

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

\_\_\_\_\_

ROBERT STEVENS, AFFORDABLE AERIAL PHOTOGRAPHY, INC., STEVEN VANDEL,

Applicants,

v.

CORELOGIC, INC.,

Respondent.

\_\_\_\_\_

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH  
TO FILE PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

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## **PARTIES TO THE PROCEEDINGS**

Applicants Robert Stevens, Affordable Aerial Photography, Inc. and Steven Vandel were the plaintiffs and the appellants in the proceedings below.

Respondent CoreLogic, Inc. was the defendant and the appellee in the proceedings below.

### **RULE 29.6 STATEMENT**

Pursuant to this Court's Rule 29.6, applicant Affordable Aerial Photography, Inc. is a nongovernmental corporation. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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To the Honorable Elena Kagan, Associate Justice of the Supreme Court  
of the United States and Circuit Justice for the Ninth Circuit:

Pursuant to 28 U.S.C. §2101(c) and Rules 13.5, 22, and 30.3 of the Rules of  
this Court, Applicants respectfully request a **60-day extension** of time, up to and  
including **Friday, January 4, 2019** within which to file a petition for a writ of  
certiorari in this case to review the judgment of the United States Court of Appeals  
for the Ninth Circuit.

The Ninth Circuit entered its amended judgment on August 6, 2018 (the  
court of appeals' amended opinion, reported at 899 F.3d 666 (9<sup>th</sup> Cir. 2018), is  
attached hereto as Exhibit A), and denied Applicants' petition for panel rehearing or  
rehearing *en banc*. Pursuant to Rules 13.1, 13.3 and 30.1 of the Rules of this Court,  
the petition for a writ of certiorari to review a judgment would be due on Monday,  
November 5, 2018. This application is made at least 10 days before that date. This  
Court's jurisdiction would be invoked under 28 U.S.C. §1254(1).

1. In 1998, Congress enacted 17 U.S.C. §1202 ("§1202") of the Digital  
Millennium Copyright Act ("DMCA") as part of legislation to implement the World  
Intellectual Property Organization ("WIPO") Copyright Treaty (CT) and  
Performances and Phonograms Treaty ("WPPT"). Section 1202 has national and  
world-wide significance based upon 97 contracting parties to those two treaties.

2. Section 1202(b) prohibits the removal or alteration of “copyright management information,” which is defined in §1202(c) to include a title of work, author of work, copyright owner of work, terms and conditions for use of the work “conveyed in connection with copies . . . of a work or . . . displays of a work, including in digital form.” 17 U.S.C. §1202(c). For digital images, such as photographs, “copyright management information” (“CMI”) *metadata* is the most practical and commonly used way to convey all of the categories of CMI protected by §1202(c).

3. The Ninth Circuit affirmed summary judgment for Respondent solely on §1202(b)’s mental state requirement that Respondent removed CMI metadata (or distributed copies thereafter) from digital photographs “*knowing*, or, with respect to civil remedies under section 1203 [17 USCS § 1203], *having reasonable grounds to know*, that it *will induce, enable, facilitate, or conceal an infringement* of any right under this title.” (emphasis added).

4. The Ninth Circuit and the Copyright Office are in conflict with respect to the appropriate interpretation of this mental state requirement. The Ninth Circuit’s Opinion omits the most important part of the Register of Copyright’s formal position (one paragraph later) regarding §1202(b) setting forth a “generally possible or easier to accomplish” standard:

Liability for the removal or alteration of information requires the actor to know or have reason to know that his acts “will induce, enable, facilitate or conceal” infringement.

*Some copyright owners have expressed concern that this standard will be too difficult to meet*, requiring proof of an

ultimate infringement in order to find a violation. *The Copyright Office believes that it is important to make clear*, possibly in legislative history, *that the reference to infringement does not mean that the actor must have intended to further any particular act of infringement—just to make infringement generally possible or easier to accomplish.*

[https://www.copyright.gov/docs/2180\\_stat.html](https://www.copyright.gov/docs/2180_stat.html) (WIPO Copyright Treaties Implementation Act (H.R. 2281), and Online Copyright Liability Limitation Act (H.R. 2180): Hearing Before the H. Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary, 105th Cong. 51 (1997) (statement of Marybeth Peters, Register of Copyrights, Copyright Office of the United States)).

In contrast, the Ninth Circuit’s Opinion acknowledges the “general possibility that exists whenever CMI is removed” that “someone *might* be able to use their photographs undetected,” but rejects a “generic approach.”

The Photographers have not offered any evidence to satisfy that mental state requirement. Their primary argument is that, because one method of identifying an infringing photograph has been impaired, to the text of the note someone *might* be able to use their photographs undetected. That assertion rests on no affirmative evidence at all; *it simply identifies a general possibility that exists whenever CMI is removed.*

*As we interpret Section 1202(b), this generic approach won't wash.*

*Stevens v. CoreLogic, Inc.*, 899 F.3d 666, 673 (9th Cir. 2018) (emphasis in original and added).

5. Additionally, the Ninth Circuit’s Opinion relied on a sex trafficking case to interpret this mental state element to require plaintiffs’ “policing” of

infringement using CMI; and a “pattern of conduct” or “modus operandi” of defendant involving policing infringement by metadata even though §1202(b) does not contain those terms.

The Photographers have not offered any specific evidence that removal of CMI metadata from their real estate photographs *will impair their policing of infringement*. There are no allegations, for example, of a “*pattern of conduct*” or “*modus operandi*” involving *policing infringement by tracking metadata*. *Todd*, 627 F.3d at 334.

*Stevens v. CoreLogic, Inc.*, 899 F.3d at 675 quoting *United States v. Todd*, 627 F.3d 329, 334 (9th Cir. 2010) (emphasis added). The *Todd* opinion interpreted 18 U.S.C. §1591(a) (“§1591(a)”) that contains the element “knowing that force, fraud, or coercion . . . will be used to cause the person to engage in a commercial sex act.” The differences between the mental state elements in §1202(b) and §1591(a) include:

(a) §1591(a) does not allow liability for “having reasonable grounds to know” provided for under §1202(b); and

(b) §1591(a) contains the restrictive language “will be used *to cause* the person to engage in a commercial sex act” whereas §1202(b) contains the very broad alternative language “will *induce, enable, facilitate, or conceal* an infringement.”

6. This case is an ideal vehicle for the Court to resolve the statutory issue. Summary judgment was affirmed on the sole ground of the “knowing, or, . . . having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement” mental state element of §1202(b).

Respondent continued to remove CMI metadata in IPTC fields even after notice of the lawsuit and even after filing its motion for summary judgment. Respondent generated nearly \$13 million in infringing revenues from photos with CMI metadata removed (and distributed thereafter) between 2011 through the first six months of 2015.

7. Good cause exists to extend the deadline to file a petition for a writ of certiorari by 60 days until **Friday, January 4, 2019**. The specific reasons why an extension is justified include:

- a. The undersigned counsel needs additional time to review the record and to prepare the petition and appendix.
- b. The undersigned counsel has been previously engaged in other matters after the August 6, 2018 Ninth Circuit opinion was issued that prevented full consideration of the record and preparation of a petition, including:

1. From August 6, 2018 to August 27, 2018, undersigned counsel was involved in the preparation and filing of the Brief for Petitioner in *Fourth Estate Public Benefit Corporation v. Wall-Street.com, LLC and Jerrold D. Buden*, Supreme Court of the United States, No. 17-571 regarding whether “registration of [a] copyright claim has been made” within the meaning of 17 U.S.C. §411(a) when the copyright holder delivers the required application, deposit, and fee to the Copyright Office.



2. From August 27, 2018 to October 5, 2018, undersigned counsel was involved in trial preparation and trial of *Live Face on Web, LLC v. Integrity Solutions Group, Inc.*, Case No.: 1:16-cv-01627-STV, before the United States District Court for the District of Colorado;

3. Though September 19, 2018, undersigned counsel was involved in the consolidated appeals of *Compulife Software, Inc. v. Moses Newman, et al.*, Case No.: 18-12004-B, and *Compulife Software, Inc. v. Binyomin Rutstein, et al.*, Case No.: 18-12007-C, pending before the Eleventh Circuit Court of Appeals;

c. The undersigned counsel observed Rosh Hashanah (September 9 – 11, 2018) and Yom Kippur (September 18-19, 2018);

d. The undersigned counsel has a pre-paid family vacation during Thanksgiving week upcoming.

e. The undersigned counsel needs additional time to coordinate with potential amici and the Copyright Office, especially given the upcoming Thanksgiving and Christmas holidays.

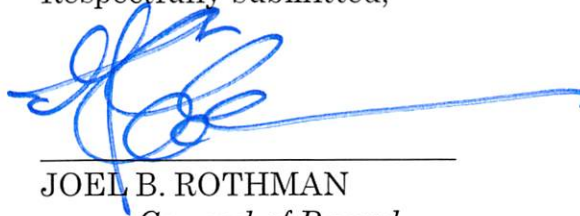
1. Under the present November 5, 2018 petition deadline, amicus briefs would be due Wednesday, December 5, 2018 which may effectively prevent the filing of an amicus brief due to the week of Thanksgiving November 19 – 23, 2018.

2. Under a lesser 30-day extension (*i.e.* December 5, 2018), amicus briefs would be due Friday, January 4, 2019 which may

effectively prevent the filing of an amicus brief due to unavailability of amici and their counsel between December 24, 2018 and Tuesday, January 1, 2019.

Accordingly, Applicants respectfully request a 60-day extension of time, up to and including **Friday, January 4, 2019**, within which to file a petition for a writ of certiorari in this case to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,



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