech on the Internet is a matter of public concern. Numerous comments by visitors reflect this public concern and interest.

The media has a constitutional right to promote itself by reproducing it's news stories. *Montana v. San Jose Mercury News, Inc.* 40 Cal. Rptr. 2d 639 (Ct. App. May 3, 1995), as modified, (May 30, 1995), review denied, (Aug. 17, 1995). Gregerson's use of the defendant's name and likeness is non-commercial and relates to a newsworthy account of litigation. Gregerson has not appropriated Vilenchik's name or likeness for self-promotion or any improper benefit.

Respectfully submitted,

Dated: November 26th, 2007

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