

NO. 22A357

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In The  
**Supreme Court of the United  
States**

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**VICTOR ELIAS PHOTOGRAPHY, LLC,**  
*Petitioner,*

v.

**ICE PORTAL, INC., A DIVISION OF  
SHIJI (US), INC.,**  
*Respondent.*

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**APPENDIX TO PETITION FOR A WRIT OF  
CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE ELEVENTH  
CIRCUIT**

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**Opinion of the United States Court of Appeals  
for the Eleventh Circuit, *Victor Elias Photography, LLC v. ICE Portal, Inc.*, No. 21-11892 (August 12, 2022)**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

No. 21-11892

VICTOR ELIAS PHOTOGRAPHY, LLC.,  
Plaintiff-Appellant,

v.

ICE PORTAL, INC.,  
Defendants-Appellee.

Appeal from the United States District Court  
for the Southern District of Florida  
D.C. Docket No. 0:19-cv-62173-RS

Before NEWSOM and MARCUS, Circuit Judges,  
and COVINGTON,\* District Judge.

COVINGTON, District Judge:

In 2016, commercial photographer Victor Elias discovered infringing uses of his copyrighted images on the internet. Instead of pursuing the infringing parties, Mr. Elias brought a lawsuit against Ice Portal, Inc. - now a division of Shiji (US), Inc. ("Shiji") - which acts as an intermediary between the hotels that licensed Mr. Elias's photographs and online

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\* Honorable Virginia M. Covington, United States District Judge for the Middle District of Florida, sitting by designation.

travel agents ("OTAs") like Expedia and Travelocity.<sup>1</sup> In optimizing the photographs for use by the OTAs, Shiji's software allegedly removed certain copyright-related information that Mr. Elias had embedded within the metadata of the photographs. Mr. Elias, through his company Victor Elias Photography, LLC ("Elias LLC"), claimed that Shiji therefore violated the Digital Millennium Copyright Act ("DMCA").

The district court correctly granted summary judgment to Shiji because Elias LLC did not show an essential element of its claim — namely, that Shiji knew, or had reasonable grounds to know, that its actions would induce, enable, facilitate, or conceal a copyright infringement. Accordingly, we affirm.

## I

### **A. Mr. Elias's photographs and their CMI**

Mr. Elias is a professional photographer who specializes in taking photographs of hotels and resorts throughout the United States, Mexico, and the Caribbean. He is the sole owner and operator of Elias LLC. Mr. Elias registers his photographs with the Copyright Office, and Elias LLC holds those copyrights by written assignment.

Between 2013 and 2017, Mr. Elias took photographs for hotels owned by Starwood Hotels &

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<sup>1</sup> During the relevant time periods, ICE Portal, Inc. was the company acting as the intermediary between the hotels and OTAs. Shiji (US), Inc. acquired Ice Portal in February 2019, at which time ICE Portal merged into Shiji and became a division of the larger company. This opinion will refer to the companies collectively as Shiji.

Resorts Worldwide, Inc. ("Starwood")<sup>2</sup> and Wyndham Hotels & Resorts ("Wyndham") (collectively, the "Hotels"). Mr. Elias claims that the following information was inserted into the metadata within the image files that he sent to the Hotel properties:

Creator	Victor Elias
Creator's Job Title	Owner/Photographer
Copyright Notice	@Victor Elias
Creator's Contact Info	USA, 5301 N. Commerce Ave. Suite 4, 805-265-5421
Rights Usage Terms	Rights Managed

This information was embedded in IPTC format<sup>3</sup> in all the images at issue.

This information is commonly referred to as copyright management information ("CMI").<sup>4</sup> Because CMI is embedded within the image file, an individual must make several "clicks" on the file to access this information. Specifically, the person viewing the file would have to right-click on the image file and then

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<sup>2</sup> Starwood merged with Marriott International, Inc. in September 2016. *See* Starwood Acquisition & Historical Information, available at <https://marriott.gcs-web.com/starwood>.

<sup>3</sup> IPTC format is named for the International Press Telecommunications Council, which developed metadata standards to facilitate the exchange of news, and typically includes the title of the image, a caption or description, keywords, information about the photographer, and copyright restrictions. *See Stevens v. Corelogic, Inc.*, 899 F.3d 666, 671 (9th Cir. 2018).

<sup>4</sup> CMI metadata is specifically copyright identifying information manually added to the image by the photographer or editor. Shiji also refers to this information as "extended attributes." At least in the context of this case, "extended attributes" and "CMI" are interchangeable terms.

open the "properties" or "more info" field to access the information.

After Mr. Elias took the photographs at issue, Elias LLC would extend broad licenses to the Hotels, allowing them to use the photographs to promote their properties in unlimited quantities, for an unlimited time, and in any format — without a restriction on how the photographs' CMI could be manipulated or removed.<sup>5</sup> The Hotels were licensed to use the photographs at issue to market their properties on their own websites and on third-party travel booking websites or OTAs. The parties do not dispute that, as they were displayed on the Hotels' own websites, the at-issue photographs included Elias LLC's CMI embedded within the metadata.

### **B. Shiji's role**

Shiji acts as an intermediary between hotel chains, like Starwood and Wyndham, and OTAs by receiving copies of photographs from the hotels and making them available to OTAs. From 2013 to 2018, Shiji

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<sup>5</sup> Elias LLC claims that it reserved this right by including a disclaimer in the agreements with the Hotels that it reserved "[a]ll rights not specifically granted in writing, including copyright" as the "exclusive property of [Elias LLC]." But Elias LLC does not explain how this language prevents the Hotels (or their agents) from removing CMI. Moreover, Elias LLC's argument that it reserved this right by requiring proper attribution of the photographs also does not establish that Elias LLC desired to preserve its CMI. Finally, while Elias LLC cites the license for the Marriott Casa Magna Resort, which provided that "[a]ll metadata information included within the images shall remain intact," Shiji argues that Elias LLC slyly inserted that term into a new version of the licenses sent to Marriott upon request, without revealing that the term did not appear in the original licensing agreement. Elias LLC does not respond to this argument in its reply brief. And, in any event, Shiji never received files from Marriott or made images of Marriott hotel properties available to OTAs.

housed approximately 1.5 million different hotel images in its system. During the relevant time periods, Starwood and Wyndham contracted with Shiji to make images for thousands of their properties available to OTAs. Of the more than 9,400 images that Shiji processed for the Hotels, 220 were taken by Elias.

Between 2013 and 2018, Shiji processed photos collected from the Hotels in the following manner. First, Shiji's software would download copies of image files from the Hotels' respective servers and store them on Shiji's server. Each image file provided to Shiji came with a separate spreadsheet file containing pertinent information about the image that would be displayed on the OTA websites, such as room type or a caption. After receiving the image files, Shiji's software would then convert the files into JPEG format, making copies of the photos in various industry-standard sizes. The conversion to JPEG format optimized the image files for faster display on OTA websites, but it came at a cost — sometimes the metadata on the image file, such as the CMI, would be erased. Finally, the JPEG copies of the photographs would be saved on Shiji's server, along with the accompanying spreadsheet file, and made available to OTAs.

### **C. Mr. Elias discovers photographs missing his CMI**

Protecting his copyrights is important to Mr. Elias. He claims that he embedded the CMI within his photographs because the CMI's text is fully searchable, allowing him to patrol the internet and find instances of copyright violations. As the district court succinctly summarized, Elias employs six methods by which he searches for his images and ensures that his copyright is not being violated:

- (1) Elias visits OTA websites, types in the

names of locations where he has shot photos of a hotel, then looks for the hotels he shot, and then looks for the images; (2) Elias Googles the hotel name plus "Victor Elias"; (3) Elias uses ImageRights software, which searches for visual image matches on the internet; (4) Elias uses TinEye which searches for copies of images he uploads; and (5) Elias uses Google images to search for copies of the photos. According to Elias, he also uses Google to search using keywords such as "Victor Elias" and "Victor Elias Photography," which can result in the return of pages containing keywords in the embedded metadata.

In September 2016, using the methods described above, Mr. Elias discovered unauthorized copies of his photographs posted on non-party, non-OTA websites without his CMI. Although some of these photographs included visible credits, the photographs credited someone other than Mr. Elias. He admits that he has no actual knowledge of where these non-party websites obtained the images. Mr. Elias then discovered that on OTA websites, his CMI was stripped out of the images at issue.

#### **D. Procedural History**

Based on the foregoing facts, Elias LLC filed suit against Shiji in August 2019. In its amended complaint, it alleged in a single count that Shiji violated two sections of the DMCA - 17 U.S.C. §§ 1202(a) and 1202(b) - through its stripping of the CMI in Elias LLC's copyrighted photos.<sup>6</sup>

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<sup>6</sup> On appeal, Elias LLC does not present any arguments pertaining to its Section 1202(a) claim. It has therefore waived any such argument, and we will focus on the Section 1202(b) claim. See *Lind v. United Parcel Serv., Inc.*, 254 F.3d 1281, 1283 n.2 (11th Cir. 2001).



Following discovery, Shiji moved for summary judgment, and Elias LLC sought partial summary judgment. The district court ruled in favor of Shiji, finding that Elias LLC could not satisfy the "second scienter requirement" of the statute, a concept we will explain further below. Relying on the Ninth Circuit Court of Appeals' decision in *Stevens v. Corelogic, Inc.*, 899 F.3d 666 (9th Cir. 2018), the district court held that Elias LLC could not satisfy the second scienter requirement because it had not established that Shiji "knew or had reason to know that its actions would induce, enable, facilitate, or conceal infringement" and had failed to present any evidence "demonstrating that [Shiji] was aware or had reasonable grounds to be aware of the probable future impact of its actions."

The district court reasoned that Elias LLC had failed to make its showing for two reasons. First, it had not shown that Shiji's removal of CMI "is the reason, or even the likely reason, for the infringing use of the images [Mr. Elias] has found on the internet." Second, Elias LLC had not shown that Shiji was even aware that searching for terms embedded in the extended attributes was a method used by copyright holders to find infringement on the internet. The district court also dismissed Elias LLC's argument that a prior arbitration gave Shiji the requisite awareness because (1) it had failed to show that "mere familiarity" with the DMCA gave Shiji reason to know that removal of CMI from the photos it copied would induce, enable, facilitate, or conceal infringement; and (2) the arbitration panel ruled in Shiji's favor, finding that the other party "had not shown that [Shiji's] removal of CMI would result in infringement."

Because the district court concluded that Elias LLC

could not, as a matter of law, show that Shiji knew, or had reasonable grounds to know, that its actions would "induce, enable, facilitate, or conceal infringement," the court entered summary judgment in favor of Shiji. This appeal followed.

## II

We review a district court's grant of summary judgment de novo, employing the "same legal standards that bound the district court." *Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1561 (11th Cir. 1992).

Summary judgment is proper where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" only if it has the potential to affect the outcome of the case, and a dispute is "genuine" only if a reasonable jury could return a verdict for the non-moving party. *Shaw v. City of Selma*, 884 F.3d 1093, 1098 (11th Cir. 2018). When the non-moving party has failed to prove an essential element of its case, summary judgment is appropriate. *Am. Fed'n of Labor & Congress of Indus. Orgs. v. City of Miami*, 637 F.3d 1178, 1186-87 (11th Cir. 2011) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)).

## III

### **A. The DMCA and Section 1202(b)'s second scienter requirement**

Congress enacted the DMCA in 1998 "to strengthen copyright protection in the digital age." *Mango v. BuzzFeed, Inc.*, 970 F.3d 167, 170-71 (2d Cir. 2020). The DMCA provision pertinent to this case provides as follows:

**(b) Removal or alteration of copyright management information.** - No person shall, without the authority of the copyright

owner or the law -

(1) intentionally remove or alter any copyright management information,  
[or]

. . .

(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 . . . having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

17 U.S.C. § 1202(b).<sup>7</sup>

Interpretation of Section 1202(b) is an issue of first impression in this Circuit. We start, as always, with the language of the statute. *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (en banc) ("We begin our construction of [a statutory provision] where courts should always begin the process of legislative interpretation, and where they should often end it as well, which is with the words of the statutory provision."). If the statute's language is plain, then the sole function of the court is to enforce the statute according to its terms. *Gonzalez v. McNary*, 980 F.2d 1418, 1420 (11th Cir. 1993). A statute should be construed to give effect to all its provisions, "so that no part of it will be inoperative or superfluous, void or insignificant." *Calzadilla v. Banco Latino*

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<sup>7</sup>The statute also defines "copyright management information," and Shiji does not contest that the CMI here falls within the statutory definition.

*Internacional*, 413 F.3d 1285, 1287 (11th Cir. 2005).

By its plain terms, the statute requires proof that the defendant knew, or had reasonable grounds to know, that its conduct "will" induce, enable, facilitate, or conceal an infringement. Use of the word "will" indicates a degree of likelihood or certainty. *See Spokane Cnty. v. Dep't of Fish & Wildlife*, 192 Wn.2d 453, 430 P.3d 655, 662 (Wash. 2018) (canvassing multiple dictionaries for definitions of the term "will," and explaining that it "can be a statement of future tense, of strong intention or assertion about the future, or a probability or expectation about something," although it can also mean "inevitability" or "probability" (citations and quotation marks omitted)). The statute does not state that a violation occurs if a defendant knows, or has reason to know, that its actions "may" or "might" enable infringement. As we explain further below, the statute requires more than that.

To assist in interpreting the statute, we may also look to the opinions of our sister Circuits. The Second Circuit has held that, to establish a violation of Section 1202(b)(3), a plaintiff must prove: (1) the existence of CMI in connection with a copyrighted work; and (2) that a defendant "distribute[d] . . . works [or] copies of works"; (3) while "knowing that copyright management information has been removed or altered without authority of the copyright owner or the law"<sup>8</sup>; and (4) while "knowing or . . . having reasonable grounds to know" that such distribution "will induce, enable, facilitate, or conceal an infringement." *Mango*, 970 F.3d at 171. The last two of these

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<sup>8</sup> Shiji maintains that it did not intentionally or knowingly remove the CMI from the photographs. We need not address this first scienter requirement because we can affirm the district court's grant of summary judgment for failure to demonstrate the second scienter requirement.

elements comprise a "so-called 'double-scienter requirement.'" *Id.* "[T]he defendant . . . must have actual knowledge that CMI 'has been removed or altered without authority of the copyright owner or the law,' as well as actual or constructive knowledge that such distribution 'will induce, enable, facilitate, or conceal an infringement.'" *Id.* (quoting 17 U.S.C. § 1202(b)(3)); *see also Stevens*, 899 F.3d at 673 (explaining that both Section 1202(b)(1) and (3) "require the defendant to possess the mental state of knowing, or having a reasonable basis to know, that his actions 'will induce, enable, facilitate, or conceal' infringement").

We agree with our sister Circuits' interpretation of the plain language<sup>9</sup> of Section 1202(b)(1) and (3) and with their formulation of the scienter requirement necessary to prove a violation thereof. As the Ninth Circuit explained in *Stevens*:

To avoid superfluity, the mental state requirement in Section 1202(b) must have a more specific application than the universal possibility of encouraging infringement; specific allegations as to how identifiable infringements "will" be affected are necessary.

. . .

[W]e hold that a plaintiff bringing a Section 1202(b) claim must make an affirmative showing, such as by demonstrating a past "pattern of conduct" or "modus operandi," that the defendant was aware [of] or had reasonable

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<sup>9</sup> The Ninth Circuit in *Stevens* cogently explained why its interpretation of the statute is also supported by the legislative history of Section 1202. *See Stevens*, 899 F.3d at 674-75. We need not repeat that legislative history here. *See Harris*, 216 F.3d at 976 (explaining that "[w]hen the import of words Congress has used is clear . . . we need not resort to legislative history").

grounds to be aware of the probable future impact of its actions.

*Stevens*, 899 F.3d at 674.

Elias LLC urges this Court to adopt a standard by which a defendant that knowingly removes CMI without consent can be held liable so long as the defendant knows, or has reasonable grounds to know, that its actions "make infringement generally possible or easier to accomplish." By contrast, Shiji argues, as the district court held, that the defendant must know, or have reasonable grounds to know, that removing CMI would likely lead to future infringement.

The Ninth Circuit in *Stevens*, facing a similar fact pattern to the one now before us, rejected the statutory interpretation favored by Elias LLC. The plaintiffs there, also photographers whose CMI had allegedly been removed by an intermediary software provider, argued that "because one method of identifying an infringing photograph has been impaired, someone *might* be able to use their photographs undetected." 899 F.3d at 673 (emphasis in original). The court explained that such a general approach to statutory interpretation "won't wash." *Id.* Citing the text of the statute and the legislative history of Section 1202, the Ninth Circuit concluded that plaintiffs must "provide evidence from which one can infer that future infringement is likely, albeit not certain, to occur as a result of the removal or alteration of CMI." *Id.* at 675.

**B. Whether Shiji knew, or had reasonable grounds to know, that its actions would induce, enable, facilitate, or conceal infringement**

Before the district court and on appeal, Elias LLC points to three pieces of evidence that, it claims, create a genuine dispute of material fact as to whether

Shiji knew or had reason to know that its actions "will induce, enable, facilitate, or conceal infringement" of copyrighted works. We examine each in turn.

### 1. The Leonardo arbitration

In urging us to reverse the district court's grant of summary judgment, Elias LLC's principal piece of evidence is a 2016 arbitration proceeding between Shiji and a competitor in the OTA photo distribution business, Leonardo Worldwide Corporation.<sup>10</sup> The dispute began when two of Leonardo's clients were looking to switch photo management services to Shiji (at the time, ICE Portal). In the arbitration, Leonardo accused Shiji of corporate infiltration and theft. It claimed that Shiji improperly accessed Leonardo's image database, downloaded multiple images from the database without Leonardo's consent, processed those images through Shiji's own software (thereby scrubbing the images of CMI inserted by Leonardo), and then re-published the images on Shiji's own website for financial gain. According to Leonardo, Shiji's actions of removing CMI from the images or distributing the images knowing they were cleansed of CMI violated Section 1202(b) of the DCMA because they "induced, enabled, facilitated, or concealed [Shiji's] infringement of the copyrighted images." Importantly, the DMCA claim rested on Leonardo's insertion of its own CMI into images that were owned by third-party hotels, not Leonardo.

The arbitration panel dismissed the DMCA claim on multiple grounds: (1) "Leonardo has not shown the essential ingredient of a DMCA claim that any allegedly improper actions regarding CMI would

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<sup>10</sup> The record on appeal included an interim dispositive order issued by the arbitration panel and certain deposition excerpts, but no other underlying evidence. Thus, we will present the facts and holdings as set forth in the arbitration order.

result in an infringement of a copyright"; (2) the panel construed Section 1202(b) as requiring that a DMCA claimant be both the owner of the copyright and the party who inserted the wrongly removed CMI, and Leonardo was not both because it was not the copyright owner; (3) Shiji's removal of Leonardo's CMI did not result in an infringement of any hotel copyrights; and (4) Leonardo lacked standing because the DMCA is intended to protect copyright holders that have employed CMI, and Leonardo had no copyright in the stolen images.

According to Elias LLC, Leonardo's claims in the arbitration "put [Shiji] on notice and imbued [Shiji] with the necessary mental state to violate § 1202 in the future where, as here, [Shiji's] metadata stripping system was challenged by [a] copyright owner." In other words, while Leonardo's lack of copyright ownership may have left its DMCA claim dead in the water, it was reasonably foreseeable to Shiji that another litigant (who *is* a copyright owner) could assert similar claims against Shiji in the future. This is a tempting inference to make, but it is insufficient to raise a genuine issue of material fact as to the second scienter requirement for several reasons.

First, the facts of the Leonardo arbitration are distinguishable. There, Shiji went farther than simply running images through its automated software and making those optimized images available on its server. Rather, it allegedly accessed, knowingly and without permission, a competitor's database of copyrighted images, put those images through the scrubber, and then re-published them for direct financial gain. Therefore, "Leonardo allege[d] that [Shiji's] actions induced, enabled, facilitated, or concealed [*Shiji's own*] *infringement* of the copyrighted images." (emphasis added). The Leonardo arbitration had



nothing to do with whether Shiji's role as an intermediary image optimizer might induce or enable infringement by a third party.

Second, and more importantly, the record before us does not indicate that the Leonardo arbitration adduced any facts that would give Shiji reason to know that its software's effects on CMI would make copyright infringement "likely, albeit not certain" to occur. At most, the 2016 Leonardo arbitration gave Shiji knowledge that its software was scrubbing CMI from some of the extended attributes of the images — and, in fact, different extended attributes than the ones at issue here. But there is no evidence that Shiji learned, for example, that copyright owners routinely rely on embedded CMI to police infringements of their works on the internet or that would-be infringers prefer to utilize images from OTAs because they have already been cleansed of CMI.

Third, it may have been reasonable for Shiji to presume, in the wake of the Leonardo arbitration, that the next DMCA lawsuit it faced would come from a copyright owner. But it does not follow that Shiji must have *also* known that it was engaging in conduct that violated the law. We do not hold here that prior litigation or arbitration of a DMCA claim can never give a defendant the requisite knowledge under Section 1202(b). We limit our holding to an affirmation of the district court's conclusion that Leonardo's particular accusations in this case did not give Shiji reasonable grounds to know that its software's removal of CMI, and the subsequent distribution of photographs stripped of CMI, would induce, enable, facilitate, or conceal the infringement of Elias LLC's copyrighted works.

For these reasons, the Leonardo arbitration fails to create a genuine issue of material fact as to

whether Shiji knew, or had reasonable grounds to know, that its actions of stripping CMI and distributing those stripped images would "induce, enable, facilitate, or conceal an infringement." *See Stevens*, 899 F.3d at 676 ("Because the [plaintiffs] have not put forward *any* evidence that [the defendant] knew its software carried even a substantial risk of inducing, enabling, facilitating, or concealing infringement, let alone a pattern or probability of such a connection to infringement, [the defendant] is not liable for violating [the DMCA].").

2. Mr. Elias's purposeful insertion of CMI into images

Elias LLC claims that, unlike the photographer-plaintiffs in *Stevens*, Mr. Elias did use the CMI contained within the images' extended attributes to police copyright infringement on the internet. This also fails to clear the summary judgment bar.

There is no indication in the record that Shiji knew at the relevant time that copyright owners use CMI in this manner. Elias LLC therefore cannot show that Shiji knew or had reason to know that removal of CMI could conceal an infringement. And Elias LLC cannot explain how it could police copyright infringement if an infringer can just as easily remove CMI metadata from an image as it could download an image from an OTA website. *See Stevens*, 899 F.3d at 676 (explaining that "a party intent on using a copyrighted photograph undetected can itself remove any CMI metadata, precluding detection through a search for the metadata. . . . [Thus,] one cannot plausibly say that removal by a third party 'will' make it easier to use a copyrighted photograph undetected").

Elias LLC argues that the district court read requirements into Section 1202(b) that do not exist —

namely, that it prove "keyword searches" are an effective method for finding infringement and/or that Shiji be aware that copyright owners will search for keywords embedded in the metadata to find infringement on the internet. Elias LLC misunderstands the district court's order. The district court did not impose additional, extra-statutory requirements; rather, it was explaining why Elias LLC's method of proving knowledge was ineffective. Similarly, neither the district court nor the Ninth Circuit imposed an additional requirement that the plaintiff show evidence of a pattern of conduct or *modus operandi*. Consistent with *Stevens*, the district court explained that demonstrating past patterns of conduct or *modus operandi* are *examples* of ways in which plaintiffs can meet their burden of proof. *See Stevens*, 899 F.3d at 675 ("There are no allegations, for example, of a 'pattern of conduct' or 'modus operandi' involving policing infringement by tracking metadata."). Elias LLC could have provided different evidence to show that Shiji possessed the requisite level of knowledge to satisfy the second scienter requirement, but it did not.

### 3. Instances of infringement on the internet

According to Elias LLC, Shiji allegedly has a *modus operandi* of removing a photographer's CMI "knowing that CMI [being removed] has likely directly resulted in infringement of the Elias Images." In support of this argument, Elias LLC pointed to the infringing images that Mr. Elias found on non-party websites that had been stripped of his CMI.

There is a fundamental problem with this argument — there is no evidence linking Shiji's actions of removing the photographers' CMI with the instances of infringement Mr. Elias uncovered on the internet. *See Stevens*, 899 F.3d at 675 (explaining that to

prevail, a plaintiff must "provide evidence from which one can infer that future infringement is likely, albeit not certain, to occur *as a result of* the removal or alteration of CMI" (emphasis added)). Elias LLC argues that the at-issue photographs on the OTA websites have been stripped of CMI, and the infringing images he found on non-party websites have also been stripped of CMI; therefore, the infringing parties must have pulled the images from OTA websites. But this argument rests on speculative and unsupported assumptions. For example, the argument presumes that infringing parties would go to an OTA website (instead of the Hotels' or Elias LLC's own website) to copy the image. It also presumes that an infringing party would download the image, as opposed to taking a screenshot or screengrab<sup>11</sup> of the image. Yet nothing in the record substantiates these inferences. For example, Mr. Elias admitted that he did not know from which website the third-party infringers copied the images. It is also unclear *how* the infringing parties copied the images — anyone with a smart phone could simply take a screenshot of the photograph from a website, which process inherently does not preserve the photograph's embedded CMI. Similarly, Mr. Elias acknowledged that unscrupulous infringers could easily remove CMI themselves.

Here, Elias LLC produced evidence, essentially, that his CMI-cleansed photographs appeared in at least two places on the internet: OTA websites and certain non-party websites that are unaffiliated with the OTAs. We do not believe that Congress meant to impose liability under the DMCA based on such a

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<sup>11</sup> A screengrab or screenshot is essentially a digital picture of the image on the screen. When an individual takes a screenshot of the picture, the metadata of the underlying picture is not carried through with the screenshot.

tenuous connection. *See Stevens*, 899 F.3d at 673 (rejecting liability when an infringer "might" be able to use copyrighted works undetected because such an assertion "simply identifies a general possibility that exists whenever CMI is removed"). The district court was correct to grant summary judgment in the face of such speculation. *See Josendis v. Wall to Wall Residence Repairs, Inc.*, 662 F.3d 1292, 1318 (11th Cir. 2011) ("At the summary judgment stage, such 'evidence,' consisting of one speculative inference heaped upon another, [is] entirely insufficient.").

Elias LLC argues that this reasoning requires a Section 1202(b) plaintiff to show a specific and identifiable infringement. Not so. What the statute requires is a showing that a defendant took certain actions, such as wrongly removing CMI or distributing images wrongly scrubbed of CMI, (1) knowing that the CMI has been wrongly removed or altered, and (2) knowing or having reason to know that such removal or distribution "will induce, enable, facilitate, or conceal an infringement." *See* 17 U.S.C. § 1202(b)(3); *see also Mango*, 970 F.3d at 171 (setting forth the elements of a Section 1202(b)(3) claim).

What's more, we agree with the Ninth Circuit that the statute's use of the future tense does not require a plaintiff to show that any specific infringement has already occurred and does not "require knowledge in the sense of *certainty* as to a future act." *Stevens*, 899 F.3d at 674 (citation omitted) (emphasis added). Elias LLC is thus incorrect that the district court required it to show that Shiji's CMI removal "be directly linked to a particular infringement." Elias LLC chose to frame its DMCA claim in terms of proving that actual infringement occurred (and therefore that infringement was allegedly induced or enabled). We, and the district court before us, therefore,

grapple with the evidence presented by Elias LLC to determine whether Shiji was the inducer or enabler. Elias LLC cannot make that showing because the evidence indicates that the infringing parties could have purloined these images from any number of sources, and Elias LLC has identified no evidence indicating that Shiji's distribution of these photographs ever "induce[d], enable[d], facilitate[d], or conceal[ed] an infringement."

In short, the statute's plain language requires some identifiable connection between the defendant's actions and the infringement or the likelihood of infringement. To hold otherwise would create a standard under which the defendant would always know that its actions would "induce, enable, facilitate, or conceal" infringement because distributing protected images wrongly cleansed of CMI would always make infringement easier in some general sense. *See Stevens*, 899 F.3d at 673, 674 (finding that a mere showing of CMI removal, leading to the possibility that an infringer could use the photos undetected, is insufficient to meet Section 1202(b)'s second scienter requirement because "it simply identifies a general possibility that exists whenever CMI is removed" and "Section 1202(b) must have a more specific application than the universal possibility of encouraging infringement"). This reading would effectively collapse the first and second scienter requirements. Congress enunciated the double scienter requirement for a reason, and we must interpret the statute to effectuate that intent. *See CBS Inc. v. PrimeTime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001) ("The rule is that we must presume that Congress said what it meant and meant what it said." (quotation marks omitted)).

**IV**

For the reasons stated, we conclude that the district court properly granted summary judgment to Shiji on Elias LLC's claim under the DMCA. Elias LLC did not meet its burden of coming forward with sufficient evidence demonstrating Section 1202(b)'s second scienter requirement, and judgment in Shiji's favor was therefore appropriate. Accordingly, we affirm.

**AFFIRMED.**

**Order of the United States District Court for  
the Southern District of Florida Granting Mo-  
tion for Summary Judgment, *Victor Elias Pho-  
tography, LLC v. Ice Portal, Inc.*, No. 19-62173-  
CIV-SMITH (May 3, 2021)**

SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION

No. 0:19-cv-62173

VICTOR ELIAS PHOTOGRAPHY, LLC.,  
An Oregon Limited Liability Company,  
Plaintiff,

v.

ICE PORTAL, INC.,  
A Florida Corporation, and  
SHIJI (US), INC.,  
a Delaware Corporation,  
Defendants.

**ORDER GRANTING DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT AND DENYING  
PLAINTIFF'S MOTION FOR PARTIAL SUM-  
MARY JUDGMENT**

This matter is before the Court on the Plaintiff's Motion for Partial Summary Judgment [DE 37], Defendant's Response [DE 51], and Plaintiff's Reply [DE 53]. Also, before the Court is Defendant Shiji (US), Inc.'s Motion for Summary Judgment [DE 39], Plaintiff's Response [DE 48], and Defendant Shiji (US), Inc.'s Reply [DE 57]. Plaintiff's First Amended Complaint [DE 11] contains a single count alleging Defendant<sup>1</sup> violated the Digital Millennium

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<sup>1</sup>In February 2019, Defendant ICE Portal, Inc. was acquired by Shiji (US), Inc. ("Shiji"), was merged into Shiji, and became a division of Shiji, rather than a separate company. Therefore, the Court will use the singular "Defendant," even though during the relevant time period the Defendants were separate entities.



Copyright Act ("DMCA"), 17 U.S.C. § 1202, by removing or altering copyright management information from Plaintiff's photographs. Plaintiff moves for summary judgment on two discrete issues: (1) Plaintiff's ownership of valid copyrights in the images at issue in this case and (2) four of Defendant's affirmative defenses. Defendant seeks summary judgment on Plaintiff's single count of violating the DMCA. Because Plaintiff cannot establish one of the elements of its claim, Defendant's Motion for Summary Judgment is granted and Plaintiff's Motion for Partial Summary Judgment is denied as moot.

### I. MATERIAL FACTS<sup>2</sup>

Victor Elias ("Elias") is a commercial photographer, who takes and licenses photographs of hotels and resorts. Elias is the manager and owner of Plaintiff, Victor Elias Photography, LLC ("Plaintiff"), which owns the copyrights to the photographs at issue. Between 2013 and 2017, in exchange for compensation, Elias took the photographs that are at issue in this matter for hotels owned and operated by Starwood Hotels & Resorts Worldwide, Inc. ("Starwood") and Wyndham Hotels & Resorts ("Wyndham"). Elias testified that he provided the photographs directly to the individual hotels, not to the corporate offices. (Elias Dep. [DE 40-1] 34:20-35:5.) Plaintiff claims that the following information was inserted into the metadata embedded within the image files sent to the hotel properties:

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<sup>2</sup> Record citations are not included for facts that are undisputed based on the parties' statements of facts and responses thereto.

Creator	Victor Elias
Creator's Job Title	Owner/Photographer
Copyright Notice	@Victor Elias
Creator's Contact Info	USA, 5301 N. Commerce Ave. Suite 4, 805-265-5421
Rights Usage Terms	Rights Managed

This information is known as copyright management information, or CMI. The information is not visible when a photo is viewed online, unless a viewer undertakes several steps, or clicks. The hotels were licensed to use the at-issue photos to market their hotels on their websites and on third-party travel websites ("online travel agents" or "OTAs"), such as Expedia and Travelocity.

Defendant acts as an intermediary between hotel chains, like Starwood and Wyndham, and OTAs by receiving copies of photos from the hotel suppliers, optimizing the photos for use by OTAs, and making the photos available to OTAs. During the relevant time period, 2013-2018, Defendant's automated software downloaded copies of image files from Starwood's and Wyndham's corporate offices and stored them on Defendant's server. Each image file provided to Defendant came with a separate spreadsheet file referred to by Defendant, the hotel suppliers, and the OTAs as the "metadata" file, which contained information that OTAs would need to describe the photos on their websites, such as the room type and a caption for the photo. Prior to and during the relevant time period, no hotel supplier or OTA had ever asked Defendant to preserve extended attributes in the copies of the images that were made available by Defendant to OTAs.

After obtaining copies of the original image files and the associated metadata files, Defendant's automated software would make multiple JPEG copies of the photos in various industry standard sizes that were optimized for faster display on the internet by OTAs. In the process of making the JPEG copies of the images, Defendant's software may remove the extended attributes of the original file. (McMahon Dep. [DE 40-3] 179:6-180:19.) "Extended attributes" refers to information that is embedded in an image file, such as Plaintiff's CMI. The JPEG files in industry standard sizes, along with the associated metadata files, were saved to Defendant's server and made available for OTAs to access. Defendant's software does not allow it to know whether a photo is being displayed on an OTA's website. Prior to this litigation, no photographer or copyright owner ever asked Defendant to preserve extended attributes in the copies of the images that Defendant makes available to OTAs.

Plaintiff found copies of his photos, without CMI, posted on non-party, non-OTA websites. Additionally, a few of the photos actually included a visible credit, which credited the photo to someone other than Plaintiff. Plaintiff claims that these websites infringed on his copyrights by displaying the photos without license or authorization. Plaintiff does not have actual knowledge of how these websites obtained the infringing photos. The at-issue photos were publicly available, with the embedded CMI, on Starwood's and Wyndham's websites, as well as on Plaintiff's website. On Plaintiff's website, the images also include a visible watermark. According to Elias, anyone "with a little bit of knowledge" in Photoshop, or other such software, can alter the image and remove the watermark. (Elias Dep. 10:19-12:18.) In fact, he has found that watermarks are "not that

effective" at stopping people from taking the images. (*Id.*) It is possible for someone to go to the hotels' websites and create a screenshot of the images, which would not capture any of the extended attributes, including Plaintiff's CMI. Plaintiff has never contacted the OTAs about displaying his images without the CMI in the extended attributes.

Plaintiff uses various methods to search for copies of its photos online: (1) Elias visits OTA websites, types in the names of locations where he has shot photos of a hotel, then looks for the hotels he shot, and then looks for the images (Elias Dep. 133:7-11); (2) Elias Googles the hotel name plus "Victor Elias" (*id.* at 133:14-19); (3) Elias uses ImageRights software, which searches for visual image matches on the internet (*id.* at 178:1-7); (4) Elias uses TinEye which searches for copies of images he uploads (*id.* at 214:12-215:8); and (5) Elias uses Google images to search for copies of the photos (*id.*). According to Elias, he also uses Google to search using keywords such as "Victor Elias" and "Victor Elias Photography," which can result in the return of pages containing keywords in the embedded metadata. (Elias Decl. [DE 50-1] ¶ 13.)

## II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when "the pleadings . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *HCA Health Servs. of Ga., Inc. v. Employers Health Ins. Co.*, 240 F.3d 982, 991 (11th Cir. 2001). Once the moving party demonstrates the absence of a genuine issue of material fact, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue

for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (quoting Fed. R. Civ. P. 56(e)). The Court must view the record and all factual inferences therefrom in the light most favorable to the non-moving party and decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (quoting *Anderson*, 477 U.S. at 251-52)).

In opposing a motion for summary judgment, the non-moving party may not rely solely on the pleadings, but must show by affidavits, depositions, answers to interrogatories, and admissions that specific facts exist demonstrating a genuine issue for trial. *See* Fed. R. Civ. P. 56(c), (e); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A mere "scintilla" of evidence supporting the opposing party's position will not suffice; instead, there must be a sufficient showing that the jury could reasonably find for that party. *Anderson*, 477 U.S. at 252; *see also Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990).

### III. DISCUSSION

The Amended Complaint alleges a single count for violation of the DMCA. Plaintiff alleges Defendant violated two subsections of the DMCA. The first subsection states:

- (a) False copyright management information.--No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement--
  - (1) provide copyright management information that is false, or
  - (2) distribute or import for distribution

copyright management information that is false.

17 U.S.C. § 1202(a). The second subsection states, in relevant part:

No person shall, without the authority of the copyright owner or the law--

(1) intentionally remove or alter any copyright management information,

\* \* \*

or

(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.

17 U.S.C. § 1202(b). Section 1203(b) contains a so-called "double-scienter" requirement because a defendant must (1) intentionally remove CMI, under subpart (a), or distribute works knowing that the CMI has been removed, under subpart (b), and (2) have actual or constructive knowledge that such distribution will induce, enable, facilitate, or conceal an infringement. *Mango v. BuzzFeed, Inc.*, 970 F.3d 167, 171 (2d Cir. 2020) (citing 17 U.S.C. § 1202(b)(3)).

Defendant argues that it is entitled to summary judgment because (1) there is no evidence that it had intent to, knew, or had reason to know that its actions would "induce, enable, facilitate, or conceal infringement," a requirement under both subsection (a) and (b) of the DMCA; (2) there is no evidence that it intended to remove any CMI; and (3) Plaintiff cannot

show that Defendant removed CMI knowing it did not have the authority of the copyright owner.

Defendant maintains that because Defendant had permission to provide the images to the OTAs and the OTAs were allowed to display the images, Plaintiff must provide "specific evidence" that future infringement by a third party is likely to result from Defendant's removal or alteration of the CMI. In response, Plaintiff argues that whether Defendant acted with knowledge is a question for a jury and that there is evidence that, at a minimum, Defendant had reasonable grounds to know that its acts would induce, enable, facilitate, or conceal infringement.

Defendant relies primarily on *Stevens v. Corelogic, Inc.*, 899 F.3d 666 (9th Cir. 2018), to support its contention that Plaintiff has not, and cannot, meet its burden of establishing that Defendant knew or had reason to know that its actions would induce, enable, facilitate, or conceal infringement. In *Stevens*, real estate photographers sued a software developer that provided software to multiple listing services. *Id.* The photographers licensed their photos to real estate agents, who then uploaded the images to multiple listing services. *Id.* at 670. The defendant's software resizes the uploaded images to aid in storage, computer display, and speed of display. *Id.* at 671. When images are resized using the software, metadata attached to the images is not retained. *Id.* The photographers alleged a violation of § 1202(b), arguing that "because one method of identifying an infringing photograph has been impaired, someone *might* be able to use their photographs undetected." *Id.* at 673 (footnote omitted, emphasis in original). The *Stevens* Court found that this was insufficient to meet the knowledge requirement of § 1202(b), explaining:

To avoid superfluity, the mental state requirement in Section 1202(b) must have a more specific application than the universal possibility of encouraging infringement; specific allegations as to how identifiable infringements "will" be affected are necessary.

\* \* \*

[K]nowledge in the context of such statutes signifies "a state of mind in which the knower is familiar with a pattern of conduct" or "aware of an established modus operandi that will in the future cause a person to engage in" a certain act. [*United States v. Todd*, 627 F.3d 329, 334 (9th Cir. 2010) .] Applying that concept here, we hold that a plaintiff bringing a Section 1202(b) claim must make an affirmative showing, such as by demonstrating a past "pattern of conduct" or "modus operandi", that the defendant was aware or had reasonable grounds to be aware of the probable future impact of its actions.

\* \* \*

In short, to satisfy the knowledge requirement, a plaintiff bringing a Section 1202(b)(1) claim must offer more than a bare assertion that "when CMI metadata is removed, copyright infringement plaintiffs . . . lose an important method of identifying a photo as infringing." Instead, the plaintiff must provide evidence from which one can infer that future infringement is likely, albeit not certain, to occur as a result of the removal or alteration of CMI.

*Stevens*, 899 F.3d at 674-75.

Under *Stevens*, Plaintiff has not established one of the elements of a claim under § 1202 - that



Defendant knew or had reason to know that its actions would induce, enable, facilitate, or conceal infringement. Plaintiff has presented no evidence demonstrating that Defendant was aware or had reasonable grounds to be aware of the probable future impact of its actions. While Plaintiff maintains that Defendant had a modus operandi of removing Plaintiff's CMI, such evidence alone does not establish that Defendant knew or had reasonable grounds to know that such actions would induce, enable, facilitate, or conceal infringement. Plaintiff has not shown that Defendant's removal of CMI is the reason, or even the likely reason, for the infringing use of the images Plaintiff has found on the internet. Because the images are available elsewhere on the internet, including the hotel websites and Plaintiff's website, and given Plaintiff's concession that the infringing images could be copied from any of those websites without copying the CMI, or the CMI could be removed after copying, Plaintiff has not shown that Defendant knew or should have known that its removal of CMI would induce, enable, facilitate, or conceal infringement.

Plaintiff also maintains that it has met its burden by showing that removal of the CMI had practical significance to it in policing copyright infringement of its images. While Plaintiff declared that using keyword searches that would search the CMI was one of the methods he used to search for infringement, Plaintiff has offered no evidence that this is actually an effective method for finding infringement. Moreover, Plaintiff has not shown how this establishes that Defendant either intended to or knew that its actions were likely to induce, enable facilitate, or conceal infringement. There is no evidence that Defendant was aware that searching for terms embedded in

extended attributes of images was a method used by copyright holders to find infringement on the internet. Thus, Plaintiff cannot meet its burden of establishing intent or knowledge.

Plaintiff's reliance on *Mango v. BuzzFeed Inc.*, 970 F3d 167 (2nd Cir. 2020), is misplaced. In *Mango*, the defendant published a picture without permission and without attribution or CMI. *Id.* at 169. The photographer sued for copyright infringement and under § 1202(b). *Id.* at 170. The circuit court upheld the district court's finding that the defendant had violated the DMCA because the defendant distributed the photo knowing that the photographer's CMI had been removed and knowing that distributing it with a false credit would conceal the fact that the defendant did not have authority to use the photo. *Id.* at 172. Thus, in *Mango*, the defendant knew its actions were likely to induce, enable, facilitate, or conceal infringement because its actions were an attempt to conceal its own infringement. *See id.* at 173. The *Mango* court distinguished *Stevens*, noting that the *Stevens* plaintiffs "did not allege—let alone prove—an underlying claim of copyright infringement that would support the knowing concealment of either that infringement or another." The *Mango* court concluded that their decision was not in tension with *Stevens* because that case did not address whether a defendant's own infringement satisfies § 1202(b)'s second scienter requirement. *Id.* at 174. For the same reason, *Mango* is not applicable here - Defendant did not infringe.

For similar reasons, Plaintiff's reliance on *Jedson Engineering, Inc. v. Spirit Construction Services, Inc.*, 720 F. Supp. 2d 904 (S.D. Ohio 2010), is unavailing. In *Jedson*, the defendants themselves infringed. Plaintiff relies on *Jedson* for the proposition

that an indemnity clause is evidence that creates a genuine issue of material fact as to whether the defendant had reasonable grounds to know that the removal of CMI would induce, enable, facilitate, or conceal an infringement. In *Jedson*, one defendant hired another defendant to submit plans for a construction project based on the plaintiff's plans and the defendants conceded that copying of the plaintiff's plans occurred. *Id.* at 911, 919. The defendant that copied from the plaintiff's plans insisted on the inclusion of an indemnity clause in the contract between itself and the defendant that obtained access to the plaintiff's drawings. *Id.* at 931. The indemnity clause was to protect the copying defendant if there was an issue regarding rights to the plaintiff's drawings. *Id.* Thus, the defendant insisting on the indemnity clause knew it was copying someone else's work and insisted on the clause to protect itself in case it did not have the right to do so. The *Jedson* defendants were sued for copyright infringement, in addition to the DMCA. *Id.* at 911-12. The situation in the instant case is different. While Defendant also had indemnity clauses in its contracts with the hotel suppliers, Defendant's use of the photos was not infringement. Accordingly, *Jedson* does not prevent summary judgment here.

Finally, Plaintiff argues that Defendant has knowledge of the DMCA, was previously sued under the DMCA for removing CMI, and, therefore, knew or should have known that removing the CMI from Plaintiff's photos would induce, enable, facilitate, or conceal infringement. First, Plaintiff has not shown how mere familiarity with the DMCA makes Defendant know or, have reasonable grounds to know, that its removal of CMI from Plaintiff's photos would induce, enable, facilitate, or conceal an infringement of

those photos. Second, Plaintiff's reliance on the earlier dispute does not help it. In the earlier dispute, the arbitration panel found that the plaintiff in that dispute had not shown that Defendant's removal of CMI would result in infringement. (Arbitration Order [DE 40-53] at 12.) Thus, Plaintiff has not provided any authority or evidence to establish that, under the circumstances in this case, Defendant knew or should have known that its actions would induce, enable, facilitate, or conceal an infringement. Consequently, Plaintiff cannot establish one of the elements of its claim and Defendant is entitled to summary judgment.

Accordingly, it is

**ORDERED** that:

1. Defendant Shiji (US), Inc.'s Motion for Summary Judgment [DE 39] is **GRANTED**.
2. Plaintiff's Motion for Partial Summary Judgment [DE 37] is **DENIED as moot**.
3. All pending motions not otherwise ruled upon are **DENIED as moot**.
4. The Court will enter a separate judgment.
5. This case is **CLOSED**.

**DONE AND ORDERED** in Fort Lauderdale, Florida this 3rd day of May, 2021.

*/s/ Rodney Smith*

**RODNEY SMITH  
UNITED STATES  
DISTRICT JUDGE**

#### **FINAL JUDGMENT**

Pursuant to the Court's Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment,

**ORDERED** that judgment is entered in favor of Defendants, Ice Portal, Inc. and Shiji (US), Inc., and against Plaintiff, Victor Elias Photography, LLC. Plaintiff's claims are dismissed with prejudice.

**DONE AND ORDERED** in Fort Lauderdale, Florida, this 3rd day of May, 2021.

*/s/ Rodney Smith*

**RODNEY SMITH  
UNITED STATES  
DISTRICT JUDGE**

**Plaintiff's First Amended Complaint for Violations of the Digital Millennium Copyright Act  
(Exhibits Omitted)**

UNITED STATES FEDERAL COURT  
FOR THE  
SOUTHERN DISTRICT OF FLORIDA  
FORT LAUDERDALE DIVISION

CA. No. 0:19-cv-62173

VICTOR ELIAS PHOTOGRAPHY, LLC.,  
An Oregon Limited Liability Company,  
Plaintiff,

v.

ICE PORTAL, INC.,  
A Florida Corporation, and  
SHIJI (US), INC.,  
a Delaware Corporation,  
Defendants.

Victor Elias Photography LLC (“ELIAS”) files this complaint against ICE Portal, Inc., a Florida Corporation (“ICE”) and Shiji (US), Inc. (“Shiji”) (collectively, “Defendants”):

**JURISDICTION AND VENUE**

1. This is a civil action seeking damages and injunctive relief against ICE and/or Shiji – as successor by merger to ICE – for intentionally removing and/or altering copyright management information (“CMI”) and/or providing and/or distributing CMI that is false in violation of the United States Copyright Act,

17 U.S.C. §§ 1202 et seq.

2. This Court has subject matter jurisdiction under the United States Copyright Act, 17 U.S.C. §§ 101 et seq., 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1338(a) (copyright) and pendent jurisdiction over the remaining claims pursuant to 28 U.S.C. §1367. In addition, this Court has subject matter jurisdiction under 28 U.S.C. § 1332 (diversity) because there is complete diversity of citizenship between all parties and the amount in controversy exceeds \$75,000 as alleged herein.

3. Venue is proper in this District pursuant to 28 U.S.C. 1400(a) and 28 U.S.C. 1391(b) and (c), as Defendants and/or their agents reside in this District and a substantial part of the events giving rise to the claims occurred in this District.

#### **PARTIES**

4. Plaintiff ELIAS is an Oregon limited liability company with a principal place of business in Lake Oswego, Oregon. All of the members of ELIAS are residents of Oregon as well.

5. ICE was a corporation existing under the laws of the State of Florida, with its headquarters located at 3595 Sheridan St. #200, Hollywood, FL 33021. ICE was a media syndication company that promotes hotels through the use of photographs, videos, and other media for some of the largest online travel agencies throughout the world, including the United States, Canada, and the United Kingdom. Through its software platform and database of digital media, ICE provided Third Party Travel Websites with technology, sales conversion tools, and a global travel media network that enables traveling consumers to better visualize the grounds, the location, room interiors, and common areas of hotels. On or about July 31, 2019, and unbeknownst to Plaintiff, Shiji (US),

Inc. (“Shiji”) acquired ICE, but continued operating the business as “ICE Portal, A Shiji Group Brand.” Upon information and belief, Shiji assumed all past, present, and future business operations of ICE.<sup>1</sup>

6. Shiji is a corporation existing under the laws of the State of Delaware, with its headquarters located at 730 Peachtree Street NE, Suite 375, Atlanta, GA 30308, and having an active and continual place of business located at 3595 Sheridan St. #200, Hollywood, FL 33021. On or about July 31, 2019 Shiji acquired the Defendant ICE, assuming all business operations of ICE under the moniker, “ICE Portal, A Shiji Group Brand.” Shiji has been on notice of this lawsuit since service was had upon ICE. The Court has jurisdiction over Shiji pursuant to Fla. Stat. § 48.193(1)(a)(1) and § 48.193(2) for operating, conducting, engaging in, or carrying on a business or business venture in the State of Florida or having an office or agency in the State of Florida, and for engaging in substantial and not isolated activity with the State of Florida. Additionally, the Court has jurisdiction over Shiji pursuant to Fla. Stat. § 48.193(1)(a)(2) for committing tortious acts within the State of Florida, both for past violations – as the successor by merger to ICE – and continuing violations of the DMCA.

## FACTS

### The Photos at Issue

7. Plaintiff ELIAS is a photographic syndication company that specializes in creating beautiful images of hotels and resorts. ELIAS holds the

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<sup>1</sup> As such, ICE and Shiji are referred to collectively as “Defendants.”



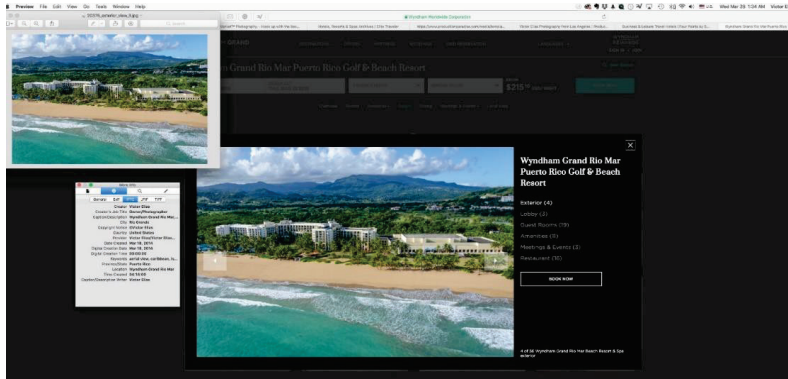
copyrights to the hotel and resort photographs created by its sole owner and operator, Victor Elias. Its library features some of the most recognizable and high-end images of resort properties in the entire world.

8. Victor Elias is a renowned international photographer whose career has spanned over twenty five years. He is recognized as one of the world's leading resort photographers, and his services are in high demand. He has photographed hotels all over the world, including premier properties in Mexico, the Caribbean and the United States. Over the years, Mr. Elias has developed his own unique and unmistakable style, and his work has been featured in numerous travel magazines. Mr. Elias and his LLC are sought out by hoteliers so that they may create the most iconic, serene, and tantalizing elements of each property he shoots. Entrusted with the task of curating professional images, Mr. Elias continuously and emphatically delivers. Among other things, Mr. Elias has composed, authored, and captured more than 220 beautiful images of hotels and resorts (hereinafter, collectively the "Copyrighted Works"), which form the subject matter of this suit. The Copyrighted Works and the applicable certificates of registration are attached hereto as Exhibits A and B, respectively. The copyrights in and to the 220 works at issue in this case were subsequently assigned to ELIAS, who brings the instant civil action. See Exhibit C.

9. For valuable consideration per licensee, ELIAS routinely grants limited licenses to hotels and other travel-related businesses throughout the world to make specific use of his works.

10. For many years, it has been ELIAS' custom and business practice to display its copyright

management information (“CMI”) on its copyrighted



photographs when they are published. All of the Copyright Works at issue in this case prominently displayed ELIAS’ CMI in the metadata of the Work, showing “Victor Elias” as the creator, “Owner/Photographer,” as well as providing notice that the Works are copyright protected (i.e. “@Victor Elias”). See Exhibit D. ELIAS includes such CMI in the metadata of the Copyrighted Works to ensure that anyone who views the Works understands that ELIAS owns all rights and title. ELIAS also includes its CMI in the metadata of the Copyrighted Works to enable ELIAS to search for and identify all uses of the Copyrighted Works on the web to determine where its photographs are being displayed and/or where copyright violations might exist.

**(Fig. 1. Immediately above is an example of just 1 (out of 220) of the Copyrighted Works submitted by ELIAS to the Contracted Hoteliers (in this case Wyndham Hotel’s Grand Rio Mar Puerto Rico Golf & Beach Resort) with ELIAS’ CMI displayed in the metadata of the Work. See Exhibit D – Part 5, p. 3).**

11. Including such CMI in the metadata of image files is a standard technical measure used by

professional photographers such as ELIAS to identify intellectual property as theirs, and thereby protect it. This custom and practice is standard operating procedure, and is well-known and understood by companies that deal with the intellectual property of others such as ICE. Image metadata was developed pursuant to a broad consensus of copyright owners and service providers in an open, fair, voluntary, multi-industry standards process. Such metadata does not impose substantial costs on Internet service providers, nor substantial burdens on their systems or networks.

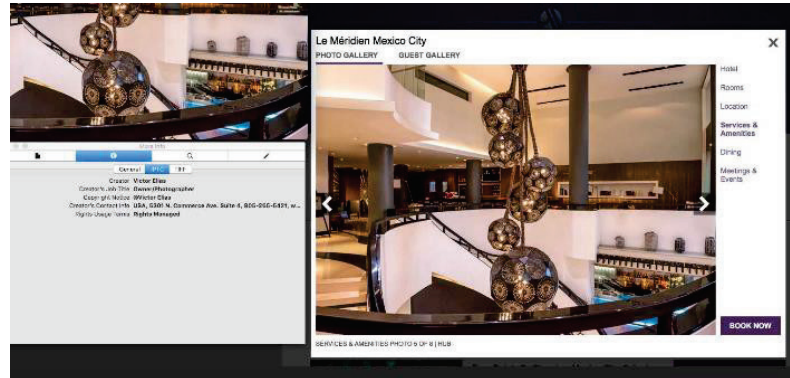
12. The size for each digital image metadata (typically 64kB or less) is extremely small as compared with the size of the digital photographs, which often are a hundred times (i.e. 6.4MB) larger.

#### **Contextual Facts**

13. Over a period of years, ELIAS was contracted by several hoteliers (“Contracted Hoteliers”) – operated by three (3) different major hotel brand and trade names, Starwood Hotels and Resorts Worldwide, LLC brand and tradename (“Starwood Hotels”), Marriottt International, Inc. (“Marriottt Hotels”), and Wyndham Hotels & Resorts, Inc. (“Wyndham Hotels”) – to create the 220 Copyrighted Works described above depicting the various resort properties for use in advertising and marketing such properties. ELIAS granted the Contracted Hoteliers licenses to use the Copyrighted Works in their advertising and/or marketing efforts on the various hotel websites (“Hotel Websites”), as well as on online travel agencies, such as expedia.com, tripadvisor.com, bookit.com, and skyscanner.net (“Third Party Travel Websites”).

14. Upon completion of the Copyrighted Works, and as is its custom and practice, ELIAS tendered

them to the Contracted Hoteliers per the contractual arrangement between ELIAS and Contracted Hotel-



iers. When ELIAS provided such Copyrighted Works, all 220 images contained ELIAS’ CMI within their metadata – showing “Victor Elias” as the creator, “Owner/Photographer,” as well as providing notice that the Works are copyright protected (i.e. “@Victor Elias”). See Exhibit D. Additionally, upon information and belief, all 220 of the Copyrighted Works as displayed on the individual Hotel Websites contained metadata embedded in their digital files, listing ELIAS’ CMI. See Exhibit D.

**(Fig. 2.** *Above is an example of another 1 (out of 220) of the Copyrighted Works submitted by ELIAS to the Contracted Hoteliers (this time to Starwood Hotel’s Le Meridien Mexico City) which retains ELIAS’ CMI displayed in the metadata of the Work as it was posted by the Contracted Hotelier on the Hotel Website. See Exhibit D – Part 3, p. 16)*

15. In or around September of 2016, ELIAS discovered that several of the Copyrighted Works being displayed on Third Party Travel Websites falsely credited “Tingo” as the author/owner of such Works. See Exhibit E.

**(Fig. 3. Above is an example of Elias’ original Copyrighted Work (from Fig. 2 above) being displayed on a Third Party Travel Website falsely crediting “Tingo” as the author/owner of the Work – instead of the rightful owner, ELIAS. See Exhibit E, p. 3)**

16. Upon further investigation, ELIAS discovered that both Starwood Hotels and Wyndham Hotels had contracted with ICE for it to distribute and upload the Copyrighted Works to various Third Party Travel Websites globally, as well as to manage and maintain photographs from Contracted Hoteliers’ websites already distributed and uploaded to Third Party Travel Websites. (See Exhibit F. Through their software platform and database of digital media, ICE and – by succession by merger - Shiji provide Third Party Travel Websites with technology, sales conversion tools, and a global travel media network that enables traveling consumers to better visualize the grounds, the location, room interiors, and common areas of hotels.

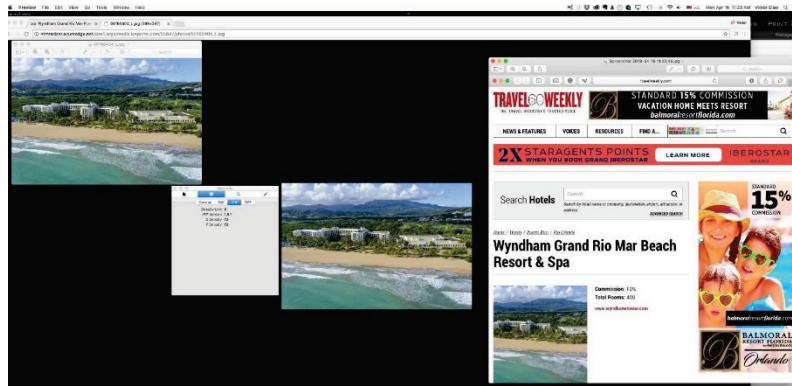
The screenshot shows a travel website interface for "Le Meridien Mexico City". On the left, there is a "Refine Results" sidebar with a search bar, a "Reset" button, and a "Hotel Price" slider set to "\$0" to "\$1000+". Below that, "Property Type" options are listed: "All (406)", "Hotel (353)", "Motel (2)", "Resort (All-Inclusive) (2)", "Resort (8)", "Boutique Hotel (2)", and "Small Hotel (39)".

The main content area displays "Le Meridien Mexico City" with the address "Paseo de la Reforma 69, Col. Tabacalera, Mexico City, Mexico, 06090". It shows a "TripAdvisor Rating" of 4.5 stars and a "Class" of 5 stars. A photo of the hotel lobby is shown with a "Photo credit: Tingo" caption. To the right of the photo, there are date pickers for "10/18/2016" and "10/21/2016", and a "1 Guest" dropdown. Below this, a large orange button displays "\$180" and "SEE DEAL".

At the bottom, a price comparison table lists the following:

Hotels.com	\$180	LeMeridien.com	\$180
Expedia.com	\$180	Orbitz.com	\$180

17. ELIAS further discovered that – even though all of the Copyrighted Works displayed on the Contracted Hoteliers’ Websites maintained ELIAS’ CMI within the metadata of the images (as shown in Fig. 1 and 2 above) – upon information and belief, ELIAS’ CMI was removed from all of his Works displayed on the various Third Party Travel Websites. For instance, ELIAS discovered 220 instances of ELIAS’ Copyrighted Works being displayed without his CMI on a variety of Third Party Travel Websites. See Exhibit G.



(**Fig. 4.** Above is an example of Elias’ Copyrighted Work (from Fig. 1 above) being displayed on a Third Party Travel Website after the removal of ELIAS’ CMI. The URL in the image reads “iceportal.com” – indicating that Defendants are hosting the photos with CMI removed. See **Exhibit G, pp. 2-3**)

18. Upon information and belief, Marriott Hotels

utilized a different third-party media syndication company named Leonardo Worldwide Corporation (“LWC”) to perform the same or similar services that Defendants perform for Starwood Hotels and Wyndham Hotels. In or around September of 2016, Marriott acquired Starwood Hotels. Therefore, upon information and belief, prior to Marriott’s acquisition of Starwood Hotels, one or more of the Copyrighted Works at issue in this case were first distributed and uploaded to Third Party Travel Websites by the Defendants. Upon further information and belief, Defendants and LWC have a cooperation agreement allowing each other to re-distribute images originally managed and controlled by the other media syndication company.<sup>2</sup> As such, upon information and belief, Defendants re-distributed 26 of ELIAS’ Copyrighted Works which depict Marriott Hotel’s Casa Magna Puerto Vallarta Resort & Spa knowing that Elias’ CMI had already been removed. See Exhibit G, pp. 4 – 26.

19. Therefore, upon information and belief, Defendants, or one or more third parties at Defendants’ direction, knowingly, intentionally, and willfully removed ELIAS’ CMI, including but not limited to authorship and ownership information contained within the metadata of the Copyrighted Works, and thereafter distributed the same, without authorization.

20. Further, upon information and belief, Defendants removed and/or altered ELIAS’s CMI from/in other original photographs contained within the

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<sup>2</sup> Such cooperation agreement explains why many of the resulting photographs – originating from Starwood and Wyndham Hotels – displayed on Third Party Travel Websites with Elias CMI removed state “Source: Leonardo” on the face of the image. See Exhibit G, pp. 27 – 59.



Copyrighted Works – and thereafter distributed the same – without authorization from ELIAS and in violation of the law. The scope and breadth and nature and extent of these additional violations will be ascertained through and during the course of the discovery process.

**Violations of the Digital Millennium Copyright Act ( “DMCA” )**

21. Professional photographers across the nation – including ELIAS and Mr. Victor Elias – routinely embed CMI in the metadata of their images. Such is done to enable professional photographers such as ELIAS to search for and identify the Copyrighted Works on the web to determine where the works are being displayed, where apparent copyright violations might exist, and to maintain control of their valued intellectual property.

22. All of the Copyrighted Works at issue in this suit were submitted by ELIAS to Defendants and/or Contracted Hoteliers displaying ELIAS’ CMI within the metadata of each and every one of the Works.

23. Importantly, Defendants know that they do not own the copyrights for the Copyrighted Works. Moreover, Defendants know that they do not possess any written authorization from ELIAS or Mr. Victor Elias to remove or alter CMI for the Copyrighted Works uploaded to the Hotel Websites and/or Third Party Travel Websites. Yet, in the course of their marketing activities for their customers, Defendants, knowingly, intentionally, and willfully removed ELIAS’ CMI -- including but not limited to authorship and ownership information contained within the metadata and/or watermarks of the Copyrighted Works -- and thereafter distributed them without authorization.



24. In so doing, upon information and belief, Defendants reproduced and distributed copies of, and publicly displayed ELIAS' Copyrighted Works, or derivative versions thereof, knowing that ELIAS' and/or Mr. Victor Elias' CMI had been removed without either's authorization, and while knowing, or having reasonable grounds to know, that it would induce, enable, facilitate, and/or conceal infringement of ELIAS' exclusive rights secured under 17 U.S.C. § 106. Upon information and belief, Defendants continue to knowingly distribute the Copyrighted Works having known that ELIAS' and/or Mr. Victor Elias' CMI has been removed without ELIAS' and/or Mr. Victor Elias' authorization knowing, or having reasonable grounds to know, that it will continue to induce, enable, facilitate, and/or conceal infringement of ELIAS' exclusive rights secured under 17 U.S.C. § 106.

25. Additionally and alternatively, upon information and belief, Defendants knew or should have known that the CMI had been removed and/or altered from the Copyrighted Works when they received the same for distribution on the Third Party Travel Websites. Despite such knowledge, Defendants reproduced and/or distributed copies of, and publicly displayed ELIAS' Copyrighted Works, or derivative versions thereof, knowing that ELIAS' and/or Mr. Victor Elias' CMI had been removed without ELIAS' and/or Mr. Victor Elias' authorization. As such, Defendants knew, or having reasonable grounds to know, that such would induce, enable, facilitate, and/or conceal infringement of ELIAS' exclusive rights secured under 17 U.S.C. § 106. Upon information and belief, Defendants continue to knowingly distribute the Copyrighted Works after becoming aware that ELIAS' and/or Mr. Victor Elias' CMI

had been removed without ELIAS' and/or Mr. Victor Elias' authorization. As such, Defendants know, or have reasonable grounds to know, that such will continue to induce, enable, facilitate, and/or conceal infringement of ELIAS' exclusive rights secured under 17 U.S.C. § 106.

26. As a direct result of Defendants' removal of ELIAS' and/or Mr. Victor Elias' CMI and subsequent distribution, ELIAS' Copyrighted Works have been infringed through the copying, publishing, posting, and/or display of said Works throughout the World Wide Web without license or authorization by ELIAS. See Exhibit H (Resulting Infringements). Further, as a direct result of Defendants' removal of ELIAS' and/or Mr. Victor Elias' CMI and subsequent distribution, ELIAS has lost the ability to monitor and control of its intellectual property.

27. Although Defendants are sophisticated technology corporations that have been using, distributing, and/or otherwise handling copyrighted content on a daily basis for many years, they have engaged in these willful, wanton, and brazen violations of the DMCA, and are continuing to regularly and egregiously infringe ELIAS' rights in its Copyrighted Works on an ongoing basis.

28. Upon information and belief, Defendants collectively engaged in at least 220 instances of removal ELIAS' CMI from the metadata of the Copyrighted Works, and then distribution such Works with knowledge that ELIAS' CMI had been removed without authorization from ELIAS or the law.

#### **CLAIM FOR RELIEF – COUNT I**

**(Removal or Alteration of Copyright Information, 17 U.S.C. § 1202 et seq., against all Defendants)**

29. ELIAS incorporates here by reference the allegations in paragraphs 1 through 28 above.

30. Plaintiff included a metadata credit line and/or watermark to Victor Elias and/or Victor Elias Photography (a “Notice of Copyright Ownership”) in all of its published photographs, including the Works at issue in this suit. The inclusion of the Notice of Copyright Ownership in all of Plaintiff’s published photographs, including its Copyrighted Works, constitutes CMI as defined under 17 U.S.C. § 1202(c). See Exhibit D.

31. Plaintiff is informed and believes, and on that basis alleges that Defendants intentionally, and without authority of ELIAS or the law, removed and/or altered and/or caused or induced others to remove and/or alter ELIAS’ CMI by removing the Notice of Copyright Ownerships from ELIAS’ Copyrighted Works and distributed the Copyrighted Works to the general public knowing that the Notice had been removed without the authority of ELIAS – knowing, or having reasonable grounds to know, that such would induce, enable, facilitate, or conceal infringement of ELIAS’ Copyrighted Works in violation of 17 U.S.C. § 1202(b)(1)-(3).

32. Plaintiff is informed and believes, and on the basis alleges that Defendants – without authority of ELIAS or the law – distributed the Copyrighted Works knowing that ELIAS’ CMI had been removed and/or altered without ELIAS’ authority or the law, knowing – and/or having reasonable grounds to know that such would – induce, enable, facilitate and/or conceal infringement of ELIAS’ copyright, distributed the Copyrighted Works to the general public, in violation of 17 U.S.C. § 1202(b)(3).

33. Plaintiff is informed and believes, and on the basis alleges that Defendants – without authority of

ELIAS or the law – knowingly provided CMI that was false and/or distributed CMI that was false with the intent to induce, enable, facilitate and/or conceal infringement of Plaintiff's copyright, in violation of 17 U.S.C. § 1202(a)(1) and § 1202(a)(2).

34. Defendants' removal or alteration of CMI from the Copyrighted Works and subsequent distribution of the Copyrighted Works was and is willful and intentional, and was and is executed with full knowledge of Plaintiff's rights under copyright law, and in disregard of Plaintiff's rights. Plaintiff is entitled to recover its actual damages suffered as a result of the violation and any profits of Defendants attributable to the violations and not taken into account in computing actual damages, or, at Plaintiff's election, statutory damages, pursuant to 17 U.S.C. § 1203(c) of up to \$25,000 per act of removal and/or distribution, which upon information and belief, total more than 220.

35. Plaintiff is entitled to recover costs and attorneys' fees from Defendants pursuant to 17 U.S.C. § 1203(b)(4) and (5).

36. Defendants' violations of 17 U.S.C. § 1202(a)(1) – (2) and § 1202(b)(1) – (3) have caused, and, unless restrained by this Court, will continue to cause, irreparable injury to ELIAS not fully compensable in monetary damages. Further, Defendants' violations are against the public interest as they have deprived ELIAS – a copyright holder – from the ability to monitor and control its intellectual property, and resulted in rampant and unrestrained infringement of ELIAS' Copyrighted Works throughout the World Wide Web. Pursuant to 17 U.S.C. § 1202(b)(1), Plaintiff is entitled to a preliminary and permanent injunction enjoining Defendants from further such violations.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiff requests judgment against Defendants as follows:

37. For a mandatory injunction of Defendants, their officers, agents, servants, employees, representatives, and attorneys, and all persons in active concert or participation with them, ordering them to replace ELIAS' CMI in the metadata in all 220 images, and provide the proper credit line to any and all editorial publications that received such images;

38. For ELIAS' actual damages and a disgorgement of all profits derived by Defendants attributable to their violations of 17 U.S.C. § 1203(c)(2) et seq.;

39. For an accounting of all profits, income, receipts or other benefit derived by Defendants from the reproduction, copying, display, promotion, distribution or sale of products and services, or other media, either now known or hereafter devised, from which ELIAS' copyright management information was removed or altered pursuant to 17 U.S.C. § 1203(c)(2);

40. For statutory damages for removal or alteration of copyright management information, as provided by 17 U.S.C. § 1203(c)(3);

41. For reimbursement of costs, including Lodestar attorneys' fees, as well as interest pursuant to 17 U.S.C. § 1203(b)(4); and

42. For any such other and further relief as the Court may deem just and appropriate.

**DEMAND FOR JURY TRIAL**

PLAINTIFF HEREBY DEMANDS A TRIAL BY JURY AND TENDERS THE REQUISITE JURY FEE.

52a

Date: November 4, 2019

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**STATUTORY PROVISIONS INVOLVED**

**17 U.S.C. §1202. Integrity of copyright management information**

(a) False copyright management information. No person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement--

(1) provide copyright management information that is false, or

(2) distribute or import for distribution copyright management information that is false.

(b) Removal or alteration of copyright management information. No person shall, without the authority of the copyright owner or the law--

(1) intentionally remove or alter any copyright management information,

(2) distribute or import for distribution copyright management information knowing that the copyright management information has been removed or altered without authority of the copyright owner or the law, or

(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 [17 USCS § 1203], having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right under this title.

(c) Definition. As used in this section, the term “copyright management information” means any of the following information conveyed in connection with copies or phonorecords of a work or performances or displays of a work, including in digital form, except that such term does not include any

personally identifying information about a user of a work or of a copy, phonorecord, performance, or display of a work:

(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.

(3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.

(4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.

(5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.

(6) Terms and conditions for use of the work.

(7) Identifying numbers or symbols referring to such information or links to such information.

(8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.

(d) Law enforcement, intelligence, and other government activities. This section does not prohibit any lawfully authorized investigative, protective, information security, or intelligence activity of an officer, agent, or employee of the United States, a State, or a political subdivision of a State, or a person acting



pursuant to a contract with the United States, a State, or a political subdivision of a State. For purposes of this subsection, the term “information security” means activities carried out in order to identify and address the vulnerabilities of a government computer, computer system, or computer network.

(e) Limitations on liability.

(1) Analog transmissions. In the case of an analog transmission, a person who is making transmissions in its capacity as a broadcast station, or as a cable system, or someone who provides programming to such station or system, shall not be liable for a violation of subsection (b) if-

(A) avoiding the activity that constitutes such violation is not technically feasible or would create an undue financial hardship on such person; and

(B) such person did not intend, by engaging in such activity, to induce, enable, facilitate, or conceal infringement of a right under this title.

(2) Digital transmissions.

(A) If a digital transmission standard for the placement of copyright management information for a category of works is set in a voluntary, consensus standard-setting process involving a representative cross-section of broadcast stations or cable systems and copyright owners of a category of works that are intended for public performance by such stations or systems, a person identified in paragraph (1) shall not be liable for a violation of subsection (b) with respect to the particular copyright management information addressed by such standard if-

(i) the placement of such information by someone other than such person is not in accordance with such standard; and

(ii) the activity that constitutes such violation is not intended to induce, enable, facilitate, or conceal infringement of a right under this title.

(B) Until a digital transmission standard has been set pursuant to subparagraph (A) with respect to the placement of copyright management information for a category of works, a person identified in paragraph (1) shall not be liable for a violation of subsection (b) with respect to such copyright management information, if the activity that constitutes such violation is not intended to induce, enable, facilitate, or conceal infringement of a right under this title, and if--

(i) the transmission of such information by such person would result in a perceptible visual or aural degradation of the digital signal; or

(ii) the transmission of such information by such person would conflict with--

(I) an applicable government regulation relating to transmission of information in a digital signal;

(II) an applicable industry-wide standard relating to the transmission of information in a digital signal that was adopted by a voluntary consensus standards body prior to the effective date of this chapter; or

(III) an applicable industry-wide standard relating to the transmission of information in a digital signal that was adopted in a voluntary, consensus standards-setting process open to participation by a representative cross-section of broadcast stations or cable systems and copyright owners of a category of works that are intended for public performance by such stations or systems.

(3) Definitions. As used in this subsection--

(A) the term "broadcast station" has the meaning given that term in section 3 of the Communications Act of 1934 (47 U.S.C. 153); and

(B) the term "cable system" has the meaning given that term in section 602 of the Communications Act of 1934 (47 U.S.C. 522).

**17 U.S.C. §1203. Civil remedies**

**(a) Civil actions.** Any person injured by a violation of section 1201 or 1202 [17 USCS § 1201 or 1202] may bring a civil action in an appropriate United States district court for such violation.

**(b) Powers of the court.** In an action brought under subsection (a), the court—

**(1)** may grant temporary and permanent injunctions on such terms as it deems reasonable to prevent or restrain a violation, but in no event shall impose a prior restraint on free speech or the press protected under the 1st amendment to the Constitution;

**(2)** at any time while an action is pending, may order the impounding, on such terms as it deems reasonable, of any device or product that is in the custody or control of the alleged violator and that the court has reasonable cause to believe was involved in a violation;

**(3)** may award damages under subsection (c);

**(4)** in its discretion may allow the recovery of costs by or against any party other than the United States or an officer thereof;

**(5)** in its discretion may award reasonable attorney's fees to the prevailing party; and

**(6)** may, as part of a final judgment or decree finding a violation, order the remedial modification or the destruction of any device or product involved in the violation that is in the custody or control of the violator or has been impounded under paragraph (2).

**(c) Award of damages.**

**(1)** In general. Except as otherwise provided in this title, a person committing a violation of section 1201 or 1202 [17 USCS § 1201 or 1202] is liable for either—

**(A)** the actual damages and any additional profits

of the violator, as provided in paragraph (2), or

**(B)** statutory damages, as provided in paragraph (3).

**(2)** Actual damages. The court shall award to the complaining party the actual damages suffered by the party as a result of the violation, and any profits of the violator that are attributable to the violation and are not taken into account in computing the actual damages, if the complaining party elects such damages at any time before final judgment is entered.

**(3)** Statutory damages.

**(A)** 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 1201 [17 USCS § 1201] in the sum of not less than \$200 or more than \$2,500 per act of circumvention, device, product, component, offer, or performance of service, as the court considers just.

**(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 [17 USCS § 1202] in the sum of not less than \$2,500 or more than \$25,000.

**(4)** Repeated violations. In any case in which the injured party sustains the burden of proving, and the court finds, that a person has violated section 1201 or 1202 [17 USCS § 1201 or 1202] within 3 years after a final judgment was entered against the person for another such violation, the court may increase the award of damages up to triple the amount that would otherwise be awarded, as the court considers just.

**(5)** Innocent violations.

**(A)** In general. The court in its discretion may reduce or remit the total award of damages in any case

in which the violator sustains the burden of proving, and the court finds, that the violator was not aware and had no reason to believe that its acts constituted a violation.

**(B)** Nonprofit library, archives, educational institutions, or public broadcasting entities.

**(i)** Definition. In this subparagraph, the term “public broadcasting entity” has the meaning given such term under section 118(f) [17 USCS § 118(f)].

**(ii)** In general. In the case of a nonprofit library, archives, educational institution, or public broadcasting entity, the court shall remit damages in any case in which the library, archives, educational institution, or public broadcasting entity sustains the burden of proving, and the court finds, that the library, archives, educational institution, or public broadcasting entity was not aware and had no reason to believe that its acts constituted a violation.

**17 U.S.C. § 1204. Criminal offenses and penalties**

**(a) In general.** Any person who violates section 1201 or 1202 [17 USCS § 1201 or 1202] willfully and for purposes of commercial advantage or private financial gain—

**(1)** shall be fined not more than \$500,000 or imprisoned for not more than 5 years, or both, for the first offense; and

**(2)** shall be fined not more than \$1,000,000 or imprisoned for not more than 10 years, or both, for any subsequent offense.

**(b) Limitation for nonprofit library, archives, educational institution, or public broadcasting entity.** Subsection (a) shall not apply to a nonprofit library, archives, educational institution, or public broadcasting entity (as defined under section 118(f) [17 USCS § 118(f)]).

**(c) Statute of limitations.** No criminal proceeding shall be brought under this section unless such proceeding is commenced within 5 years after the cause of action arose.