

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT NEW YORK

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AGENCE FRANCE PRESSE,	X	
	:	<b>FILED ELECTRONICALLY</b>
Plaintiff,	:	
	:	
- against -	:	10 Civ. 2730 (AJN)(FM)
	:	
DANIEL MOREL,	:	ECF CASE
	:	
Defendant,	:	
	:	
- against -	:	
	:	
GETTY IMAGES (US), INC., AGENCE FRANCE	:	
PRESSE, ET AL.,	:	
	:	
Counterclaim Defendants.	:	
-----	X	

**DEFENDANTS' MEMORANDUM OF LAW  
IN SUPPORT OF POST-TRIAL MOTIONS**

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This memorandum of law is submitted by defendants Getty Images (US), Inc. (“Getty Images”) and Agence France Presse (“AFP”) (collectively, “Defendants”) in support of their motions pursuant to Fed. R. Civ. P. 50 and 59(a) for judgment as a matter of law and/or a new trial or remittitur on the jury verdict: (i) finding that AFP and Getty Images were liable for willful copyright infringement; (ii) finding that AFP and Getty Images violated §§ 1202(a) and (b) of the Digital Millennium Copyright Act (“DMCA”); (iii) awarding plaintiff Daniel Morel (“Morel”) \$20,000 for the aforesaid DMCA violations; and (iv) awarding Morel the maximum statutory damages in a total amount of \$1,200,000 for willful copyright infringement of the eight photographs at issue.

In a nutshell, prior to trial, the Court found that AFP infringed Morel’s copyright in his eight photographs and, in the Pretrial Order, Getty Images withdrew its only defense under the DMCA and therefore admitted to copyright infringement. The only issues for the jury on Morel’s infringement claims were therefore whether Defendants’ actions were willful, the amount of actual damages Morel suffered, the amount of Defendants’ infringing profits, and, depending upon the culpability finding, the amount of statutory damages. The jury was asked separate questions about the willfulness of each Defendant. AFP and Getty Images challenge the jury’s finding of willfulness as to each because no reasonable jury could conclude either AFP or Getty acted willfully as defined under the applicable law, based on the evidence in the record.<sup>1</sup>

It is equally clear that the jury’s award of maximum statutory damages in the amount of \$1.2 million was against the clear weight of the evidence and constitutes a miscarriage of justice.

Consider the following: the jury awarded Morel **60** times the maximum actual damages he could

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<sup>1</sup> While that finding is not itself determinative of the proper range of statutory damages given joint and several liability of Defendants on the infringement claim, the propriety of that finding does matter. Defendants urge the Court to consider the finding of willfulness as to each Defendant separately and to overturn the finding of willfulness as against both Defendants because that determination may impact them in future copyright disputes and may also impact Morel’s application for attorneys’ fees in this case.

have recovered based upon Amalvy's stated after-the-fact willingness to pay him \$20,000, Tr. 368:25-369:5 (Amalvy)<sup>2</sup>; **80** times the amount that he would have earned if all of Getty Images' and AFP's sales had been made by Corbis instead of Getty Images and AFP, Trial Ex. 303; Tr. 213:4-11 (Morel); **600** times the amount that Getty Images paid its own freelance photographer who was in Haiti at the same time as Morel for 5 times the number of photos, Tr. 660:14-661:3; 662:2-14 (Bernasconi); about **4700** times the day rate that the uncontroverted record establishes professional photographers are paid on a freelance basis, Tr. 206:20-207:6; 208:1-4 (Morel); 470:20-471:5 (Hambach); 658:18-659:8 (Bernasconi); and **2180** times the amount that Getty Images paid Morel in 2008 for two days of freelance work, Trial Ex. 296; Tr. 210:3-18 (Morel).

As for the jury's finding that both Defendants violated § 1202 of the DMCA, that statute requires, at a minimum, "knowing" conduct, and the record on the trial in this action was devoid of any evidence from which one could conclude that AFP or Getty Images *knowingly* distributed false copyright management information, or removed or altered the same. The record is equally devoid of any evidence of any injury suffered by Morel as a result of the alleged DMCA violation that is separate and distinct from the injury he suffered by reason of the copyright infringement. And finally, as a matter of law, even assuming *arguendo* a violation of the DMCA, as previously argued to this Court, proper statutory construction yields a maximum of one, not eight violations, and therefore the verdict cannot be sustained on that basis.

For the above stated reasons, judgment as a matter of law and/or a new trial on copyright infringement damages and DMCA liability and damages should be granted for Defendants, as further explained below.

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<sup>2</sup> All trial transcript citations used in this Memorandum of Law accompany the Declaration of Meaghan Kent attached hereto as Exhibit A.

## I. THE APPLICABLE STANDARDS

Judgment as a matter of law is appropriate where “there exists such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture.” *Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 567 (2d Cir. 2011) (quotations marks omitted). Stated differently, judgment as a matter of law should be entered when “the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached.” *Simblest v. Maynard*, 427 F.2d 1, 4 (2d Cir. 1970).

“[F]or a district court to order a new trial under Rule 59(a) [of the Federal Rules of Civil Procedure], it must conclude that the jury has reached a seriously erroneous result or the verdict is a miscarriage of justice, i.e., it must view the jury's verdict as against the weight of the evidence.” *Manley v. AmBase Corp.*, 337 F.3d 237, 245 (2d Cir. 2003) (internal quotation marks and alteration omitted). “Unlike judgment as a matter of law, a new trial may be granted even if there is substantial evidence supporting the jury's verdict.” *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124, 134 (2d Cir. 1998) (citing *Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992)). A trial judge “may weigh the evidence and the credibility of witnesses and need not view the evidence in the light most favorable to the verdict winner.” *Raedle v. Credit Agricole Indosuez*, 670 F.3d 411, 418 (2d Cir. 2012).

The Court's discretion to grant a new trial “includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur).” *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 165 (2d Cir. 1998) (internal quotation marks omitted). Remittitur is the “process by which a court compels a plaintiff to choose between reduction of an excessive verdict and a new trial” on

damages. *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1328 (2d Cir. 1990). (internal quotation marks omitted). A jury verdict is excessive if “it is so high that it shocks the judicial conscience.” *Lee v. Edwards*, 101 F.3d 805, 808 (2d Cir. 1996). The Second Circuit has identified “two distinct kinds of cases” where remittitur is proper: “(1) where the court can identify an error that caused the jury to include in the verdict a quantifiable amount that should be stricken, ... and (2) more generally, where the award is ‘intrinsically excessive’ in the sense of being greater than the amount a reasonable jury could have awarded, although the surplus cannot be ascribed to a particular, quantifiable error.” *Kirsch*, 148 F.3d at 165 (quoting *Trademark Res. Corp. v. Maxwell Online, Inc.*, 995 F.2d 326, 337 (2d Cir. 1993)).

**II. JUDGMENT AS A MATTER OF LAW OR A  
NEW TRIAL IS APPROPRIATE ON THE FINDING  
OF WILLFUL INFRINGEMENT BY AFP AND GETTY IMAGES.**

“To prove ‘willfulness’ under the Copyright Act, the plaintiff must show (1) that the defendant was actually aware of the infringing activity, or (2) that the defendant's actions were the result of ‘reckless disregard’ for, or ‘willful blindness’ to, the copyright holder's rights.” *Island Software & Computer Serv., Inc. v. Microsoft Corp.*, 413 F.3d 257, 263 (2d Cir. 2005); accord *Lipton v. Nature Co.*, 71 F.3d 464, 472 (2d Cir. 1995); *N.A.S. Import Corp. v. Chenson Enters., Inc.*, 968 F.2d 250, 252 (2d Cir. 1992); see also *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101, 112 (2d Cir. 2001) (“Willfulness in this context means that the defendant recklessly disregarded the possibility that its conduct represented infringement.”) (citation and internal quotation marks omitted). “[T]he standard of ‘reckless disregard’ connotes wantonness.” 5 *Nimmer on Copyright* § 14.04[B][3][a] (2013). A finding of “reckless disregard” or “willful blindness” requires evidence either that a defendant engaged in “a pattern of conduct so unreasonable as to constitute reckless disregard” or harbored serious doubts about its right to use the work and deliberately proceeded without investigation. See *Island Software*, 413 F.3d at 263-

64. Mere negligence or bureaucratic ineptitude is insufficient to ground a finding of willfulness. *See Martin v. City of Indianapolis*, 192 F.3d 608, 614 (7th Cir. 1999); *Fitzgerald v. CBS Broadcasting, Inc.*, 491 F. Supp. 2d 177, 191 (D. Mass. 2007); *cf. A Touch of Class Jewelry Co. v. J.C. Penny Co., Inc.*, No. 98-2949, 2000 WL 1224804, at \*6 (E.D. La. Aug. 28, 2000) (“[C]arelessness and/or gross negligence will not support a finding of willfulness.”) (trademark infringement).

Canvassing these various formulations courts have used to describe “willful” infringement, none of them remotely fit the evidence of AFP or Getty Images’ conduct in this case.

**A. The Evidence Does not Support a Finding of Willful Infringement by AFP.**

Infringement is not willful if a party reasonably and in good faith believes that its conduct is innocent, permissible, or does not constitute a copyright infringement. *See* ECF No. 192 (Mem. Op. on Summ. J.) at 35; *N.A.S. Import, Corp. v. Chenson Enter., Inc.*, 968 F.2d 250, 252 (2d Cir. 1992); *see also Marshall v. Marshall*, 2012 WL 1079550, at \*25–26 (E.D.N.Y. Mar. 30, 2012); *Basic Books, Inc. v. Kinko’s Graphics Corp.*, 758 F. Supp. 1522, 1544 (S.D.N.Y.1991).

The undisputed evidence is that Amalvy obtained the photos from Suero’s TwitPic page using an application called Tweet Deck. Tr. 260:1-261:22; 268:4-19; 277:4-19; 312:7-9 (Amalvy); Tr. 189:13-21 (Morel). Suero’s page gave no indication that the photos were by Morel. Trial Exs. 141A; 403A; Tr. 266:13-268:19; 277:4-19; 290:13-291:2 (Amalvy). And Amalvy testified that at the time of downloading the photos, he had no reason to doubt the credibility of Suero and the photos. Tr. 278:6-10 (Amalvy).

When Amalvy took the photos from Suero’s TwitPic page, he testified that he believed that they had been posted by a citizen journalist for the purpose of getting the word out and AFP was permitted to use them. Trial Exs. 10-17; Tr. 290:22-291:12; 308:15-22; 309:5-9; 312:13-22;

317:5-318:1 (Amalvy). Amalvy testified to his experience as a photojournalist for 25 years, who had worked in the field with photographers for 20 years. Tr. 240:9-12; 284:23-24 (Amalvy). Based on this experience, he explained that when he saw the photos posted to TwitPic in high definition, with no restrictions or instructions, or request to sell, he believed they were posted by “an amateur who wanted to be a witness to the events going on.” Tr. 309:6-9; *see also* Tr. 289:6-12; 308:17-22; 312:16-22; 315:4-11 (Amalvy). Amalvy explained that “there are lots of people who have cameras, lots of people take good pictures, and lots of people want to show what’s happening. On the other hand, never would a professional photographer send high-definition photographs simply out into the cloud, into the websphere like that unless he was just showing them to show them.” Tr. 317:6-12 (Amalvy). In other words, based upon the method and media through which the photographs were posted and the circumstances under which they were posted, Amalvy reasonably believed that AFP was permitted to use the photographs.

The evidence showed that Amalvy’s understanding was reasonable. Morel himself testified that spreading the news of the devastation in Haiti was his first reason for posting his photos on TwitPic: “First of all, I wanted the world to see what was happening in Haiti.” Tr. 169:13-14 (Morel). Suero’s Twitter feed similarly supports this understanding, where it repeatedly stated “PLEASE GIVE CREDIT” for use of the photos posted on Lisandro Suero’s TwitPic page. Trial Ex. 403A at 10, 11, 17, 20, 23, 25, 34. Furthermore, third parties took similar actions as AFP, including other news agencies. Trial Ex. 403A at 25, 34; Trial Ex. 328 at 3 (other news agencies “stole them from Twitter”). The behavior of those third parties further supports that Amalvy’s interpretation of the method and media through which the photos were posted was not a reckless disregard of Morel’s rights; rather, it was a reasonable interpretation of

an unusual situation. This, in fact, was Amalvy's interpretation, as corroborated by his inclusion of a limitation of use of the photos for news purposes only. Trial Exs. 18; 28.

The evidence showed that once AFP knew that Morel was the photographer, it took swift action to correct the photographer's name and to reach out to Morel to make arrangements. Several hours after distributing the photos, Benjamin Fathers, an editor in AFP's Paris office, discovered that Morel was in fact the photographer. Trial Ex. 19A; Tr. 323:11-324:15 (Amalvy). Approximately an hour after making this discovery, AFP sent a caption correction. Trial Ex. 29; Tr. 329:18-330:9 (Amalvy). Once Amalvy was notified that Morel was the photographer, he continued to believe that the photographs had been posted to spread the word and that AFP and Morel would reach an agreement. Tr. 328:15-17; 345:20-346:6; 348:12-349:12 (Amalvy). Indeed, AFP repeatedly tried to reach Morel, hardly the actions of a willful infringer. Trial Exs. 350A, 351A, 356, 360A, 361A, 365, 400A; Tr. 199:2-203:22 (Morel); 285:15-19 (Amalvy).

Amalvy testified that he believed that AFP and Morel would reach an agreement and that the use would be permitted. Trial Ex. 360; Tr. 328:15-17; 345:25-346:6; 348:12-349:12; 365:2-366:12 (Amalvy). That the use was not authorized at the time was not a concern to him because he believed, based on the manner in which the photographs were posted, that the photographer's intent was for third parties to use the photographs and, if necessary, for any deal to be reached retroactively. Trial Exs. 10-17; Tr. 290:22-291:12; 308:15-22; 309:5-9; 312:13-22; 317:5-318:1 (Amalvy). AFP also continued trying to reach Morel to work out an arrangement for the already used photographs, for any future photographs, and to offer him assistance. Trial Exs. 350A, 351A, 354, 355, 356, 360A, 361A, 362A, 365, 366, 400A; Tr. 285:15-19; 345:2-346:6 (Amalvy); 199:2-203:22 (Morel). AFP's perception that it would be able to reach an accommodation with Morel retroactively was not unreasonable: Morel finally responded once he

obtained internet access that indeed he would try to reach them. Trial Ex. 360A; Tr. 365:2-366:12 (Amalvy). Importantly, had Amalvy been correct in his reasonable interpretation of Morel's actions – that is, had they reached a deal retroactively once Morel had proper internet or phone access – there would not have been any infringement. The evidence demonstrates that no one harbored serious doubts about AFP's right to use the photographs nor deliberately proceeded without investigation. *See Island Software*, 413 F.3d at 263-64.

Further, once AFP was notified by Morel and then by Corbis that Morel was represented by Corbis, AFP began removing the photographs from its system and then sent out a kill notice. The notices from Morel and Corbis arrived late in the night after Amalvy had left following 36 hours in the office. Tr. Exs. 27, 352, 358; Tr. 249:4-16; 336:16-23 (Amalvy). As soon as Amalvy received the notice first thing the next morning, he mobilized the AFP team to remove the photographs from its system. Trial Exs. 39A, 49A, 348A; Tr. 349:24-350:20 (Amalvy); 416:3-8; 419:9-11; 476:9-478:12; 480:1-483:25 (Hambach). AFP also began preparing the comprehensive kill notice that was sent to all of its subscribers and Getty Images. Trial Ex. 30; Tr. 412:25-413:12 (Hambach).

In addition, the evidence did not show that AFP was willful or acted in willful disregard of Morel's rights in the manner in which it sent the caption correction or kill notice. Rather, the testimony was that AFP followed standard procedures that had worked in the past and there was no reason to believe that they would not work in this situation. Tr. 471:16-473:14 (Hambach).

In sum, it cannot be maintained, based on the evidence, that Amalvy or anyone at AFP acted willfully or in reckless disregard of Morel's rights. In fact, to the contrary, the evidence shows that AFP: (a) repeatedly tried to reach Suero and then Morel; (b) reasonably believed it was permitted to use the photos; (c) included a limitation for use of the photos for news purposes

only; and (d) expeditiously issued a caption correction and subsequently a kill notice to all of its subscribers.

**B. The Evidence Does not Support a Finding of Willful Infringement by Getty Images.**

Likewise, the evidence at trial does not support a finding of willfulness with respect to Getty Images. It is undisputed that Getty Images, whose entire business model revolves around copyright protection, received Morel's photos as part of its "image partnership" relationship with AFP – an internationally respected news organization with its own editorial staff. Getty Images receives thousands of images a day from AFP with the understanding that AFP has the right to authorize Getty Images' customers to use them. *See* Tr. 513:1-18, 534:9-18 (Gebhard); Tr. 656:18-657:17 (Bernasconi). It is also undisputed that AFP downloaded Morel's photos, affixed the credits, and then transmitted them to Getty Images; AFP then changed the credit from Lisandro Suero to Daniel Morel and transmitted a new set of these images to Getty Images' system; Getty Images does not control what AFP transmits or monitor the feed of AFP content. Trial Exs. 10-18, 28; Tr. 302:11-304:13; 307:23-308:14; 309:20-311:2; 312:7-9; 318:11-17; 320:15-24; 326:6-10 (Amalvy); Tr. 404:10-406:14; 410:6-411:3; 412:13-24 (Hambach); Tr. 513:1-11; 530:1-23; 532:3-533:9, 575:10-13 (Gebhard); Tr. 607:8-19, 670:15-17 (Bernasconi).

It cannot be disputed that Getty Images took immediate steps to address Morel's claim of infringement each time that it was notified and acted on the information clearly provided to it at the time. *See* Trial Exs. 22, 260, 261; Tr. 575:22-576:25 (Gebhard); 754:20-755:10, 756:16-20, 756:21-757:25, 762:23-765:11 (Cameron). But AFP's caption correction and kill notice, as well as Corbis's January 13 notification, did not identify "Lisandro Suero" or "David" Morel, did not provide specific URLs for the infringing photos, did not provide thumbnail copies of the photos, and did not identify them by image numbers Getty Images could recognize. Trial Exs. 29-30,

276 at G3825; Tr. 585:14-587:7 (Gebhard); Tr. 753:19-754:12, 754:20-755:12, 755:25-756:20, 761:19-762:2 (Cameron). When Corbis finally notified Getty about the Suero-credited images on February 2, Getty Images immediately took them down and immediately ceased all further licensing activities. Trial Ex. 261; Tr. 762:23-765:11 (Cameron).

Against this backdrop, the only reasonable conclusion from the evidence is that Getty Images acted reasonably in reliance on its trusted partner AFP and responded promptly to cease licensing Morel's images based on the information provided to it at the time. But assuming the jury could rationally have concluded that Getty Images was not blameless in failing to discover and kill the mis-credited photos in a timely fashion, the evidence at most supports a finding of negligence or "bureaucratic ineptitude" on Getty Images' part with respect to that failure, not reckless disregard or willful blindness. *See supra* at 4-5.

Admittedly, Andreas Gebhard did not remove the photos mis-credited to Suero from Getty Images' system on January 14 when he responded to AFP's kill notice, but he testified without contradiction that he was not aware of images credited to Suero, that he did not see AFP's caption correction until this time, and that he mistakenly believed that the change in photographer name was a change from "David Morel" to "Daniel Morel." Tr. 533:19-534:1, Tr. 538:16-542:20, 559:8-560:6 (Gebhard).<sup>3</sup> No evidence supports the conclusion that Gebhard knew about the Suero-credited photos on January 14 or had doubts about whether he had complied with AFP's kill notice and deliberately failed to investigate. To the contrary, Gebhard testified without contradiction that he believed he had done everything necessary to comply with AFP's kill notice and he did not learn about the Suero-credited photos until February 2. Tr.

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<sup>3</sup> Although Gebhard saw Morel's images on Morel's TwitPic page on January 12 and emailed his colleagues at the Picture Desk about them (Trial Ex. 2), he testified that he did not see the photos attributed to Suero online that night. Tr. 518:16-519:14, 573:7-15 (Gebhard). Nothing about seeing Morel's TwitPic page alone could possibly have alerted Gebhard to the existence of a second set of photos, much less the presence of those photos in Getty Images' computer system.

577:7-578:8 (Gebhard).<sup>4</sup> Gebhard's failure to do a more expansive search on January 14 might have been careless, but it simply does not rise to the level of reckless disregard or willful blindness.

Francisco ("Pancho") Bernasconi received an email from Gebhard on January 12 about Morel's photos on Twitter, but he did not open the link to Morel's TwitPic page. Trial Ex. 2; Tr. 593:7-595:16 (Bernasconi). The next day, he received an email from another Getty Images' employee that an AFP stringer was posting his Haiti photos on Twitter, furnishing a link to Suero's TwitPic page.<sup>5</sup> Tr. 598:18-601:22 (Bernasconi). Bernasconi testified that he had no recollection of seeing that email (Tr. 599:15-17, 601:18-19 (Bernasconi)), and no evidence was elicited that he opened the link. Even if the jury (i) didn't believe Bernasconi's testimony *and* (ii) thought he did open both links, *and* (iii) even if they believed that he remembered that both links were to the same images, *and* (iv) that he knew that copies of those photos, credited to both photographers, were in Getty Images' system, *and* (v) that AFP did not have permission to publish them; that still would do absolutely nothing to establish that Bernasconi – who never went into the system to kill any of these images – deliberately or recklessly chose not to remove them, but instead to continue infringing. See 5 *Nimmer on Copyright* § 14.04[B][3][a] (imputation of knowledge through agency relationship not sufficient).

Nor was there any evidence from which a jury could conclude that the infringement flowed from a larger systemic failure to respect photographers' rights or of "a pattern of conduct

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<sup>4</sup> Although the Court indicated in its summary judgment opinion that Gebhard's January 14 email to Eva Hambach of AFP (Trial Ex. 55) created an issue of fact for the jury on point, there was no evidence adduced at trial from which a reasonable jury could infer that he knew about the Suero-credited photos on January 14 and deliberately failed to investigate or remove them.

<sup>5</sup> This email was not on the exhibit list and was not admitted into evidence, and counsel went far beyond the scope of refreshing Bernasconi's recollection, virtually reading the entire email into the record, over counsel's objection, despite the fact that it did not refresh his recollection. See Tr. 598:18-601:22 (Bernasconi); Tr. 641:4-642:14 (argument).

so unreasonable as to constitute reckless disregard.”<sup>6</sup> Morel introduced no evidence whatsoever of previous or subsequent copyright claims involving similar issues, nor any evidence suggesting that Getty Images had reason not to trust content provided to it by AFP. As to any alleged failure of communication between AFP and Getty, that too would not constitute willful conduct by either absent a systemic “blind eye.” Yes, Amalvy of AFP testified that he “supposes” he mentioned Suero to Bernasconi (Tr. 361:21-362:1, 371:16-372:14 (Amalvy)); and the latter denied having any conversation with him about either Morel or Suero or these photos (Tr. 629:18-630:2 (Bernasconi)). The jury may have believed one or the other, but that still does not amount to “willful” conduct under the applicable law. The jury could have reasonably concluded that defendants’ systems and procedures should have been more effective, and/or that the right hand should have known what the left hand was (or was not) doing, but there was no evidence from which it could reasonably conclude that Getty Images designed a reckless system or deliberately turned a blind eye to infringement when notified of Morel’s copyright claim.

\* \* \*

Because the jury’s willfulness finding as to AFP and Getty Images is not supported by the evidence and is a seriously erroneous result, judgment as a matter of law, or, in the alternative a new trial, is mandated.

### **III. JUDGMENT AS A MATTER OF LAW IS APPROPRIATE ON MOREL’S DMCA CLAIMS.**

Based on the evidence at trial, no reasonable jury could have found that AFP or Getty Images violated the DMCA or that Morel suffered any damages compensable under that statute

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<sup>6</sup> The facts here contrast sharply in that respect with those in *Psioyos v. John Wiley & Sons Inc.*, No. 11 Civ. 1416 (JPO), 2012 U.S. Dist. LEXIS 162822 (S.D.N.Y. Nov. 7, 2012), where defendant was adjudged a willful infringer because it made no effort to curb the infringement after learning it had exceeded its license and continued distributing the book with the infringing photo; defendant lacked any copyright compliance program; arbitrarily limited the maximum runs in all of its licenses regardless of projected sales; had violated license agreements with photographers on numerous other occasions; and attempted to cover up its infringement. *Id.* at \* 5-6.

that are not wholly duplicative of the damages he recovered for copyright infringement. Accordingly, AFP and Getty Images are entitled to judgment as a matter of law dismissing the DMCA claims as against them. In the alternative, the Court should grant judgment as a matter of law finding that Morel is entitled to statutory damages on but one DMCA violation and remit the verdict accordingly.

**A. No Reasonable Jury Could Have Found that AFP or Getty Images Removed Morel's Information.**

Section 1202(b), subpart (b)(1) prohibits intentionally *removing* or *altering* CMI, while subparts (b)(2) and (b)(3) prohibit distribution “knowing that copyright management information has been removed or altered without authority of the copyright owner or the law.” 17 U.S.C. 1202(b) (2013).

The record does not support a finding under section 1202(b) that either AFP or Getty Images intentionally *removed* any of Morel's information from his photographs. Nor did they know that the information had been removed. The undisputed evidence is that Amalvy obtained the photographs from Suero's TwitPic page. Tr. 260:1-261:22; 268:4-19; 277:4-19; 312:7-9 (Amalvy); Tr. 189:13-21 (Morel). The record is also undisputed that Morel's information was not available on Suero's page. Trial Exs. 141A; 403A; Tr. 266:13-268:19; 277:4-19; 290:13-291:2 (Amalvy). Indeed, the evidence shows that it was Suero, not AFP or Getty Images, that *removed* Morel's information from his photographs. Trial Ex. 141A (showing Suero posting Morel's images as little as five minutes after Morel posted). Once AFP determined that Morel was the photographer, it sent a caption correction and revised the caption on the photographs within one hour. Trial Ex. 29; Tr. 329:18-331:17 (Amalvy). As above, Getty Images was never aware and only distributed the photographs with the credits as they received them from AFP, its

trusted partner. Tr. 412:13-24 (Hambach); 575:10-13 (Gebhard); Tr. 607:8-19, 670:15-17 (Bernasconi).

**B. No Reasonable Jury Could Have Found that the Notation “AFP/Getty Images” Constituted Copyright Management Information.**

Copyright Management Information (“CMI”) is defined in 17 U.S.C. § 1202, which provides, in pertinent part, that—

[T]he term “copyright management information” means any of the following information conveyed in connection with copies or phonorecords 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.
- . . .
- (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.

17 U.S.C. § 1202(c) (2013). The definition plainly enumerates several categories of information Congress deemed worth protecting by § 1202—namely, the title of a work, the name of the author or copyright owner of a work, terms and conditions for using a work, and symbols or links to such information—and leaves the Copyright Office free to promulgate additional categories. (The Copyright Office has promulgated no regulations to enlarge the scope of this definition.) No subsection exists to redress a false perception of affiliation or association between parties. At trial, Morel testified and Morel’s counsel argued to the jury that the caption credit “AFP/Getty Images/Daniel Morel” negatively impacted Morel’s reputation by creating a false impression that Morel was associated with the Defendants. However, as a matter of law, the DMCA provides no recourse to Morel for this kind of alleged injury. The plain language of

§ 1202(c) specifically delineates what constitutes CMI. Further, applying the canon *expressio unius est exclusio alterius*, Congress' inclusion of these specific categories of information and not others suggests that no information beyond the enumerated categories should be considered CMI. *See, e.g., Walters v. Indus. & Comm. Bank of China, Ltd.*, 651 F.3d 280, 294 (2d Cir. 2011) (citing *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199, 221 (2d Cir. 2009) (referring to the “familiar principle” that “the mention of one thing implies the exclusion of the other”)).

The evidence of record is undisputed that the credit line that includes the notation “AFP/Getty Images” does not identify any copyright information. Trial Exs. 18, 28, 29; Tr. 404:22-407:2; 408:25-409:14; 432:2-13; 474:22-475:1 (Hambach); 319:15-320:5 (Amalvy). As such, the notation AFP/Getty Images could not support Morel's claim under the DMCA.

**C. No Reasonable Jury Could Have Found that AFP or Getty Images Acted with the Requisite Intent.**

Unlike the willfulness inquiry for copyright infringement, neither reckless disregard nor willful blindness is a sufficient predicate for a DMCA violation, which requires knowing and intentional misconduct. Under § 1202(a), “[t]here are two prerequisites that must be met for these prohibitions to be violated: (1) the person providing, distributing or importing the false [copyright management information] *must know* the [CMI] is false, and (2) the person providing, distributing, or importing the false [CMI] must do so *with the intent to induce, enable, facilitate or conceal an infringement* of any right under title 17.” *Ward v. Nat'l Geographic Soc'y*, 208 F. Supp. 2d 429, 449 (S.D.N.Y. 2002) (quoting S. Rep. No. 105–190, at 34-35 (1998)) (emphasis added). Likewise, under § 1202(b), subpart (b)(1) prohibits “*intentionally*” removing or altering CMI, while subparts (b)(2) and (b)(3) prohibit distribution “*knowing* that the copyright management information has been removed or altered without authority of the copyright owner or the law.” 17 U.S.C. 1202(b) (emphasis).

The record does not support a finding under 1202(a) that either AFP or Getty Images acted recklessly, much less intentionally or knowingly, when they distributed Morel's photographs. *See supra* Part II. Accordingly, judgment as a matter of law dismissing the DMCA claims is appropriate.

**D. Morel Cannot Recover Twice for the Same Injury.**

As the Court properly instructed the jury, Morel is not entitled to recover more than once for the same injury. *Indu Craft, Inc. v. Bank of Baroda*, 47 F.3d 490, 497 (2d Cir. 1995) (“A plaintiff seeking compensation for the same injury under different legal theories is of course only entitled to one recovery”); *see Softel, Inc. v. Dragon Med. & Scientific Commc'ns, Inc.*, 118 F.3d 955, 969–70 (2d Cir.1997) (plaintiff not entitled to additional damages for trade secret misappropriation where such damages were co-extensive with damages from copyright infringement); *Tu v. TAD Sys. Tech. Inc.*, No. 08–CV–3822 (SLT)(RML), 2009 WL 2905780, at \*3-5 (E.D.N.Y. Sept. 10, 2009) (refusing to award separate statutory damages under the Lanham Act, Copyright Act, and DMCA based on “the bar to double recovery in the intellectual property context”) (citing cases).<sup>7</sup> Since the only DMCA damages the jury could reasonably have found are co-extensive with Morel's copyright infringement damages, Getty Images is entitled to judgment as a matter of law dismissing the DMCA claim.

Morel's very limited testimony on damages established only the following potential injuries: (1) loss of \$500 from NBC which cancelled a license because it received the photos on the AFP wire (Tr. 171:6-20, 176:19-177:1 (Morel)); (2) loss of his ability to license other photos directly to news organizations from Haiti (Tr. 169:23-170:3 (Morel)); (3) loss of royalties

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<sup>7</sup> *See also Adobe Sys. Inc. v. Feather*, 895 F. Supp. 2d 297, 303 n.5 (D. Conn. 2012) (plaintiff could not recover statutory damages under both Copyright Act and DMCA); *Blue Moon Media Group, Inc. v. Field*, No. CV 08–1000, 2011 WL 4056068, at \*7 n.2 (E.D.N.Y. Apr. 11, 2011) (refusing to award damages under both Copyright Act and DMCA).

because Corbis had difficulty licensing as many uses as it might have for the prices it might have (Tr. 179:11-24 (Morel)); (4) loss of a reasonable license fee or royalty rate that AFP and/or Getty Images would have paid for the Photos-at-Issue (Tr. 205:18-207:6; 208:1-210:18 (Morel)); and (5) distress at not getting credit for his photographs, (Tr. 177:5-25; 204:1-20 (Morel)). The first four of these categories were the subject of Morel's claims for damages for copyright infringement and are fully compensated by the damages award for that infringement.

Only the fifth category could stand apart from damages for infringement, but copyright law does not redress moral outrage or personal distress. “[T]he justification of the copyright law is *the protection of commercial interests of the artist/author*. It is not to coddle artistic vanity or to protect secrecy, but to stimulate the creation by protecting its rewards.” *Salinger v. Colting*, 607 F.3d 68, 81 n.9 (2d Cir. 2010) (emphasis added) (quoting *New Era Publ'ns Int'l, Aps v. Henry Holt & Co.*, 695 F. Supp. 1493, 1526 (S.D.N.Y. 1988)); *see also Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002) (“hurt feelings” have “no place” in calculating actual damages). While the DMCA might redress reputational injury when it translates into economic harm (Final Pretrial Conference Tr. 14:21-15:11, reserving on this question on in limine motion),<sup>8</sup> Morel's conclusory and vague testimony regarding his failure to receive credit – if it is anything other than sheer speculation – evidences at most a personal affront not the requisite economic injury.

Specifically, Morel testified that he felt “[as] if I got stabbed in the heart because Lisandro and AFP stole a very important moment in my life that I waited for for a long time, a

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<sup>8</sup> The legislative history of § 1203 does not reveal any intent by Congress to redress emotional harm or any other damage not cognizable under the copyright act as it then existed. *See* S. Rep. 105-190, at 17 (1998) (noting, with respect to § 1203, that “[s]uch monetary relief is available under the current Copyright Act”). Defendants are aware of only one case that states, in *dicta*, that a plaintiff may recover for foreseeable emotional harm in a copyright infringement case. *Smith v. NBC Universal*, No. 06 Civ. 5350, 2008 WL 483604, at \*1-2 (S.D.N.Y. Feb. 22, 2008) (Scheidlin, J.). But Judge Scheindlin acknowledged that “the only relevant case either party has provided the Court holds that emotional damages are not recoverable under the Copyright Act” and refused to admit evidence of emotional harm at trial in that case because such harm was not foreseeable. *Id.* at \*2.

moment that I would get credit for for covering such a big event.” Tr. 177:10-13 (Morel). *See also* Tr. 204:18-20 (Morel) (noting that “AFP and Suero already stole a very important moment in my life”).<sup>9</sup> He also testified that his feelings were hurt when he did not get the compliments he felt he deserved on Twitter: “When I looked on Twitter, Lisandro was getting all the compliments, everybody was sending him thousands of compliments from around the world, the very first compliments, he was getting all of them, Lisandro was getting all of them and I was not.” Tr. 177:14-18. But he did not testify that the mis-crediting of his photos caused anyone in the business to think less of him or caused him to lose a job or other business opportunity. Indeed, the *only* evidence the jury heard about Morel’s professional reputation after the Haiti earthquake was that he won a prestigious World Press Association award for his Haiti photos and his photographs were exhibited—properly attributed to him—throughout the world in 2010. Tr. 221:20-222:6 (Morel). Because there is no evidence from which a reasonable jury could conclude that Morel suffered any distinct economic injury—as opposed to emotional harm—as a result of the purported DMCA violations, judgment as a matter of law should be granted.

**E. Morel Is Entitled to At Most One Statutory Damages Award.**

Assuming *arguendo* that the Court finds that Morel presented sufficient evidence of both the requisite intent and of non-duplicative, DMCA-specific damages, it should grant judgment as a matter of law finding that he is entitled to statutory damages for at most one DMCA violation and remitting the statutory award. Defendants renew all of the arguments presented in their *in limine* motion (Dkt. Nos. 242, 252) and on their pre-verdict Rule 50 motion (Tr. 817:18-818:15 (argument)). Defendants respectfully disagree with the Court’s ruling that § 1203 authorizes

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<sup>9</sup> To the extent the loss of Morel’s “moment” (Tr. 177:11; 204:18 (Morel)) deprived him of the ability to license his photographs, that damage would likewise be co-extensive with the harm from copyright infringement.

statutory damages on a per-work basis, without regard to distinct injury (Tr. 893:1-896:16 (Court ruling)), for two reasons.

First, the parallel this Court drew between § 504(c) and § 1203(c) is flawed. While § 504(c) specifically delineates how it overrides the common-law bar to double recovery – expressly stating that one award per work is permissible, but also cabining the potential for multiple awards by specifying that an award pertains to “all infringements involved in the action” – § 1203(c) has none of the same specificity. It simply states that a plaintiff may recover one award per “violation” without defining that term. Without a clear indication that a separate violation does not require separate harm, § 1203 should not be construed so as to alter the common law rule against double recovery. *See* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012) (“The better view is that statutes will not be interpreted as changing the common law unless they effect the change with clarity.”).

Second, just because § 1203(a) functions to identify who may sue for a violation (Tr. 895:1-22 (Court ruling)) does not mean that it does not *also* impose a substantive limitation on what the term “violation” means. Section § 1203(a) provides: “Any person injured by a violation of section 1201 or 1202 may bring a civil action in an appropriate United States district court *for such violation*.” (emphasis added). If Congress merely intended to confer standing on a person injured by a violation, then it could have left out the limiting language “for such violation” and used more general language, like that found in § 605(e) of the Communications Act, a highly similar statutory damages provision based on the term “violation”<sup>10</sup>: “Any person aggrieved by any violation of subsection (a) of this section or paragraph (4) of this subsection

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<sup>10</sup> Notably, the Second Circuit has rejected a broad reading of the term “violation” in § 605(e). Instead of finding a “violation” each time a descrambling device is used – as appears to be contemplated by a literal reading of the statutory language – the court held that “a violation occurs each time a device is purchased and installed” in order to limit “the potentially far-reaching scope of this prohibition.” *Cnty. Television Sys., Inc. v. Caruso*, 284 F.3d 430, 435 (2d Cir. 2002).

*may bring a civil action in a United States district court or in any other court of competent jurisdiction.*” 47 U.S.C. § 605(e)(3)(A) (2013) (emphasis added). This Court’s interpretation reads “for such violation” out of § 1203(a), violating the canon that all words of a statute are to be given effect. *See Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985) (“[W]e must give effect to every word that Congress used in the statute.”); *Reiter v. Sonostone Corp.*, 442 U.S. 330, 339 (1979) (“In construing a statute we are obliged to give effect, if possible, to every word Congress used.”).

Because Morel presented no evidence from which the jury could find that he suffered more than a single even theoretical injury as a result of the purported violation, judgment as a matter of law limiting the number of DMCA violations to one and remittitur to \$2,500.00 should be granted.

**IV. REMITTITUR OR A NEW TRIAL IS APPROPRIATE  
BECAUSE THE AWARD OF MAXIMUM STATUTORY DAMAGES  
IS SHOCKINGLY EXCESSIVE.**

As noted at the outset, under Rule 59(a), this Court may grant a new trial or condition that grant upon remittitur of the verdict either where a specific error caused the jury to include the verdict a quantifiable amount that should be stricken or where the award is “intrinsically excessive.” Both of these defects permeate the jury’s statutory damages award in this case, as explained below.

**A. No Evidence Supported a Finding that Morel Suffered \$275,000 in Actual Damages.**

First, a specific error infected the jury’s statutory damages award, rendering the entire award unsupportable and excessive. One of the six *Bryant* factors is “the revenue lost by the copyright holder.” *Bryant v. Media Right Prod., Inc.*, 603 F.3d 135, 144 (2d Cir. 2010). The verdict form reveals that the jury grossly overestimated the actual damages Morel suffered. This Court explained the law pertaining to actual damages as follows:

To prove actual damages, plaintiff can introduce evidence of lost sales, lost opportunities to license, or diminution in the value of the copyright, or he can simply show he did not receive a license payment from the defendant. Where the plaintiff relies on a defendant's failure to pay a licensing fee, he may recover as actual damages only the fair market value of a license covering the defendant's infringing use. Whatever a plaintiff's theory of actual damages, an award under Section 504(b) cannot be based on undue speculation.

Final Pretrial Conference Tr. 10:21-11:5 (citing *On Davis v. The Gap*, 246 F.3d 152 (2d. Cir. 2001)). The record is devoid of evidence to support a finding of actual damages in any amount even close to \$275,000 – the amount the jury found.

**1. No Evidence Exists of Lost Sales or Lost Opportunities to License Beyond One Sale for \$500.**

The only non-speculative evidence<sup>11</sup> in the record of Morel's lost sales or lost opportunities is his testimony that he lost a \$500 sale to NBC. Tr. 171:6-24 (Morel). Morel offered no information, and there is none in the record, of any other negotiations to license his images. Consequently, an award for any *additional* lost sales or lost opportunities by Morel himself would necessarily be impermissibly speculative, given that Morel had no phone service and only intermittent access to the Internet through which to arrange the terms of potential license agreements. Tr. 170:8-171:5 (Morel) (“there was no power and there was no guarantee, that probably was my last chance.”)

**2. There Is No Evidence of Diminution in the Value of His Copyrights.**

Nor is there any evidence that the value of Morel's copyrights were diminished by defendants' infringement. Morel testified that he believed his agent, Corbis, was not able to license his images successfully when he belatedly authorized Corbis to act for him the day after

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<sup>11</sup> Actual damages may not be recovered if they are overly speculative, uncertain or unsupported by substantial evidence. See *On Davis v. Gap, Inc.*, 246 F.3d 152, 166 (2d Cir. 2001); *Hamil America, Inc. v. GFI*, 193 F.3d 92, 108 (2d Cir. 1999); *Abeshouse v. Ultragraphics, Inc.*, 754 F.2d 467, 470 (2d Cir. 1985); *Peter Pan Fabrics, Inc. v. Jobella Fabrics, Inc.*, 329 F.2d 194, 196-97 (2d Cir. 1964); *Hofmann v. O'Brien*, 367 Fed. Appx. 439, 443-44 (4th Cir. 2010); *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 708-09 (9th Cir. 2004); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 513-14 (9th Cir. 1985).

the earthquake, because “these pictures were already circulating all over by AFP.” Tr. 179:11-18 (Morel). But he did not offer any testimony, and no evidence exists, suggesting that Corbis would have been able to license to more customers, or at higher prices, than AFP and Getty Images were able to license, but for defendants’ infringement. To the contrary, Morel’s then-attorney complained that Corbis had not done enough to market these photos and that it charged prices far lower for them than Getty charged. Trial Ex. 320; Tr. 213:13-20; 214:21-215:21 (Morel). In other words, there is no evidence in the record to suggest that defendants’ infringing profits represent anything less than the fair market value of the photographs, or that their infringement in any way diminished the value of the images on a prospective basis.

**3. The Fair Market Value of a License Covering Defendants’ Infringing Use Could Not Be Greater than \$20,000.**

The evidence presented at trial would have allowed a reasonable jury to make a number of different calculations to determine the fair market value of a license agreement covering defendants’ infringing use, but none of them provide a fair market value in excess of \$20,000.

First, Vincent Amalvy of AFP testified that he would have been willing to pay Morel between \$15,000 and \$20,000 – after the fact – for the right to license the images. *See* Tr. 368:25-369:5 (Amalvy). Second, Getty Images entered a license agreement with a professional freelance photographer who was in Port au Prince Haiti when the earthquake hit, and paid him \$2,000 for four days of reporting and 44 images. Tr. 660:18-661:7; 662:8-14 (Bernasconi). Third, AFP and Getty Images earned revenues of no more than \$29,000 from licensing the images. Trial Exs. 137, 138, 264C; Tr. 1016:23-1017:1 (Morel summation). If Morel had given Corbis the right to license his photographs from the outset, and if Corbis had licensed the images for the same amounts and to the same number of customers as AFP and Getty Images combined, under the terms of his Corbis contract, Morel would have earned half of that amount, or \$14,500.

See Trial Ex. 303; Tr. 211:4-8 (Morel). Thus, the fair market value of a license for these images can clearly be no more than the maximum \$20,000 Amalvy was prepared to offer.

**4. The Jury Improperly Followed Plaintiff's Counsel's Suggestion of Calculating Actual Damages Using Unsupportable Speculation.**

In many cases, it is impossible to know how or why a jury reached an arbitrary or irrational conclusion. That is not the problem in this case: the jury bought Mr. Baio's unsupported hypothesis about actual damages offered on closing, hook, line and sinker. Indeed, the very first question they asked (Court Ex. 5) was: "Do we use the damages provided by the attorneys?" In response, the Court instructed the jury as follows: "The attorneys in their closing arguments argued from the evidence in the record and inferences that they believed you should make in accordance with that evidence. To the extent that you make factual findings consistent with those arguments, based on all of my instructions, you may agree with the amounts they stated. However, if you disagree with the lawyers about what the evidence shows, you should follow your conclusions, not what the attorneys argued." Tr. 1074:13-21. There was no evidence to support Mr. Baio's hypothesis, yet the jury adopted it wholesale.

Mr. Baio told the jury:

Let me move from the willfulness point to the next point in what you can consider in copyright infringement statutory damages. That's the expenses saved and profits earned by the defendants. You saw the fancy charts they put together about \$29,000, half of it was profit. . . . We're not disputing that they made that amount at all. But, you also have to figure and consider the third element, revenue lost, if any, by Mr. Morel as a result of their infringement. Now, they have a bunch of different ways of figuring that out. They had the \$275 day rate which I think is ridiculous. . . . How many downloads occurred from AFP and from Getty Images? How many people, companies, actually downloaded them? . . . So 662 and 334 is very close to 1,000. 996 downloads. . . . So, if you take 1,000 pictures, and multiply it by any one of those numbers that you decide is appropriate, if it's \$200 as they said on their chart per picture, that's \$200,000. If you use the higher number, \$1,000, well then it is \$1 million. You have to decide what is the appropriate per image cost. You have evidence that you can consider, evidence that they provided in evaluating what Mr. Morel lost as a result of those 1,000 downloads by others.

Tr. 1016:19-1019:3.

That the jury adopted this flawed theory is clear from the numbers and as a matter of logic. They multiplied the \$275 day rate Mr. Baio cited by his supposition of 1,000 downloads or sales, to conclude that Morel suffered “actual damages” of \$275,000. Not only did Morel tacitly admit that he could not possibly have made anywhere near that number of sales given the circumstances under which he was functioning, but the 1,000 downloads counsel referred to included downloads by *both* a la carte customers and subscription customers who purchased their subscriptions long before Morel’s photographs even existed. *See* Trial Exs. 137, 138, 264C, 265C; Tr. 506:15-508:9 (Gebhard); Tr. 681:9-16, 726:15-20, 728:19-729:24, 730:16-18, 731:2-10 (Calhoun).<sup>12</sup> There is not a scintilla of evidence in the record to suggest that subscription customers would have contacted Morel or Corbis to license the image if the images had not been available through Getty Images or AFP. The jury simply had no rational basis on which it could have concluded that Morel, whether alone or through Corbis, could have sold 1,000 photos and earned revenues *nine times higher* than what AFP and Getty Images were able to earn themselves. *Abeshouse v. Ultragraphics, Inc.*, 754 F.2d 467, 470 (2d Cir. 1985) (award under § 504(b) cannot be based “upon undue speculation,” including those awards that may result from unfounded assumptions); *Stevens Linen Assocs., Inc. v. Mastercraft Corp.*, 656 F.2d 11, 14–15 (2d Cir. 1981) (“The district court was correct in refusing to grant to [plaintiff] Stevens’ damages based upon the assumption that it would have sold the entire amount of fabric

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<sup>12</sup> Including subscription downloads is inconsistent with the Court’s instruction excluding subscription revenues from the juries’ consideration for calculation of infringing profits. Tr. 891:5-11 (Court ruling). The Court reasoned that “what evidence there is suggests that it is logically impossible for defendants’ subscription revenues to be caused by their infringing activity, because customers’ subscription decisions are made before Mr. Morel’s images were distributed.” Tr. 892:14-18 (Court ruling). Yet, in an effort to circumvent this ruling, Morel told the jury to take those very transactions into account as a measure of recovering plaintiff’s lost revenue, substituting the hypothetical per image license fee (\$275) for an allocated share of revenues.

sold by [defendant] Mastercraft.”). Furthermore, multiplying 1,000 downloads by the day rate simply does not make any logical sense.

In summary, no evidence in the record supports the jury’s wildly inflated finding of actual damages. Morel should not benefit to the tune of \$255,000 (\$275,000 - \$20,000) based on his counsel’s improper and unsupported suggestion that the jury could simply multiply a reasonable license fee by 1000.

**B. The Jury Verdict Awarding Maximum Statutory Damages Is Grossly Excessive.**

“To determine whether an award of damages is shockingly excessive, the court properly may look to the amount of damages awarded to other plaintiffs in cases involving comparable injuries.” *Fink v. City of New York*, 129 F. Supp. 2d 511, 531 (E.D.N.Y. 2001) (internal quotation marks omitted). The Second Circuit applies the “least intrusive” standard for calculating remittitur, reducing the verdict “only to the maximum that would be upheld by the trial court as not excessive.” *Trademark Res. Corp. v. Maxwell Online, Inc.*, 995 F. 2d 326, 337 (2d Cir. 1993). Under this standard, trial courts review the jury award “to determine whether it exceeded the reasonable range.” *Ismail v. Cohen*, 899 F.2d 183, 186 (2d Cir. 1990). Whether under an objective or comparative standard or both, the statutory damages award here significantly exceeds the reasonable range and therefore the Court should, at a minimum, remit the award to the maximum amount sustainable by the proof or order a new trial on copyright damages.

**1. Statutory Damages Awards Must Be Commensurate With Actual Injury.**

The Second Circuit has instructed that the following factors are relevant in determining the amount of statutory damages: “(1) the infringer’s state of mind; (2) the expenses saved, and profits earned, by the infringer; (3) the revenue lost by the copyright holder; (4) the deterrent effect on the infringer and third parties; (5) the infringer’s cooperation in providing evidence

concerning the value of the infringing material; and (6) the conduct and attitude of the parties.” *Bryant*, 603 F.3d at 144.

While proof of factors (2) and (3) – infringing profits and actual damages – is not a prerequisite to recovery of statutory damages, courts in this Circuit have long recognized that “**statutory damages are not intended to provide a plaintiff with a windfall recovery.**” *Peer Int’l Corp. v. Luna Records, Inc.*, 887 F. Supp. 560, 569 (S.D.N.Y. 1995) (Sotomayor, J.) (emphasis added). See e.g., *Rogers v. Ecolor Studio*, No. 11 Civ.4493, 2013 U.S. Dist. LEXIS 28332, at \*20 (E.D.N.Y. Feb. 7, 2013), adopted by 2013 U.S. Dist. LEXIS 27029 (E.D.N.Y. Feb. 27, 2013); *Arista Records LLC v. Furia Sonidera, Inc.*, No. 05 Civ. 5906, 2007 WL 922406, at \*3 (E.D.N.Y. March 26, 2007); *Peer Int’l Corp. v. Max Music & Entm’t*, No. 03 Civ. 0996, 2004 WL 1542253, at \*4 (S.D.N.Y. July 9, 2004); *Warner Bros., Inc. v. Dae Rim Trading, Inc.*, 677 F. Supp. 740, 769 (S.D.N.Y. 1988), *aff’d in part and rev’d in part on other grounds*, 877 F.2d 1120 (2d Cir. 1989). See also *EMI Entm’t World, Inc. v. Karen Records, Inc.*, 806 F. Supp. 2d 697, 701, 707-08 (S.D.N.Y. 2011) (noting that “**statutory damages cannot be divorced from economic reality**” and “[s]tatutory damages should bear some relationship to actual damages suffered”) (emphasis added), *vacated on other grounds*, No. 05 Civ. 390, 2013 WL 2480212 (S.D.N.Y. June 10, 2013). While a copyright plaintiff is not required to prove his actual damage, “the possible actual damage weighs in the Court’s analysis” on remittitur of a statutory damages award, because while “[o]ne purpose of statutory damages under the Copyright Act is to act as a substitute for actual damages when they are difficult to calculate . . . [,] statutory damages must still bear **some** relation to actual damages.” *Capitol Records, Inc. v. Thomas-Rasset*, 680 F. Supp. 2d 1045, 1053-54 (D. Minn. 2010) (emphasis added) (finding a jury statutory damages

verdict “shocking” and remitting the award to three times the statutory minimum), *modified on other grounds on appeal after new trial*, 692 F.3d 899 (8th Cir. 2012).<sup>13</sup>

The legislative history of § 504(c) confirms that Congress intended for statutory damages to bear a reasonable relationship to the damage suffered. The House Conference Report for the 1976 Act shows that Congress envisioned only *minimum* statutory damages awards absent proof of actual harm, and that courts would consider evidence of actual damages and profits in making a higher award:

[T]he plaintiff in an infringement suit is not obliged to submit proof of damages and profits and may choose to rely on the provision for *minimum statutory damages*. However, *there is nothing in section 504 to prevent a court from taking account of evidence concerning actual damages and profits in making an award of statutory damages within the range set out in subsection (c)*.

H.R. Rep. 94-1476, at 161 (1976) (emphasis added).

In 1999, when Congress raised the maximum statutory range to its present level, Senator Hatch, the bill’s primary sponsor, made clear that statutory damages ultimately must be “commensurate with the harm caused and the gravity of the offense”:

This will not mean that a court must impose the full amount of damages in any given case, or even that it will be more likely to do so. *In most cases, courts attempt to do justice by fixing the statutory damages at a level that approximates actual damages and defendant’s profits*. What this bill does is give courts wider discretion to award damages that are *commensurate with the harm caused* and the gravity of the offense.

145 Cong. Rec. 13,785 (1999) (Sen. Hatch) (emphasis added). There can be little doubt that Congressional intent in providing courts with wider discretion to monitor the outer limits of statutory damages awards and “attempt to do justice” was in part a reaction to the Supreme Court’s ruling just a year prior in *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340

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<sup>13</sup> As the First Circuit has observed, “Section 504’s text reflects Congress’s intent ‘to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.’” *Sony BMG Music Entm’t v. Tenenbaum*, 660 F.3d 487, 502 (1st Cir. 2011) (quoting *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935)).

(1998), requiring jury trial on all issues pertinent to an award of statutory damages under the Copyright Act. As commentators have noted, “*Feltner* has exacerbated the potential for excessive and arbitrary awards when skillful lawyers are able to persuade juries to become outraged about infringing conduct.” Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 Wm. & Mary L. Rev. 439, 472 (2009). It therefore falls to the Court to serve as a gatekeeper and reign in excessive jury verdicts and ensure damages awards are commensurate with the harm caused.

## **2. Courts Award Maximum Statutory Damages Only In Unusual Circumstances.**

Case law makes clear that maximum statutory damages are seldom awarded and never awarded absent unusual factual circumstances. “Courts generally only issue maximum statutory damage awards in situations where an infringer continues infringing activities after being put on notice by a court that its activities may constitute an infringement, or where the plaintiff shows the infringer’s high revenue or profit gained through infringement.” *CJ Prod. LLC v. Your Store Online LLC*, No. 11 Civ. 9513, 2012 U.S. Dist. LEXIS 96450, at \*12-13 (S.D.N.Y. July 12, 2012), *adopted by* 2012 U.S. Dist. LEXIS 143336 (S.D.N.Y. Oct. 3, 2012);<sup>14</sup> *see also Peer Int’l Corp. v. Max Music & Entm’t*, No. 03 Civ. 0996, 2004 WL 1542253, at \*4 (S.D.N.Y. July 9, 2004) (holding that “imposing the maximum penalty in this case would permit an unjustifiably large recovery” despite a finding of willfulness, and noting that “in this Circuit, the maximum statutory penalty is rarely awarded for copyright infringement, and in most cases only where a party is found to have deliberately ignored a court decision indicating that the party’s conduct

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<sup>14</sup> *CJ Products* cites as examples: *Kepner-Tregoe, Inc. v. Vroom*, 186 F.3d 283, 288-89 (2d Cir. 1999) (awarding maximum statutory damages after continued infringement after injunction against affiliated company), *Hounddog Prods., LLC v. Empire Film Grp., Inc.*, 826 F. Supp. 2d 619, 631 (S.D.N.Y. 2011) (awarding maximum statutory damages when defendant’s revenue was \$438,841.13 and profits were over \$100,000), and *Nat’l Football League v. PrimeTime 24 Joint Venture*, 131 F. Supp. 2d 458, 479-80 (S.D.N.Y. 2001) (awarding maximum statutory damages when infringement continued after contrary court decision).

constituted infringement”). For example, in *U2Home Entertainment, Inc. v. Lai Ying Music & Video Trading, Inc.*, 2005 WL 1231645 (S.D.N.Y. May 25, 2005), the Court imposed the maximum statutory damages award where defendant “flagrantly disregarded” the Court’s injunction and continued to infringe, “consistently failed to take [the] litigation seriously” and “refused to participate in discovery in any meaningful way” such that the court could not “ascertain the true extent of [defendants’] infringing activities.” Where, in contrast, defendants are “smaller-scale or shorter-term willful infringers,” the Court has rejected the “imposition of monumental statutory damages.” *Yurman Studio, Inc. v. Castaneda*, Nos. 07 Civ. 1241, 07 Civ. 7862, 2008 WL 4949775, at \*4 (S.D.N.Y. Nov. 19, 2008) (awarding a total damage award of \$18,000 for a “limited period of willful infringement.”).

Neither Defendant in this case engaged in the type of egregious behavior or infringed for a sustained period of time or gained the magnitude of revenues which would justify an award of maximum statutory damages. Application of the *Bryant* factors to the facts of this case illustrates the point.

*First*, while, as noted *supra* at Part II, AFP and Getty Images do not believe a reasonable jury would have found their conduct to be willful, but even if the Court upholds that finding, there was no direct evidence of AFP or Getty Images’ intentional wrongdoing, no evidence whatsoever of a pattern or practice of infringement, and certainly no evidence of truly aggravated conduct like piracy, counterfeiting, continued infringement after the lawsuit was filed, or infringement in defiance of court orders.

*Second and third*, as also discussed *supra*, Defendants’ total *revenue* (not infringing profits) was less than \$30,000, and the revenue lost by Morel could not possibly exceed \$20,000.

*Fourth*, the jury heard totally uncontroverted evidence that there is no need for deterrence since AFP and Getty Images have each already made changes to improve their systems and practices in response to what transpired in this case (Tr. 475:11-476:8 (Hambach); Tr. 585:1-586:6 (Gebhard)), and there was no evidence that those changes were inadequate or that the same or a similar occurrence of infringement has happened in the almost four years since the infringement at issue. Clearly, Plaintiff's counsel's repeated reference to the corporate wealth of Defendants also influenced the jury. But the idea is palpably absurd that Defendants should be "punished" to the maximum extent possible where there was no evidence of repeat offenses or a pattern or practice of infringing conduct; no evidence of the need for deterrence; and no evidence of concealment of either the nature or scope of the infringement. Deterrence is not the same as punishment: the former is intended to affect *prospective* behavior; the latter is a *retrospective* assessment of how much defendant must suffer for its past misdeeds. Combining counsel's unsupported conjecture with inflammatory rhetoric about corporate wealth may explain the verdict, but it cannot justify it.<sup>15</sup>

*Fifth and sixth*, Morel did not adduce any evidence that AFP or Getty Images failed to cooperate in providing evidence concerning the value of the infringing material; to the contrary, the *undisputed* evidence was that Getty Images prepared a licensing history and was prepared to submit it to Corbis (and had scheduled a meeting with Corbis), when Morel's former counsel, Barbara Hoffman, instructed Getty not to proceed maintaining that Corbis was no longer

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<sup>15</sup> Many cases specifically considering the need for deterrence along with defendant's size and corporate wealth have awarded far less than the maximum. *See, e.g., Stevens v. Aeonian Press, Inc.*, No. 00 Civ. 6330, 2002 WL 31387224, at \*1 (S.D.N.Y. Oct. 23, 2002) (awarding \$30,000 for each of 16 copyrighted works for wilful copyright infringement where defendants failed to cooperate fully in discovery and court intervention was required, and noting that "Defendants' financial circumstances also are relevant in determining an amount of damages that will serve to deter future infringing conduct"); *UMG Recordings, Inc. v. MP3.com, Inc.*, No. 00 Civ. 472, 2000 WL 1262568, \*6 (S.D.N.Y. Sept. 6, 2000) (awarding statutory damages of \$25,000 per infringing work and noting "while the defendant's size and financial assets are highly relevant to arriving at the appropriate level of statutory damages, the Court declines to engage in speculation as to what might be the effect of any award on other litigants").

authorized to act for Morel. Trial Ex. 315; Tr. 775:3-776:15 (Cameron). It is also undisputed that Getty Images discontinued distribution of any of Morel's images on February 2, 2010 – two weeks after receiving them from its licensing partner – upon receipt of the first notice from Corbis that some of Morel's images, attributed to Lisandro Suero, were still on Getty's website. Trial Ex. 261; Tr. 762:23-765:11 (Cameron). Similarly, AFP promptly prepared and produced download and revenue charts detailing the uses of Morel's photographs, which Morel used at trial. Trial Exs. 137, 138; Tr. 785:25-792:1 (Tarot). And again, the evidence adduced at trial showed that AFP issued a caption correction within one hour of learning Morel was the true photographer, and killed the photographs approximately eighteen hours after learning of Corbis' involvement. Trial Exs. 19A, 27, 29, 30. Notably, nothing was presented to the jury that Getty Images or AFP failed to comply with discovery or failed to provide witnesses (unsurprisingly since the Defendants did cooperate in discovery and comply with the requirements of the Federal Rules of Civil Procedure).

Given these undisputed facts, the jury's grant of the maximum statutory award was intrinsically excessive. The jury simply ignored the relevant factors in favor of providing a sympathetic plaintiff with a large recovery. But “[w]hile a jury has broad discretion in measuring damages, it ‘may not abandon analysis for sympathy for a suffering plaintiff and treat an injury as though it were a winning lottery ticket.’” *Scala v. Moore McCormack Lines, Inc.*, 985 F.2d 680, 684 (2d Cir. 1993) (quoting *Nairn v. Nat'l R.R. Passenger Corp.*, 837 F.2d 565, 568 (2d Cir. 1988) (internal quotation marks and citation omitted)).

**3. Courts Routinely Award Significantly Smaller Statutory Damages Awards for Similar (and More Egregious) Conduct Resulting in Similar Harm.**

From a comparative standpoint, the record evidence at trial is more consistent with decisions consistently awarding statutory damages in a range between \$20,000 and \$50,000 per

work for infringements not involving grossly willful behavior or high revenues. *See, e.g., Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1001, 1012 (2d Cir. 1995) (awarding \$25,000 per work for willful infringement of sweater designs); *Lucerne Textiles, Inc. v. H.C.T. Textiles Co.*, No. 12 Civ. 5456, 2013 WL 174226, at \*3-4 (S.D.N.Y. Jan. 17, 2013) (awarding \$30,000 per work for willful infringement of fabric design); *Rogers*, 2013 U.S. Dist. LEXIS 28332, at \*22 (awarding \$50,000 per work for willful infringement of short film after taking into account deterrence considerations where defendants “affirmatively misrepresented on their commercial website that the concept and storyline of [the infringed work] was the own creation”); *Telebrands Corp. v. HM Imp. USA Corp.*, No. 09-CV-3492, 2012 WL 3930405, at \*9-10 (E.D.N.Y. July 26, 2012) (awarding \$30,000 per work for willful infringement in light of “the need to send a signal to these defendants, as well as others, that they will pay a substantial price for willfully infringing the intellectual property rights of others”), *adopted by* 2012 WL 3957188 (E.D.N.Y. Sept. 10, 2012); *CJ Prods. LLC*, 2012 U.S. Dist. LEXIS 96450, at \*14 (awarding \$25,000 per work for willful infringement of stuffed animals); *EMI Entm’t World*, 806 F. Supp. 2d at 708 (awarding \$25,000 per work for willful infringement of musical compositions after taking into account “the need for deterrence and Defendants’ lack of cooperation”); *Lyons P’ship, L.P. v. D & L Amusement & Entm’t, Inc.*, 702 F. Supp. 2d 104, 117 (E.D.N.Y. 2010) (awarding \$25,000 in statutory damages per work for willful infringement of television characters); *Tar-Hong Melamine USA, Inc. v. Shun Hoa Trading Co.*, No. 08-CV-3962, 2010 U.S. Dist. LEXIS 49717, at \*13 (E.D.N.Y. Feb. 16, 2010) (awarding \$50,000 per work for willful infringement of tableware products), *adopted by* 2010 U.S. Dist. LEXIS 4114 (E.D.N.Y. Apr. 27, 2010); *M. Lady, LLC v. AJI, Inc.*, No. 06-CV-0194, 2009 U.S. Dist. LEXIS 36212, at \*11 (S.D.N.Y. Apr. 29, 2009) (awarding \$25,000 per work for willful infringement of jewelry

designs); *Scafa-Tornabene Art Publ'g Co.*, No. 03 Civ. 8273, 2007 WL 2469453, at \*4-5 (S.D.N.Y. June 4, 2007) (awarding \$20,000 per work for willful infringement of religious prints and concluding that “imposing the maximum penalty in this case would permit an unjustifiably large recovery”), adopted by 2007 WL 2469454 (S.D.N.Y. Aug. 31, 2007); *Richard Feiner & Co., Inc. v. Passport Int'l Prod., Inc.*, No. 97 Civ. 9144, 1998 WL 437157, at \*2 (S.D.N.Y., July 31, 1998) (finding an award of \$30,000 sufficient to both restore plaintiff and to serve the Copyright Act's deterrent function where defendants' combined revenues were \$15,500); *Spencer Promotions Inc. v. 5<sup>th</sup> Quarter Enters. Inc.*, No. C-94-0988, 1996 WL 438789, at \*6 (N.D. Cal. Feb. 21, 1996) (awarding \$25,000 per work for willful infringement of telecast and noting that awarding “the maximum penalty mechanistically, without engaging in some proportionality analysis, would be unconscionable”).

Cases involving photographs are no different and in fact show a typically lower range of \$11,000 to \$25,000 per work. *See, e.g., Burch v. Nyarko*, No. 06 Civ. 7022, 2007 WL 2191615, at \*3 (S.D.N.Y. July 31, 2007) (awarding \$15,000 per work for willful infringement of photographs); *Van Der Zee v. Greenidge*, No. 03 Civ. 8659, 2006 WL 44020, at \*1-3 (S.D.N.Y. Jan. 6, 2006) (awarding \$11,000 total for willful infringement of two photographs); *Wilen v. Alternative Media Net, Inc.*, No. 03 Civ. 2524, 2004 WL 2823036, at \*1-2 (S.D.N.Y. Dec. 3, 2004) (awarding \$20,000 per work for willful infringement of photographs), adopted by 2005 WL 167589 (S.D.N.Y. Jan 26, 2005); *E. Am. Trio Prods., Inc. v. Tang Elec. Corp.*, 97 F. Supp. 2d 395, 414-15, 419 (S.D.N.Y. 2000) (awarding \$25,000 per work for willful infringement of photographs); *Suze Randall Photography v. Reactor, Inc.*, No. 99 C 7812, 2000 WL 679922, at \*1 (N.D. Ill. May 12, 2000) (awarding \$150,000 total for willful infringement of eleven photographs).

Even in cases involving egregious forms of infringement like counterfeiting or blatant piracy, courts have awarded substantially less than the statutory maximum in the absence of evidence of substantial damages and/or infringing profits. *See, e.g., Telebrands Corp.*, 2012 WL 3930405, at \*10 (defendants imported and sold counterfeits of plaintiff's products; the Court awarded \$30,000 in statutory damages); *Adobe Sys. Inc. v. Feather*, 895 F. Supp. 2d 297, 299-303 (D. Conn. 2012) (court granted default judgment for software piracy and found willfulness but declined to award maximum statutory damages and instead awarded \$90,000 for each of the 28 copyrights identified); *Blue Ribbon Pet Products, Inc. v. Hagen (USA) Corp.*, 66 F. Supp. 2d 454 (E.D.N.Y. 1999) (awarding \$20,000 in damages for each of four copyrights at issue for willful sales of counterfeit ornaments, where defendants net sales of infringing products totaled \$44,307); *GMA Accessories, Inc. v. Megatoys, Inc.*, No. 01 Civ. 12743, 2003 WL 193507, at \*4 (S.D.N.Y., Jan. 14, 2003) (declining to award the maximum statutory damages of \$450,000 which "would result in a judgment approximately seven times larger than [the infringer's] gross revenues from the accused product" and instead finding that damages in the amount of \$132,975).

Since defendants' conduct did not include continued infringement after notice by a court or egregious behavior such as piracy or counterfeiting, and since they received only \$30,000 in revenues from their infringement, the award of the maximum statutory damages is shocking and unconscionable, divorced from economic reality, and constitutes the prototypical windfall recovery which should be remitted as a matter of fairness.

### **CONCLUSION**

For the foregoing reasons, this Court should grant AFP and Getty Images judgment as a matter of law that its conduct constituted "regular" not "willful" infringement or, in the alternative, grant a new trial on point; grant AFP and Getty Images judgment as a matter of law

on Morel's DMCA claims or, in the alternative, remit the DMCA award to \$2,500; and grant a new trial on damages or remit the statutory damages award to \$25,000 per infringement or a total of \$200,000.00.

Dated: New York, New York  
January 7, 2014

Respectfully submitted,

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