

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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Chris Gregerson	)	No.: 06-cv-01164 (ADM/AJB)
	)	
Plaintiff	)	
	)	
vs.	)	<b>PLAINTIFF'S STATEMENT</b>
	)	<b>OF THE CASE</b>
Vilana Financial, Inc., a Minnesota	)	
Corporation; and Vilana Realty,	)	
Inc., a Minnesota Corporation	)	
	)	
Defendants	)	
	)	

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Pursuant to the Court's order of September 14th, 2007, Plaintiff respectfully submits his statement of the case.

**I. STATEMENT OF FACTS**

Plaintiff will prove the following facts at trial:

1. The Plaintiff published his photographs #2891 (“Minneapolis skyline at night”) and #2258 (“Kenwood Residence”) on his website prior to their use by the defendants. The photos had a copyright notice underneath them and a link to the Plaintiff's licensing terms. The photos had a digital copyright notice embedded in the image and a visible watermark with Plaintiff's website address.
2. The defendants removed the visible watermark and the digitally-embedded copyright notice (the Plaintiff's Copyright Management Information) and then re-distributed the images to several parties for publication in advertisements; image #2891 was sent to Dex, R.H. Donnelley, *Zerkalo* newspaper, and a brochure

printing service the defendants have not identified; image #2258 was sent to the brochure printing service.

3. The defendants published Plaintiff's photograph #2891 in the Dex phone book, Zerkalo newspaper, an advertising brochure, web ads on Zerkalo's homepage, and bestredyp.com (a website published by R.H. Donnelley).
4. The licensing terms published on Gregerson's website and invoices require different fees if the use of a photo is authorized prior to publication versus after publication, with a ten-fold increase if authorization is obtained 10 days or more after the publication of an image (terms common in stock photography).
5. The defendants published #2258 in a brochure after the Plaintiff registered his copyright to that image.
6. The defendant's attempted to conceal the infringement by removing the Plaintiff's Copyright Management Information, fabricating Michael Zubitskiy as the man who really shot the photos, and misrepresenting the number of images they used and how extensively they used them during discovery.
7. The statements Gregerson wrote on his webpage about Vilana Financial are true: Vilana obtained Gregerson's photos from his website, removed the website address, infringed on Gregerson's copyright, fabricated "Michael Zubitskiy", forged the Zubitskiy photo agreement, and ex-employee Vladimir Kazaryan providing a false, back-dated notarization for that document.
8. The defendants posted comments on Gregerson's webpage calling Gregerson a terrorist and extortionist, claiming they had ties to the Russian Mafia, and making

an implied threat of violence against the Plaintiff if he prevails in this litigation.

9. The defendants obtained a TRO against Gregerson's webpage from a Minnesota district court judge using forged evidence (the Zubitskiy Sales Agreement).

## **II. UNRESOLVED EVIDENTIARY/PROCEDURAL ISSUES**

The specific statements on Gregerson's webpage which Vilana alleges to be false were not identified by Vilana during discovery (despite a request by Gregerson). Absent clarification by Vilana, Gregerson is obligated at trial to affirmatively prove everything he ever wrote on his webpage is true, including statements Vilana will not actually be challenging when they present their counterclaims. This would waste trial time.

To resolve this issue, part of the Plaintiff's Motion in Limine seeks to limit the comments on Gregerson's webpage which are admissible (for the purposes of Vilana's counterclaims of deceptive trade practices and interference with contractual relations) to those comments authored by Gregerson which Vilana identifies as false.

## **III. CITATION AND DISCUSSION OF AUTHORITY**

### **A. Plaintiff is entitled to actual damages for infringement of image #2891**

Plaintiff has a valid copyright to image #2891, which the defendants infringed upon, and he is entitled to actual damages. The Plaintiff will produce damage calculations at trial based on his own licensing policies and the fair market value for similar usage of a rights-managed stock photograph.

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 Plaintiff's website had a link to his licensing terms under each photo, which the defendants agreed to when they downloaded photos from the website and used them in a fashion for which the Plaintiff normally charges a fee. The terms require a fee of ten-fold when authorization is given more than 10 days after publication relative to when authorization is given prior to publication. This is consistent with other prominent stock photo websites, but in the alternative, a "Multiplier for unauthorized use x 5" for the use of a photograph was upheld by the first circuit. *Bruce v. Weekly World News, Inc.*, 310 F.3d 25 (1<sup>st</sup> Cir. 2002).

**B. Plaintiff is entitled to statutory damages for infringement of image #2258**

The Plaintiff will show at trial that the defendant's infringement of image #2258 occurred after his registration of the copyright for that image, and the infringement was willful. The Plaintiff is thus entitled to statutory damages for willful infringement under 17 USC § 504(c)(2). ("...the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000").

The defendants ignored the copyright notice under the photos and attempted to conceal their infringement by removing the photo's watermark. They further fabricated Michael Zubitskiy as the true photographer. "A plaintiff can still prove willfulness by proffering circumstantial evidence that gives rise to an inference of willful conduct." *Island Software & Computer Serv. v. Microsoft Corp.*, 413 F.3d 257, 264 (2d Cir. 2005). The defendant's knowledge of their infringement can be established by intentional

concealment of the infringement. *Johnson v. Salomon*, 1977 U.S. Dist. LEXIS 15735 (D. Minn. May 25, 1977).

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). An explanation of the factors in calculating statutory damages for willful infringement is found in *Stevens v. Aeonian Press Inc.*, 64 U.S.P.Q.2d 1920 (S.D.N.Y. 2002):

"...the Court is required to consider various factors, including...the deterrent effect of the award on other potential infringers, and factors relating to individual culpability. These include the innocence or willfulness of the conduct, whether the defendant has cooperated in providing records from which to assess the value of the infringing materials produced, and the potential of the award for discouraging the defendant....*Superior Form Builders v. Chase Taxidermy Supply Co.*, 74 F.3d 488, 496 (4<sup>th</sup> Cir.), cert. denied, 519 U.S. 809 (1996)(focus is not only on actual damages suffered, but also..."any evidence that the defendants are apparently impervious to either deterrence or rehabilitation;...any misleading or false statements made by the defendants;... and any factor which the jury believes evidences the defendants knew, had reason to know, or recklessly disregarded the fact that its conduct constituted copyright infringement."); *Chi-Boy Music v. Charlie Club, Inc.*, 930 F.2d 1224, 1229 (7<sup>th</sup> Cir. 1991)("...When the infringement is willful, the statutory damages award may be designed to penalize the infringer and to deter future violations")...."[f]oremost, the court must award an amount that will put the defendant on notice that it costs more to violate the copyright law than to obey it".

"...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.

"Similarly large multiples of actual damages were awarded in Superior Form Builders, Inc. v. Chase Taxidermy Supply Co., 14 F.3d 488 (4th Cir.), cert. denied, 519 U.S. 809 (1996) (finding an award of maximum statutory damages of \$400,000 was appropriate where the defendants profit was \$10,200, there were no damages identified, and the amount awarded equalled twice the net income of the corporate defendant for a two year period); Odegard, Inc. v. Costikyan Classic Carpets, 963 F. Supp. 1328, 1342 (S.D.N.Y. 1997)(awarding statutory damages of \$25,000 for one willful infringement at a time when the maximum damages for a nonwillful infringement was \$20,000, and there was no showing that plaintiffs had lost profits or that defendants had benefitted financially from the infringement);"

Internal emphasis added. In *Wilen v. Alternative Media Net, Inc* (2004 WL 2823036, at \*1-2 (S.D.N.Y. Dec. 3, 2004)) the court award \$20,000 per photograph for statutory damages, stating "...the need to deter AltMedia and others from committing similar violations in the future supports a large statutory damages award."

Note that most copyright violations go undiscovered, and when discovered, they are not always litigated. If an infringer's violations are discovered 10% of the time and they are forced to pay damages in half of those cases, they would have to pay over twenty times the normal fee before the goal of making “it costs more to violate the copyright law than to obey it” would be effected.

**C. Plaintiff is entitled to statutory damages for defendant's removal of Copyright Management Information under 17 U.S.C. § 1203(c)(3)(B).**

The Digital Millennium Copyright Act protects the rights of copyright owners by establishing severe penalties for those that interfere with copyright owners' attempts to protect their copyrights. In particular 17 U.S.C. § 1203 proscribes the removal of any electronic copyright notice embedded in a digital image. This provision is intended to help copyright owners protect their works by preventing their copyright notices from being removed. The Plaintiff is entitled to statutory damages for defendant's removal of his Copyright Management Information (CMI). CMI is defined by 17 U.S.C. § 1202(c):

(1) The title and other information identifying the work, including the information set forth on a notice of copyright.

(2) The name of, and other identifying information about, the author of a work.

The Plaintiff placed a visible watermark on all his photos with his website address. The website address is “identifying information about the author of the work”. The Plaintiff also digitally embedded a notice of copyright in both photos (contained in the JPEG file's “Comment” field, and readable by software which can parse jpeg file tags).

When Gregerson's image #2891 appeared in Vilana's ad on the Zerkalo website,

both visible watermark and embedded copyright notice were removed. When the image was sent to Dex, it also had the watermark and copyright notice removed. The DMCA provides for statutory damages for violations in an amount not less than \$2,500 per violation. 17 U.S.C. § 1203(c)(3)(B):

"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."

(emphasis added). The defendants committed as many as five "violations" of section 1202 of the DMCA by distributing the plaintiff's image #2891 (with the Copyright Management Information removed) to four different parties, and image #2258 to one party. 17 U.S.C. § 1202(b)(3) states no person shall, without the authority of the copyright owner of the law,

"(3) distribute, import for distribution, or publicly perform works, copies of works, or phonorecords, knowing that copyright management information has been removed or altered without authority of the copyright owner or the law,

knowing, or, with respect to civil remedies under section [1203](#), having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title."

In *Propet USA v. Shugart*, statutory damages awarded for removal of the Copyright Management Information from several photos were \$500,000 (where actual damages were \$12,800). *Propet USA, Inc. v. Lloyd Shugart*, U.S. District Court for the Western District of Washington at Seattle, Case No. C06-186 MAT. 2007.

**D. Defendants violated Plaintiff's right of attribution under § 106A(a)(1)(A)**

Both of Plaintiff's images were published by the defendants without attributing authorship to the Plaintiff. The website addressed the Plaintiff had stamped on the photos serves that purpose but it was removed by the defendants. This violates the Plaintiff's rights of attribution under § 106A(a)(1)(A):

"(a)...the author of a work of visual art—  
(1) shall have the right—  
(A) to claim authorship of that work,...

Image #2891 (Minneapolis skyline at night) is a unique photograph of the downtown Minneapolis skyline in winter taken from an unusual vantage point in freezing weather. The inclusion of the Plaintiff's name or website address would be of value. "...the inclusion of a credit line would likely have significant value to a photographer, in view of the additional notoriety and business opportunities such a credit might bring." Barrera v. Brooklyn Music Ltd., 346 F. Supp.2d 400,412 (S.D.N.Y. 2004).

**E. Plaintiff are entitled to costs and attorney's fees under 17 USC § 505.**

Section 505 of the Copyright Act expressly authorizes recovery of full costs, because an award of costs would "(1) deter future copyright infringement; (2) ensure that all holders of copyrights which have been infringed will have equal access to the court to protect their works; and (3) penalize the losing party and compensate the prevailing party." A&N Music Corp. v. Venezia, 733 F. Supp. 955, 959 (E.D. Pa.. 1990). Plaintiff intends to attorney fees and costs under 17 U.S.C. § 505.

**F. Vilana must show any publication of false statements by the Plaintiff was willful to prevail on their tortuous interference counterclaim**

Under Minnesota law, the counterclaim for Tortious interference with prospective business relations requires “...a plaintiff must prove 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 must show Gregerson wrote and published false comments with the knowledge they were false, and this specifically interfered with a prospective business relationship.

**G. Vilana's appropriation of name and likeness counterclaim is barred by the newsworthy/non-commercial nature of Gregerson's use**

The first amendment permits the use of a plaintiff's name or likeness when that use is made in the context of, and reasonably relates to, a publication concerning a matter that is newsworthy or of legitimate public concern. The same protection applies if the use is primarily non-commercial, and there is no implied endorsement that exploits a plaintiff's positive reputation.

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 primarily non-commercial, and also relates to a newsworthy account. Forgery by a local mortgage originator, and litigation over free speech on the Internet, are matters of public concern. Numerous comments posted by visitors reflect this public concern, as does the discussion of the litigation on other websites, such as the Citizen Media Law Project<sup>1</sup>.

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<sup>1</sup> <http://www.citmedialaw.org/vilenchik-v-gregerson>

#### **H. Vilana's counterclaims are barred by the their unclean hands**

Unclean hands is an equitable defense that restricts the availability of equitable remedies to parties who are guilty of unconscionable conduct. Fred O. Watson Co. v. U.S. Life Ins. Co., 258 N.W.2d 776, 778 (Minn. 1977). The defendants forged the Zubitskiy photo agreement and presented it to a Minnesota district court judge to obtain a TRO against the webpage of Gregerson's they are now suing over. The use of forged evidence to manipulate a state court into suspending a citizen's right to free speech is “unconscionable”, and precludes Vilana from relief over that webpage.

Vilana also posted comments on Gregerson's website that accused Gregerson of being a terrorist and extortionist. To the extent these comments are defamatory, Vilana further has unclean hands in their pursuit of relief over the same webpage.

#### **IV. ESTIMATED LENGTH OF TIME FOR THE TRIAL**

3 days.

Respectfully submitted,

Dated: October 22nd, 2007

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