DESTINATION COURT OF ARBITRATION

AI GLIMPSE	)	
v.	)	**Case No. 3279-3**
IMAGES CORPORATION	)	

DECISION

The parties in this matter have appeared and presented their evidence in open court. The court now enters these findings of fact and conclusions of law and awards judgment as follows.

FINDINGS OF FACT

The following facts are established by the record:

Trademark infringement: AI Glimpse asserts trademark infringement in connection with the domain name glimpsedestination.com.

AI Glimpse is a professional photographer who resides on Destination. AI Glimpse licenses photographs using the trademark GLIMPSE DESTINATION. AI Glimpse filed an application to register the GLIMPSE DESTINATION trademark with the Complaint in this action. AI Glimpse has used the trademark GLIMPSE DESTINATION for 4 years. Ownership of the trademark for use providing professional photography services is not disputed.

Images Corp. is a foreign corporation publishing coverage of current events on various worlds using social media accounts and domain names related to the events covered.

In connection with the appointment of AI Jane as Governor of Destination, Images Corp. published an article on glimpsedestination.com, a domain name Images Corp. recently registered in connection with the AI Jane article.

There was no evidence Images Corp. intended to divert customers from AI Glimpse or that actual damages were caused by trademark infringement.

Images Corp. has voluntarily transferred the domain name to AI Glimpse and has moved the article to another site.

Copyright infringement: AI Glimpse also asserts copyright infringement. AI Glimpse filed an application to copyright four photographs (depicting Governor AI Jane and Governor Selena Smith) with the Complaint in this action.

AI Glimpse is the author of the four photographs taken at the swearing in ceremony depicting Governor AI Jane and Governor Selena Smith. Ownership of the copyright in the photographs is not disputed.

The four photographs were used by Images Corp. without authorization in an article originally published on glimpsedestination.com. Although the domain name has been transferred to AI

Glimpse, the article, including the disputed photographs, continues to be publicly available on another site controlled by Images Corp.

The photos at issue here appear in the article Images Corp. published on glimpsedestination.com.

AI Glimpse, the author of the photographs, did not create them at the request of Images Corp. Nor did AI Glimpse post the photographs intending that Images Corp. could copy and distribute them.

AI Glimpse published the photographs on his social media account, #Glimpse's#. AI Glimpse also offered to license his photographs on #Glimpse's#.

Images Corp. used the photographs commercially and for the same purpose for which they were created—to depict images of the new Governor of Destination, AI Jane, and the new Governor of Proxima b, Selena Smith Rich.

The photos appeared in their entirety, without editing, in connection with the Images Corp article.

AI Glimpse licensed use the photos to other Net users before they were used by Images Corp.

Copyright management information: AI Glimpse's identifying information was removed from the AI Glimpse photos in the Images Corp. article.

In at least 30 instances the photos appeared, without attribution to AI Glimpse, in articles republishing the Images Corp. article or attributing Images Corp. as a source.

It is undisputed Images Corp. did not receive any compensation related to the original article, republished articles or articles attributed to Images Corp. as a source.

Images Corp. denies it infringed the exclusive rights in the Glimpse photos because (1) the images displayed were not copies, (2) AI Glimpse granted an implied license, and (3) the Images Corp. article made fair use of the photos. Images Corp. denies vicarious or contributory liability for use of the photos by third parties because there is no direct infringer.

JURISDICTION

Images Corp. consented to Jurisdiction. Moreover, the effects of the alleged conduct are purposefully directed toward Destination, where AI Glimpse resides. Images Corp.:

> (1) . . . purposefully direct[ed] activities or consummate[d] some transaction with the forum or resident thereof . . ., thereby invoking the benefits and protections of its laws;
>
> (2) the claim . . . arise[s] out of or relates to the [party's] forum-related activities; and
>
> (3) the exercise of jurisdiction comports with fair play and substantial justice, i.e., it [is] reasonable.

EX Corp. v. Travelers, et al., Destination Case No. 3276-1A *quoting Schwarzenegger v. Fred Martin Superstore*, 374 F.3d 797, 802 (9th Cir. 2004) (*citing Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)).

Personal jurisdiction over Images Corp. arises under the effects test. *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482 (1994). Images Corp. purposefully directed its activities toward Destination. Al Glimpse, a Destination resident, was damaged as a result.

> To determine whether a defendant "purposefully directed" its activities toward the forum, we apply, in turn, the "effects" test derived from *Calder v. Jones*, 465 U.S. 783 (1984)... . The *Calder* effects test asks "whether the defendant: '(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.'" *Will Co. v. Lee*, 47 F.4th 917, 922 (9th Cir. 2022) (quoting *Schwarzenegger*, 374 F.3d at 803).

Herbal Brands, Inc. v. Photoplaza, Inc., 72 F.4th 1085, 1091 (9th Cir. 2023).

The claims asserted arise out of forum related activities. The effects of the trademark and copyright infringement were felt on Destination.

The exercise of jurisdiction on Destination is reasonable. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77, 105 S. Ct. 2174, 2185-86 (1985). *See* ***Mayor of Eastcity v. Thisssucks Co***., Destination Case No. 3276-3A (Supplemental Decision). Jurisdiction exists.

CONCLUSIONS OF LAW

Summary

Trademark Use. Al Glimpse was the first person to use the GLIMPSE DESTINATION trademark in connection with his professional photography services. Al Glimpse owns the mark GLIMPSE DESTINATION for use in connection with his photos.

> To prevail on a claim of trademark infringement under the Lanham Act, 15 U.S.C. § 1114, a party must prove: (1) that it has a protectible ownership interest in the mark; and (2) that the defendant's use of the mark is likely to cause consumer confusion.

Network Automation, Inc. v. Advanced Sys. Concepts, Inc., 638 F.3d 1137, 1144 (9th Cir. 2011) (internal quotation marks and citation omitted).

Images Corp. used glimpsedestination.com. to promote an article using the Glimpse photos. Images Corp. preemptively (and wisely) transferred the domain name to Al Glimpse.

Generally, domain name disputes must be initiated in UDRP proceedings rather than this court. While damages can be awarded in this court for trademark infringement, this is not an appropriate case for damages.

Copyrighted Photos Use. Al Glimpse owns the copyright in the four photos at issue. Images Corp. used the Al Glimpse photos in an article about Governor Selena Smith Rich and Governor Al Jane.

> Copyright infringement is established by proof of ownership of a valid copyright and copying (or violation of any other exclusive right of the author) by the defendant.

Feist Publications Inc. v. Rural Tel. Service Co., 499 U.S. 340, 362, 111 S. Ct. 1282, 1296 (1991).

The article displayed the AI Glimpse photos to the public. A volitional act by an agent of Images Corp caused the photos to be displayed. Creating a copy is not inherent in creating a display. Both copying and displaying are exclusive rights of the author. AI Glimpse did not authorize copying or displaying the photos at issue. Images Corp. infringed the copyright in the photos.

The infringement is not excused by an implied license or fair use. The mere fact material was posted on a social media website does not imply a license permitting republication or display. Here all four fair use factors weigh against a determination of fair use.

Analysis

I. Trademark Protection of Domain Names

A. The GLIMPSEDESTINATION.COM Domain Name

AI Glimpse asserts trademark rights in the Images Corp. domain name glimpsedestination.com.

It was the practice in the U.S. Trademark Office to ignore the .com element in trademark applications. TMEP 1209.03(m). Consequently, many .com trademark registrations were rejected as generic.

Nonetheless, cases did arise regarding trademark registration and trademark protection of domain names. *See, e.g.*, *Booking.com B.V. v. U.S. Patent & Trademark Office*, 915 F.3d 171, 185-86 (4th Cir. 2019) (exceptional domain name cases may warrant trademark protection); *Advertise.com, Inc v. AOL Advertising, Inc*., 616 F.3d 974 (9th Cir. 2010); *In re Hotels.com, LP,* 573 F.3d 1300 (Fed. Cir. 2009).

"[T]he case where the URL consists of nothing but a trademark followed by a suffix like .com or .org is a special one indeed." *Toyota Motor Sales* v. *Tabari,* 610 F.3d 1171, 1176 (9th Cir. 2010) ("far less confusion will result when a domain making nominative use of a trademark includes characters in addition to those making up the mark"). Images Corp. used nothing but the Glimpse trademark.

GLIMPSE DESTINATION, as a mark for AI Glimpse photography, is not generic. Like AI CORPORATION, GLIMPSE DESTINATION is at least a descriptive mark.[1] The DESTINATION element in particular requires proof of secondary meaning if it is primarily geographically descriptive. *See* 15 U.S.C. §§ 1052(e)(2), 1052(f). Arguably GLIMPSE DESTINATION is suggestive and connotes the place to go (destination) to look at (glimpse) photography by AI Glimpse (double entendre). TMEP 1213.05(c)("The mark that comprises the "double entendre" will not be refused registration as merely descriptive if one of its meanings is not merely descriptive in relation to the goods or services.")

GLIMPSE DESTINATION has been in use for less than the 5 year period required for a presumption of secondary meaning, *id.*, § 1052(f), but AI Glimpse is one of the most famous artists on Destination. The composite mark GLIMPSE DESTINATION is a primarily source identifying, unitary mark and has acquired distinctiveness (secondary meaning).

---

[1] *See* **Chapter Twelve A—Memorandum on Trademark Analysis** regarding the AI CORPORATION trademark.

The application by AI Glimpse to register GLIMPSE DESTINATION as a trademark for professional photography services is granted. The Court Clerk shall register the mark noting the date of first use four years ago.

In the United States, the Anticybersquatting Consumer Protection Act (1999) (ACPA) protects distinctive or famous trademarks by prohibiting a cybersquatter from registering, using, or trafficking in a domain name that is confusingly similar to the trademark with a bad faith intent to profit. See 15 U.S.C. §1125(d)(1); *BMW of N. Am. LLC v. Mini Works LLC*, 166 F. Supp. 3d 976 (D. Ariz. 2010). Statutory damages were available in the range of $1,000 to $100,000 per domain name. 15 U.S.C. § 1117(d).

Statutory trademark damages are not available under Destination public policy. **PSA 79/ONE**. AI Glimpse has not sought relief under the cybersquatting statue referenced in **PSA 79/ONE**.

In the interest of justice, and to establish clarifying precedent to guide future litigation, the Destination Court of Arbitration has determined, as a matter of public policy, domain name disputes must be brought initially as a UDRP proceeding. *See* **Part C** *infra*.

B. UDRP Proceedings

Most domain name confusion cases were resolved by arbitration decisions under the international Uniform Domain Name Dispute Resolution Policy ("UDRP") adopted by the Internet Corporation for Assigned Names and Numbers (ICANN) as a required provision in Registrar Agreements. In a UDRP proceeding, a complainant must prove:

1. The domain name is identical or confusingly similar to complainant's mark;
2. The domain name registrant has no rights or legitimate interests in the domain name; and
3. The domain has been registered and is being used in bad faith.

Uniform Domain Name Dispute Resolution Policy (UDRP) Article 4(a) (Applicable Disputes). See https://www.icann.org/resources/pages/policy-2012-02-25-en

A UDRP proceeding does not prevent either party "from submitting the dispute to a court of competent jurisdiction for independent resolution before such mandatory administrative proceeding is commenced or after such proceeding is concluded." UDRP Article 4(k) (Availability of Court Proceedings). *See, e.g., Barcelona.com Inc. v. Excelentisimo Ayuntamiento De Barcelona*, 330 F. 3d 617, 624 (4th Cir. 2003) ("Because the administrative process prescribed by the UDRP is "adjudication lite" as a result of its streamlined nature and its loose rules regarding applicable law, the UDRP itself contemplates judicial intervention, which can occur before, during, or after the UDRP's dispute-resolution process is invoked."); *BroadBridge Media, L.L.C. v. Hypercd.com*, 106 F. Supp. 2d 505, 508-09 (S.D.N.Y. 2000) (concluding that a plaintiff that has filed an ICANN administrative proceeding may, before, during, and after filing such a proceeding, bring an action in federal court)

> In sum, domain names are issued pursuant to contractual arrangements under which the registrant agrees to a dispute resolution process, the UDRP, which is designed to resolve a large number of disputes involving domain names, but this process is not intended to interfere with or modify any "independent resolution" by a court of competent jurisdiction.

Barcelona.com Inc., 330 F. 3d at 625.

> Moreover, any decision made by a panel under the UDRP is no more than an agreed-upon administration that is *not* given any deference under the ACPA.

Id., at 626*; accord Sallen v. Corinthians Licenciamentos LTDA,* 273 F.3d 14, 28 (1st Cir. 2001) (explaining that "a federal court's interpretation of the ACPA supplants a WIPO panel's interpretation of the UDRP").

A UDRP proceeding is much less expensive than an ACPA action and participants can generally expect a decision within a few months. The World Intellectual Property Organization (WIPO) and The National Arbitration FORUM were, and remain, leading UDRP arbitration service providers.

> In fact, as of July 2003, UDRP panels had rendered more than 7,200 decisions affecting the ownership of over 12,800 domains, resulting in the cancellation or transfer of the disputed domain names approximately 70% of the time.

https://assets.fenwick.com/legacy/FenwickDocuments/UDRP_Versus_ACPA.pdf

C. On Destination Trademark Owners Must Seek UDRP Protection of Domain Names

UDRP arbitration can transfer a domain name, but arbitration cannot award damages to either party. Trademark registration is not required, but registration does assist the trademark owner in establishing rights in a UDRP proceeding.

Most domain name trademark cases seek to control use of the mark in a domain name. That remedy is available in UDRP arbitration. As a matter of Destination policy, trademark owners are required to seek control of infringing domain names under the UDRP in an arbitration conducted by WIPO, The FORUM, or another UDRP arbitration service provider. Trademark infringement based on use of a domain name alone is not actionable in The Destination Court of Arbitration until a UDRP arbitration is concluded.

D. Trademark Actual Damages are Available in Exceptional Cases

When damages are awarded for cybersquatting, they are often based on statutory damages under the ACPA. As a matter of policy, The Destination Court of Arbitration will not award statutory damages. **PSA 79/ONE**. Only actual damages for trademark infringement can be recovered.

Actual damages for trademark infringement, however, are difficult to prove. *Gucci America, Inc. v. Daffy's, Inc.,* 354 F.3d 228 (3rd Cir. 2003). Despite infringement, the court denied Gucci's request for an award of Daffy's profits based on the absence of willfulness and lack of proof use of the mark caused damages.

> [I]t is also quite possible that the purchasers were motivated by the opportunity of purchasing what appeared to be an attractive handbag of exceedingly high quality at the very favorable price afforded by Daffy's "discount." To the extent that consumers were motivated by obtaining such a bargain, the fact that they were also obtaining "a genuine Gucci" may have been only an incidental factor in their purchase, or no factor at all. In

> other words, given the quality, attractiveness, and price of the bags, we cannot conclude that Daffy's could not have sold them at the same price even if they contained no reference to "Gucci." Since Gucci is "only entitled to those profits attributable to the unlawful use of its mark," the record would not support awarding Gucci lost profits.

Gucci America, Inc., 354 F.3d at 242 ¶ 86.

> [T]he record does not establish that the infringer was enriched *because of* the owner's mark. As noted above, that requires speculation. The district court could not conclude that Daffy's was able to sell the counterfeit bags because of the Gucci mark without speculating about whether purchasers were attracted to the handbags because of the Gucci mark as opposed to quality, price, and appearance.

Id., at 243 ¶ 89.

In *Romag Fasteners, Inc. v. Fossil Group, Inc.*, 590 U.S. 212, 140 S. Ct. 1492, 1497 (2020), the Supreme Court held willfulness is relevant but not required for an award of profits.

> *Mens rea* figured as an important consideration in awarding profits in pre-Lanham Act cases. This reflects the ordinary, transsubstantive principle that a defendant's mental state is relevant to assigning an appropriate remedy. ...
>
> Given these traditional principles, we do not doubt that a trademark defendant's mental state is a highly important consideration in determining whether an award of profits is appropriate. But acknowledging that much is a far cry from insisting on the inflexible precondition to recovery Fossil advances.

Id.

Willfulness is not required for an award of actual damages on Destination, but intent remains relevant to an award of a defendant's profits. *See* 5 J. T. McCarthy, Trademarks and Unfair Competition § 30:62, at 30-116 (4th ed. 2002) ("To obtain an accounting of profits, the courts almost always require that defendant's infringement imply some connotation of `intent' or a knowing act denoting an intent, to infringe or reap the harvest of another's mark and advertising."). Additional proof is required to establish that actual damages were caused by trademark infringement.

In exceptional cases, actual damages based on a trademark infringing domain name may be awarded in the Destination Court of Arbitration in connection with other trademark infringements when comprising comprehensive infringing or counterfeiting conduct. *Cf. Skydive Arizona, Inc. v. Quattrocchi*, 673 F.3d 1105 (9th Cir. 2012) ("Skydive Arizona is awarded $1 million in actual damages for false advertising, $2.5 million in actual damages for trademark infringement, $2,500,004 in lost profits for trademark infringement, and $600,000 in statutory damages for cybersquatting."). Although Skydive could not recover statutory damages for cybersquatting under Destination law, It could recover actual damages (including lost profits) for domain names used in a comprehensive trademark infringement scheme, assuming causation was proven.

This is not an exceptional case warranting litigation of the trademark issue raised by GLIMPSE DESTINATION or the glimpsedestination.com domain name. There was no evidence that use of the GLIMPSE DESTINATION mark caused actual damages.

Trademark ownership was not disputed by Images Corp., and the domain name has been voluntarily transferred. *See Skydive Arizona, Inc. v. Hogue*, 238 Ariz. 357, ¶¶ 40, 42, 360 P.3d 153 (App. 2015) (enforcing a settlement agreement regarding use of a domain name). There is no need for a UDRP Proceeding.

It is hereby ordered adjudged and decreed, awarding judgment dismissing the domain name claim with prejudice.

II. Copyright Protection of Embedded Website Content

A. Copyright Infringement

Copyright law grants an author the exclusive right to copy, distribute, display publicly, perform publicly, or create derivatives of an original work of authorship. 17 U.S.C. § 106 (granting the right "to do and to authorize" these "exclusive rights"). "'Copies' are material objects ... in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 101 ("copies").

To "display" a work means to "show a copy of it, either directly or by means of a film, slide, television image, or any other device or process." 17 U.S.C. § 101 ("display"). The copyright owner has the exclusive right to "transmit or otherwise communicate ... a display of the work ... to the public, by means of any device or process." 17 U.S.C. § 101 ("publicly"). Any "device, machine, or process" includes "one now known or later developed." 17 U.S.C. § 101 ("device, machine, or process").

Copyright infringement is established by proof of ownership of a valid copyright and copying (or violation of any other exclusive right of the author) by the defendant. 17 U.S.C. § 501(a) (infringement occurs when the alleged infringer engages in activity listed in § 106). *Feist Publications Inc. v. Rural Tel. Service Co*., 499 U.S. 340, 362, 111 S. Ct. 1282, 1296 (1991); *A&M Records., Inc. v. Napster, Inc.* , 239 F.3d 1004, 1013 (9th Cir. 2001); *S.O.S, Inc. v. Payday, Inc*., 886 F.2d 1081, 1085 n.3 (9th Cir. 1989) ("'copying' is shorthand for infringing any of the copyright owner's five exclusive rights" under 17 U.S.C. §106).
Al Glimpse is the author of four original photographic works. It is undisputed Al Glimpse owns the copyright in the Al Glimpse photos.

Copying can be proven by direct evidence. Alternatively, "[c]opying may be shown by circumstantial evidence of access to the copyrighted work and substantial similarity of both the general ideas and expression in the copyrighted work and the allegedly infringing work." *Apple Computer, Inc v. Microsoft Corp*., 35 F.3d 1435, 1442 (9th Cir. 1994). Copying is only actionable if the "defendant's work is substantially similar to [the copyrighted work] (and is the product of copying rather than independent effort)." 2 M. Nimmer & D. Nimmer, Copyright § 8.01[G] (2019). "If such duplication is literal or verbatim, then clearly substantial similarity exists." *Id.* § 13.03[A][1].

The photos at issue here appear, in their entirety and unedited, in the article Images Corp. published on glimpsedestination.com.

1. The Volitional Act Requirement

"Copying" requires a volitional act causing the infringement.

> Although copyright is a strict liability statute, there should still be some element of volition or causation which is lacking where a defendant's system is merely used to create a copy by a third party.

Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., 907 F. Supp. 1361, 1370 (N.D. Cal. 1995).

> [I]nfringement under the Copyright Act requires proof of volitional conduct, the Copyright Act's version of proximate cause.

Hunley v. Instagram, LLC, 73 F.4th 1060, 1074 (9th Cir. 2023); accord *BWP Media USA, Inc. v. T&S Software Assocs., Inc.*, 852 F.3d 436, 440 (5th Cir. 2017) ("every circuit to address this issue has adopted some version of *Netcom*'s reasoning and the volitional-conduct requirement.").

2. Direct Copyright Infringement

A "direct infringement claim turn[s] on '*who made*' the copies[.]" *Fox Broad. Co. v. Dish Network L.L.C.* , 747 F.3d 1060, 1067 (9th Cir. 2014) (*quoting Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121, 130 (2d Cir. 2008)) (emphasis in original).

The infringer, the entity providing access to infringing content, must be the "direct cause" of the infringement. *Perfect 10, Inc. v. Giganews*, 847 F.3d 657, 666 (9th Cir. 2017), *cert denied*, 138 S. Ct. 504 (2017). "A defendant may be held directly liable only if it has engaged in volitional conduct that violates the Act." *American Broadcasting Co. v. Aereo*, 573 U.S. 431, 453, 134 S. Ct. 2498, 2512 (2014) (Scalia, J., dissenting).

> [D]irect infringement requires the plaintiff to show causation (also referred to as 'volitional conduct') by the defendant. ...
>
> [This requirement] 'simply stands for the unremarkable proposition that proximate causation historically underlines copyright infringement liability no less than other torts.' 4 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.08 [C][1] (2016).

Perfect 10, Inc. v. Giganews, 847 F.3d at 666.

> And since the Act makes it unlawful to copy or perform copyrighted works, not to copy or perform in general, see [17 U.S.C.] § 501(a), the volitional-act requirement demands conduct directed to the plaintiff's copyrighted material, see *Sony* [*Corp. of America v. Universal City Studios, Inc.*, 464 U. S. 417, 434, 104 S. Ct. 774 (1984)].

Aereo, 573 U.S. at 453, 134 S. Ct. at 2512 (Scalia, J., dissenting).

> The defendant may be held directly liable only if the defendant *itself* "trespassed on the exclusive domain of the copyright owner." [*CoStar Group, Inc. v. LoopNet, Inc.*, 373 F. 3d 544, 550 (4th Cir. 2004).] Most of the time that issue will come down to who selects the copyrighted content: the defendant or its customers. *See Cartoon Network* [*LP, LLLP v. CSC Holdings, Inc.*, 536 F. 3d 121, 131-32 (2nd Cir. 2008).

Aereo, 573 U.S. at 454-55, 134 S. Ct. at 2513 (Scalia, J., dissenting).

> The Court in *Aereo* did not address volitional conduct as such, although Justice Scalia did so in his dissent. *See Aereo*, 573 U.S. at 453, 134 S. Ct. 2498 (Scalia, J., dissenting). But the Court did distinguish between those who engage in activities and may be said to "perform" and those who engage in passive activities such as "merely suppl[ying] equipment that allows others to do so." *Id*. at 438-39, 134 S. Ct. 2498. In any event, *Perfect 10* was bound to apply our volitional-conduct analysis. When we applied our requirement that the infringer be the direct cause of the infringement, we concluded that the entity providing access to infringing content did not directly infringe, but the websites who copied and displayed the content did. *Perfect 10[, Inc. v. Amazon.com, Inc.]*, 508 F.3d [1146,] 1160 (9th Cir. 2007).

Hunley v. Instagram, LLC, 73 F.4th 1060, 1074 (9th Cir. 2023).

The article displayed the AI Glimpse photos to the public. A volitional act by an agent of Images Corp caused the photos to be displayed. Creating a copy is not inherent in creating a display. "To '<u>display</u>' a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other <u>device</u> or <u>process</u> …." 17 U.S.C. § 101. Showing a copy does not necessarily require creation of the copy. Both copying and displaying are exclusive rights of the author. AI Glimpse did not authorize copying or displaying the photos at issue.

For the reasons stated in part B below, the photos in the article on the glimpsedestination.com website were displayed publicly. Images Corp. infringed the copyright in the photos.

3. Secondary Liability for Copyright Infringement

Thirty copyright violations are attributed to republication of the 4 photos. Secondary liability claims, holding defendants responsible for infringement by third parties, can be based on vicarious infringement or contributory infringement.

> Vicarious infringement occurs when one profits from direct infringement while declining to exercise a right to stop or limit it, and contributory infringement liability requires "inducing or encouraging" direct infringement.

Luvdarts, LLC v. AT & T Mobility, LLC, 710 F.3d 1068, 1071 (9th Cir. 2013) (*quoting Metro–Goldwyn–Mayer Studios Inc. v. Grokster, Ltd.,* 545 U.S. 913, 930, 125 S. Ct. 2764 (2005)). "[O]ne contributorily infringes when he (1) has knowledge of another's infringement and (2) either (a) materially contributes to or (b) induces that infringement." *Perfect 10 v. Visa Intern*, 494 F.3d 788, 795 (9th Cir. 2007).

Although Images Corp. did not profit directly from republication (precluding vicarious liability), Images Corp. was aware of republication. Images Corp. materially contributed to or induced infringement by publishing 4 photos without authorization or copyright management information on glimpsedestination.com.

Secondary liability claims require the threshold showing "that there has been direct infringement by third parties." *Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1050 (9th Cir. 2020).

> Our volitional conduct requirement draws a distinction between direct and secondary infringement that would likely foreclose direct liability for third-party embedders. And without direct infringement, ... secondary liability theories all fail.

Hunley v. Instagram, LLC, 73 F.4th at 1074-75 (*citing Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, 971 F.3d 1042, 1050 (9th Cir. 2020)). Under the "server test" applied under Ninth Circuit law, embedding, without storing, the underlying copyrighted photographs is not direct infringement. *See Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160-61 (9th Cir. 2007).

For direct and contributory infringement liability, we need to determine if unauthorized public display requires creation of an unauthorized copy.

B. The Right to Display Publicly

1. The Server Test

The U.S. Copyright Act defines "display" to mean "show a copy." 17 U.S.C. § 101. A "copy" is a "material object" in which a work is "fixed" and from which the copyrighted work can be reproduced. *Id*. A work is "fixed in a tangible medium of expression" if it is sufficiently permanent to be reproduced "for a period of more than a transitory duration." *Id*. If the image displayed is created using html programming to link to a third party computer, the only "material object" is on a third party server.

An "image is a work that is fixed in a tangible medium of expression, for purposes of the Copyright Act, when embodied (*i.e.*, stored) in a computer's server (or hard disk, or other storage device)." *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007) (internal quotation marks omitted). If a website publisher does not "store" an image or video in the relevant sense, the website publisher does not "communicate a copy" of the image or video and thus does not violate the copyright owner's exclusive display right. *Id.* at 1160-61. Therefore, when third parties embed the images and videos, they do not display "copies" of the copyrighted work. *Id.*; *Bell v. Wilmott Storage Servs., LLC*. 12 F.4th 1065, 1072-73 (9th Cir. 2021). This rule is known as the "server test."

The server test has been applied to the rights to copy and distribute as well as display. *Flava Works, Inc. v. Gunter*, 689 F.3d 754, 757 (7th Cir. 2012).

2. Criticism of the Server Test

District courts in the Second Circuit, however, refused to apply the server test. *See Nicklen v. Sinclair Broadcasting Group, Inc.,* 551 F. Supp. 3d 188 (S.D.N.Y. 2021) (*Perfect 10* should be "cabined" to the search engine context, or contexts in which an Internet user must click a hyperlink to view an image); *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018).

Even proponents of the server test recognized the server test had technological limitations.

> Finally, we note that the Server Test applies only to embedding in its current technological format, which involves a single host server storing and transmitting an image, with an embedding website that directs the browser to retrieve and display that same underlying image from the host server. *Perfect 10* does not foreclose other avenues to relief for future technologies that configure retransmission in a new way. We cannot foreclose the possibility that some future panel may conclude that there are ways to display a copy other than to store it on a server. But it is not our role to craft a policy solution and rewrite the law to our tastes.

Hunley, 73 F.4th at 1076; *see Aereo*, 573 U.S. at 463 (Scalia, J., dissenting) (courts cannot "foresee the path of future technological development.").

3. The Server Test Does Not Apply on Destination

The server test does not comport with public policy on Destination because: (1) computer technology has advanced, rendering the server test obsolete; (2) the server test was based on specific statutory language not formulated in contemplation of specific technological advances and (3) Destination is not bound to follow concepts of U.S. copyright legislation – such as statutory damages – nor is Destination bound by statutory language not adopted by the Destination Charter, international treaties or EX Corp. The *Nicklen* opinion is quoted extensively here because it clearly expresses the concerns raised by the rejected server test.

> Further, the exclusive display right set forth in the Copyright Act is technology-neutral, covering displays made directly or by means of any device or process "now known or later developed." The concept of "display" thus includes "the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system." H.R. Rep. No. 94-1476, at 64 (1976). The right is concerned not with how a work is shown, but *that* a work is shown.

Nicklen v. Sinclair Broad. Group., 551 F. Supp. 3d 188, 194 (S.D.N.Y. 2021) (emphasis in original).

> The server rule is contrary to the text and legislative history of the Copyright Act. The Act defines to display as "to show a copy of" a work, 17 U.S.C. § 101, not "to make and then show a copy of the copyrighted work." The Ninth Circuit's approach, under which no display is possible unless the alleged infringer has also stored a copy of the work on the infringer's computer, makes the display right merely a subset of the reproduction right. *See* Jane C. Ginsburg & Luke Ali Budiardjo, *Embedding Content or Interring Copyright: Does the Internet Need the "Server Rule"?*, 32 Colum. J. L. & Arts 417, 430 (2019) (explaining that the server rule "convert[s] the display right into an atrophied appendage of the reproduction right" and

> thereby "ignores Congress's endeavor to ensure that the full 'bundle' of exclusive rights will address evolving modes of exploitation of works")

Id., 551 F. Supp. at 195.

> Under the server rule, a photographer who promotes his work on Instagram or a filmmaker who posts her short film on YouTube surrenders control over how, when, and by whom their work is subsequently shown -- reducing the display right, effectively, to the limited right of first publication that the Copyright Act of 1976 rejects. The Sinclair Defendants argue that an author wishing to maintain control over how a work is shown could abstain from sharing the work on social media, pointing out that if Nicklen removed his work from Instagram, the Video would disappear from the Sinclair Defendants' websites as well. But it cannot be that the Copyright Act grants authors an exclusive right to display their work publicly only if that public is not online.

Id., at 195-96.

Images Corp. displayed to the public AI Glimpse photographs. It does not matter whether Images Corp. also made a copy of the AI Glimpse photographs. Subsequently, third parties displayed the same photographs to the public, and Images Corp. induced, encouraged, or contributed to the infringement with knowledge of the infringement. Images Corp. is liable for direct and contributory infringement.

C. The Implied License Defense

Images Corp. asserts the photos were subject to an implied license. A license is a contract in which the copyright owner agrees not to sue the licensee for copyright infringement provided the licensee satisfies the terms of the license agreement. By license the copyright owner can grant the licensee some (or all) of the copyright owner's rights, to exercise exclusively or as one of multiple licensees. If the licensor does not retain any rights, a written, exclusive license is treated as an assignment. See 17 U.S.C. § 204(a) ("A transfer of copyright ownership ... is not valid unless an instrument of conveyance ... is in writing and signed by the owner of the rights conveyed."). An exclusive licensee can sue to enforce the copyright, 17 U.S.C. § 501(b), but cannot transfer the licensed rights without the consent of the copyright owner. *Gardner v. Nike Inc*., 279 F.2d 774 (9th Cir. 2002).

A nonexclusive license need not be in writing. 17 U.S.C. § 101; *see Effects Associates, Inc. v. Cohen*, 908 F.2d 555, 557 (9th Cir. 1990), *cert denied*, 498 U.S. 1103 (1991) (implied license is not exclusive).

A license can be implied by conduct or by terms in an agreement consistent with a license of rights. See Restatement (Second) of Contracts § 4 (1981); *Photographic Illustrations Corp. v. Orgill, Inc*., 953 F.3d 56 (1st Cir. 2020) (an implied sublicense can arise by conduct if the copyright owner granted a license including an unrestricted right to sublicense).

There is an implied nonexclusive license when the author "created a work at [the other's] request and handed it over, intending that [the other] copy and distribute it." *A&M Records, Inc. v. Napster Inc*., 239 F.3d 1004, 1026 (9th Cir. 2001); *I.A.E, Inc. v. Shaver*, 74 F.3d 768 (7th Cir. 1996); 3 M. Nimmer & D. Nimmer, Copyright § 10.03[A] at 10-41 (1996). *Accord Muhammad-Ali v. Final Call,*

Inc., 832 F.3d 755, 763 (7th Cir. 2016); *Estate of Hevia v. Portrio Corp*., 602 F.3d 34, 41 (1st Cir. 2010); *SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharm., Inc*., 211 F.3d 21, 25 (2d Cir. 2000); *Lulirama Ltd., Inc. v. Axcess Broadcast Services, Inc.,* 128 F.3d 872, 874-75 (5th Cir. 1997).

> The Second Circuit has not yet developed a test for determining whether a copyright owner has conveyed an implied license, however, it "has followed the lead of other appeals courts and cautioned that implied non-exclusive licenses should be found only in narrow circumstances where one party created a work at the other's request and handed it over, intending that the other copy and distribute it." *Psihoyos v. Pearson Educ., Inc.*, 855 F. Supp. 2d 103, 120 (S.D.N.Y. 2012) (*quoting Weinstein Co. v. Smokewood Entm't Grp.* , LLC, 664 F. Supp. 2d 332, 344 (S.D.N.Y. 2009)). "[T]he question comes down to whether there was a 'meeting of the minds' between the parties to permit the particular usage at issue." [*Psihoyos*, 855 F. Supp. 2d] at 124.

Otto v. Hearst Commc'ns, Inc., 345 F. Supp. 3d 412, 434 (S.D.N.Y. 2018). *Accord O'Neil v. Ratajkowski*, 563 F. Supp. 3d at 136. Neither case found the required "meeting of the minds." *Cf* ***EX Corp v. Travelers, et al.,*** Destination Case No. 3276-1; and ***Out Transport v. Al Hunter, et al.,*** Destination Case No. 3276-2).

The mere fact material was posted on a social media website does not imply a license permitting republication or display. One court briefly concluded there was an implied license from the Instagram terms of use permitting creation of embedded images of photos from Instagram posts. *Sinclair v. Ziff Davis LLC*, 454 F. Supp. 3d 342 (S.D.N.Y. 2020), *on reconsideration*, 2020 WL 3450136 (S.D.N.Y. June 24, 2020).

The *Sinclair* court's logic appeared to be:

> All posted Instagram user content is licensed by the user to Instagram with the right to sublicense.
>
> All content embedded elsewhere using Instagram software is posted Instagram user content.
>
> Therefore, all content embedded elsewhere using Instagram software is licensed by the user to Instagram with the right to sublicense.

On reconsideration, the *Sinclair* court ruled additional evidence was needed to determine whether a sublicense was implied. The mere fact content "is licensed by the user with the right to sublicense" does not mean Instagram has exercised the right to sublicense. Instagram publicly asserted a right to sublicense exists, but Instagram claims no sublicense was automatically extended to media publishing companies to embed Instagram user content. https://arstechnica.com/tech-policy/2020.06/instagram-just-threw-users-of-its-embedding-api-under-the-bus/

Moreover, in cases like *Otto*, where a third party posted the Instagram content, the user could not grant Instagram a license to the third party content.

The *Sinclair* case, *supra*, and *McGucken v. Newsweek LLC, infra,* both settled without a judicial determination of the implied license issue. An Indiana court also refused to imply a right to repost a photo from Twitter based on the terms of use without evidence of intent. *Babcock v. Gannett Satellite Information Network, LLC*, 2021 WL 534754 (N.D. Ind. Feb. 12, 2021).

Intent to license must establish the author "created a work at [the other's] request and handed it over, intending that [the other] copy and distribute it." *A&M Records,* 239 F.3d at 1026. That proof is not present in this case.

AI Glimpse did not authorize copying or displaying the AI Glimpse photos at issue here. There is no evidence sufficient to establish an implied license to copy or display the AI Glimpse photos. An implied license must establish the author "created a work at [the other's] request and handed it over, intending that [the other] copy and distribute it." The mere fact AI Glimpse posted some material on his social media website does not imply a license permitting republication or display.

D. The Fair Use Defense

1. Analysis of the Fair Use Factors

The fair use doctrine is a defense to copyright infringement. Under U.S. law, there are four statutory factors to consider. 17 U.S.C. §107. The fair use doctrine "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Google LLC v. Oracle Am. Inc*., 593 U.S. 1, 141 S. Ct. 1183, 1196 (2021). *See also The Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 143 S. Ct. 1258 (2023) (transformative use analysis must weigh commercial use against the degree to which the work has a "further purpose or different character." Here the purpose of the use of the Warhol image of Prince was the same as the use of the original Goldsmith image of Prince – to illustrate articles about Prince. Unjustified commercial use of the Warhol image beyond the scope of the original license from Goldsmith was not transformative fair use.)

"Transformative" use of a copyright protected work is an important consideration because copyright law exists to "promote the Progress of Science and useful Arts." U.S. Const. art. I, § 8, cl. 8. A transformative work "adds something new, with a further purpose or different character, altering the first [work] with new expression, meaning, or message." *Campbell v. Acuff Rose Music Inc.*, 510 U.S. 569, 579, 114 S. Ct 1164 (1994).

The fair use defense can be determined on summary judgment as a matter of law from the factual record when, either:

> all four factors weigh in favor of fair use. *See, e.g., Boesen v. United Sports Publications, Ltd.,* 2020 WL 6393010 (E.D.N.Y. Nov. 2, 2020), *reconsideration denied*, 2020 WL 7625222 (E.D.N.Y. Dec. 22, 2020).
>
> or
>
> all four factors weigh against fair use. *See, e.g.*, *McGucken v. Pub Ocean Limited*, 42 F.4th 1149, 1164 (9th Cir 2022).

Not all the fair use factors have equal weight in the analysis; consequently, fair use can be determined on summary judgment by balancing the factors.

> Factors one [purpose and character of the use] and four [effect on the market] favor Thomson Reuters. Factors two [nature of the work] and three [amount used] favor Ross. Factor two [nature of the work] matters less than the others, and factor four [effect on the market] matters more. Weighing them all together, I grant summary judgment for Thomson Reuters on fair use.

Thomson Reuters Enterprise Centre, GMBH v. Ross Intelligence, Inc, No. 1:20-cv-613-SB (D Del. February 11, 2025)(use of Westlaw headnotes to develop an AI legal search tool infringed copyright), available at https://fingfx.thomsonreuters.com/gfx/legaldocs/xmvjbznbkvr/THOMSON%20REUTERS%20ROSS%20LAWSUIT%20fair%20use.pdf. The case is on appeal to the Third Circuit, Case No. 25-2153. https://copyrightalliance.org/wp-content/uploads/2025/11/TR-v.-Ross-Brief.pdf.

Purpose and character of the use: Commercial use weighs against fair use.

Using photographs for the same purpose for which the author created them is not transformative. *McGucken v. Pub Ocean Limited*, 42 F.4th 1149, 1153, 1158 (9th Cir 2022) (article used photos about an ephemeral 10 mile long lake formed in Death Valley in March 2019). Transformative works have been identified as the kind of creative works the fair use doctrine is intended to protect. *Campbell v. Acuff-Rose Music, Inc*., 510 U.S. at 578-79. Transformative copying "adds something new and important." *Google*, 141 S. Ct. at 1203.

> When a copyrighted work is used simply to illustrate what that work already depicts, the infringer adds 'no further purpose or different character.'

McGucken, 42 F.4th at 1158, *quoting Campbell*, 510 U.S. at 579.

Embedding photos in an article is not transformative. *McGucken,* 42 F.4th at 1158-59. "Adding informative captions does not necessarily transform the copyrighted works." *Sicre de Fontbrune v. Wofsy*, 39 F. 4th 1214, 1245 (9th Cir. 2022).

Often media publishers assert freedom of speech when publishing copyrighted works. This is not always effective. *See, e.g.*, *Conrad v. Yahoo!* 20-CV-8638 (Woods) (S.D.N.Y. June 9, 2021) (not fair use of a photo of Megan Markle at a High School dance "to illustrate [her] appearance"); *Golden v. Michael Grecco Productions, Inc*., 2021 WL 878587 (E.D.N.Y. March 9, 2021) (not fair use of a photo of Lucy Lawless as *Zena Warrior Princess* on a blog discussing a possible relaunch of the show); *Otto v. Hearst Communications, Inc.*, 345 F. Supp. 3d 412, 433 (S.D.N.Y. 2018) (news publisher's use of a personal photo taken of President Trump crashing a wedding, posted on Instagram without permission, was not fair use); *Monge v. Maya Mags*., 688 F.3d 1164, 1176 (9th Cir. 2012) (use of photos of a secret celebrity wedding in gossip magazine expose was not transformative).

> It would be antithetical to the purposes of copyright protection to allow media companies to steal personal images and benefit from the fair use defense by simply inserting the photo

in an article which only recites factual information – much of which can be gleaned from the photo itself.

Otto v. Hearst Communications, Inc., 345 F. Supp. 3d at 432.

"Use of a copyrighted photograph in a news article can properly be deemed transformative when the photograph itself is the subject of the story." *Nicklen v. Sinclair Broadcast Group, Inc*., 551 F. Supp. 3d 188 (S.D.N.Y. July 30, 2021) (video of a starving polar bear in an article on global warming).

Commercial use weighs against fair use. The AI Glimpse photographs were used commercially.

Use of the AI Glimpse photographs was not transformative. The AI Glimpse photos were simply used for the same purpose they were created for—to depict images of the new Governor of Destination, AI Jane, and the new Governor of Proxima b, Selena Smith Rich.

Nature of the work: Photos are creative works involving technical and artistic decisions. Prior publication "on Instagram and in online articles . . . does not weigh in favor of fair use." *McGucken,* 42 F.4th at 1162.

The amount used: In *McGucken,* the article used twelve of plaintiff's photos without cropping or other modification. The article is written as captions to the photos (plaintiff's 12 photos plus 28 photos from others), and the photos "dwarf the text" in size. The number of other photos is not relevant. The amount used is measured in terms of the portion of Plaintiff's copyrighted works used. *McGucken,* 42 F.4th at 1162.

The AI Glimpse photos were copied in their entirety.

The effect on the market for the works: McGucken licensed his photos to other websites. "If the challenged use should become widespread, it would adversely affect the *potential* market for the copyrighted work." *McGucken,* 42 F.4th at 1163, *quoting Monge*, 688 F.3d at 1182.

Some cases have applied a presumption of market harm to commercial, non-transformative uses. *See, e.g.*, *Disney Enters. v. VidAngel, Inc*., 869 F.3d 848, 861 (9th Cir. 2017). The *McGucken* court did not need to determine if the presumption should apply because the facts established market harm.

The commercial, non-transformative use of the AI Glimpse photographs supports a presumption of market harm.

AI Glimpse also licensed his photos to others. The potential market for those licenses was harmed. In at least 30 instances the photos appeared, without attribution to AI Glimpse. The author of the photos had no opportunity (at least a diminished potential market) to license them to the stream once they were displayed by Images Corp.

2. **Conclusion on Fair Use**

All four factors in *McGucken* indicated there was not fair use of a transformed work; consequently, the appellate court reversed summary judgment of fair use and directed summary judgment should be entered finding no fair use. *McGucken*, 42 F.4th at 1164.

Here, again all four factors weigh against fair use. The confluence of all four fair use factors leads to judgment in this case rejecting the fair use defense.

3. **Limitations on Fair Use as Case Dispositive**

Numerous other cases arising from Instagram posts, even a case involving one of the same embedded McGucken photographs, have granted or denied summary judgment for either party based on a combination of factors weighing both for and against fair use. *McGucken v. Newsweek LLC*, 464 F. Supp. 3d 594, 609 (S.D.N.Y. 2020), *reconsideration denied*, 2020 WL 6135733 (S.D.N.Y. Oct. 19, 2020), *summary judgment denied*, 2022 WL 836786 (S.D.N.Y March 21, 2022), *notice of settlement* April 14, 2022 https://casetext.com/case/mcgucken-v-newsweek-llc-3 (suit over Newsweek article with an embedded link to McGucken's Instagram post of Death Valley photo was settled after the court rejected the server test and found copying, but also found defense evidence of fair use and license created a genuine dispute precluding summary judgment and requiring a trial).

A case involving a model/actress's post of a paparazzi photo of her on her Instagram story board (for 24 hours) provides another example demonstrating disputed facts preventing application of the fair use doctrine as a matter of law. *O'Neil v. Ratajkowski*, 563 F. Supp. 3d 112 (S.D.N.Y. 2021).

> A reasonable observer could conclude the Instagram Photograph merely showcases Ratajkowski's clothes, location, and pose at that time—the same [non-transformative] purpose, effectively, as the Photograph. On the other hand, it is possible a reasonable observer could also conclude that, given the flowers covering Ratajkowski's face and body and the text "mood forever," the Instagram Photograph instead conveyed that Ratajkowski's "mood forever" was her attempt to hide from the encroaching eyes of the paparazzi—a [transformative] commentary on the Photograph.

Id., at 129.

The fair use analysis is fact specific.

> The Court must remind the parties, however, of the "fact-driven nature" of the fair use inquiry and thus, the outcome may have been different in a similar scenario.

Otto v. Hearst Communications, Inc., 345 F. Supp. 3d at 433.

Future Decisions in this Court regarding fair use will depend upon the specific facts presented.

It is hereby ordered, adjudged, and decreed awarding judgment for AI Glimpse on the copyright infringement claim.

AI Glimpse is entitled to copyright registration for the four photographs he authored. The clerk shall issue registration in accord with the application filed with the Complaint.

AI Glimpse is entitled to damages in the form of a reasonable royalty from Images Corp. for:

(1) unauthorized display of the four copyrighted photographs he authored (including display in the article and on glimpsedestination.com or any other website), and

(2) unauthorized display in the 30 instances of unauthorized republication. The amount of damages to be awarded remains to be determined. **See Part IV below**.

III. Protection for Copyright Management Information

The Digital Millenium Copyright Act (1998) provided additional protection for copyright owners for works published on the Internet. In brief, intentional removal of copyright protection information, including the author's identifying information, has been punishable under the U.S. Copyright Act for almost 13 centuries. 17 U.S.C. § 1202(b). The statute provides for actual damages, *id.*, § 1203(c)(2), or statutory damages ranging from $2,500 to $25,000. *Id.*, § 1203(c)(3)(B). If the violation is willful and for purposes of commercial advantage, criminal penalties can be imposed (up to $500,000 plus 5 years in prison). *Id.*, § 1204.

As previously noted, Destination public policy does not permit an award of statutory damages. **PSA 79/ONE**. This court does not have jurisdiction to impose criminal penalties.

Images Corp. does not deny it is aware of the obligation to preserve copyright management information. Nor does Images Corp. deny the information identifying AI Glimpse as the author appears on the images AI Glimpse published on social media and does not appear on the images published by Images Corp.

Images Corp. received no royalties from the article or the 30 instances where the photos appeared without attribution to AI Glimpse to substitute photos. Nevertheless, AI Glimpse was deprived of royalties. If the royalties awarded in **Part II** *supra* cover AI Glimpse's lost royalties, no further award for removal of copyright management information is warranted.

A dispute exists, however, regarding whether the copyright management information was removed intentionally. *Kelly v. Ariba Soft Corp*., 77 F. Supp. 1116 (C.D. Cal. 1999) (information ignored by a crawler when gathering digital images was not "intentionally" removed as required for DMCA liability), *aff'd in part, rev'd in part, on other grounds*, 336 F.3d 811 (9th Cir. 2003). *See* 17 U.S.C. §1202(b):

> No person shall, without the authority of the copyright owner or the law—
>
> (1) intentionally remove or alter any copyright management information, ...
>
> 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.

Although not dispositive, the evidence defendant registered the domain name glimpsedestination.com may be relevant to intent.

Disputed issues of fact exist regarding:

> whether the removal of copyright management information was intentional, and
>
> whether, If Images Corp. intentionally removed copyright management information, actual damages are warranted, in addition to the copyright damages in **Part II** *supra*.

Injunctive relief is available to prevent irreparable and continuing harm to AI Glimpse from the omission of copyright management information in the four photographs. 17 U.S.C. § 1203(b)(1).

It is hereby ordered, adjudged, and decreed as follows:

Awarding judgment for AI Glimpse on the copyright management information claim.

Permanently enjoining Images Corp., and those in active concert or participation with Images Corp., from:

displaying the Glimpse photographs without the copyright management information, or

permitting republication of the photographs in the original article without the copyright management information.

It is further ordered,

Images Corp. shall instruct the publisher in each of the 30 instances where the photos appeared without attribution to AI Glimpse to remove the photos or substitute photos *with* the required copyright management information; and

Damages, in excess of the copyright infringement royalty damages awarded in **Part II** *supra,* may be awarded for any continuing display by republication of the AI Glimpse photographs *without* copyright management information or proper attribution.

It is further ordered, the parties shall have 10 days from the date of this Decision to agree whether Images Corp. had the intent required for wrongful removal of copyright management information.

If the parties do not reach agreement within 10 days, *liability (and damages, if any) will be established under Rule 3 of the Destination Court Rules of Arbitration for disputed facts*.

IV. **Damages**

Damages for copyright infringement are measured by actual damages incurred by the plaintiff plus the infringer's profits. 17 U.S.C. § 504 (b). Images Corp. has no profits attributable to the copyright infringement.

Damages for intentional removal of copyright protection information are measured by actual damages. 17 U.S.C. § 1203(b). Images Corp. has no profits attributable to the removal of copyright management information.

It is hereby ordered, adjudged, and decreed, awarding AI Glimpse actual damages measured by:

a reasonable royalty for display of the four photographs by Images Corp. (in the article, on the glimpsedestination.com website or on any other website controlled by Images Corp.), plus

a reasonable royalty for the 30 instances the photos appeared, without attribution to AI Glimpse, in articles republishing the Images Corp. article or articles attributing Images Corp. as a source, plus

a reasonable royalty for the continuing display by republication of the AI Glimpse photographs *without* copyright management information or proper attribution.

It is further ordered, The parties shall have 10 days from the date of this Decision to agree to the reasonable royalties awarded above.

If there is no agreement on the reasonable royalties, then both parties shall instead submit, within the same 10-day period, their calculation of the disputed amount. Damages will then be *established under Rule 3 of the Destination Court Rules of Arbitration for disputed facts*.

If the parties stipulate as ordered in **Parts III and IV** within 10 days, the Clerk is ordered to enter judgment in accordance with the foregoing and the stipulations of the parties.

/s/ AI Judge