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6

7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10 **WESTERN DIVISION**
11

12 ADRIAN FALKNER, an individual,
13 Plaintiff,
14
15 v.
16 GENERAL MOTORS LLC, a Delaware
corporation; and DOES 1-10 inclusive,
17 Defendants.

CASE NO. 2:18-cv-00549-SVW-JPR
DEFENDANT GENERAL MOTORS
LLC'S MOTION FOR SUMMARY
JUDGMENT, OR IN THE
ALTERNATIVE, PARTIAL
SUMMARY JUDGMENT

CTRM: 350 W. 1st Street
Courtroom 10A
Los Angeles, CA 90012
DATE: July 23, 2018
TIME: 1:30 p.m.

1 TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

2 NOTICE IS HEREBY GIVEN that on July 23, 2018, at 1:30 p.m., or as soon
3 thereafter as counsel may be heard by the above-entitled Court, located at 350 West 1st
4 Street, Courtroom 10A, 10th Floor, Los Angeles, CA 90012, defendant General
5 Motors LLC (“GM” or “Defendant”) will and hereby does move the Court for
6 summary judgment against the causes of action asserted against Defendant in Plaintiff
7 Adrian Falkner’s (“Plaintiff’s” or “Falkner’s”) First Amended Complaint.

8 Defendant moves for summary judgment against the two claims asserted
9 against it, namely, the First Claim for Relief for copyright infringement, and the
10 Second Claim for Relief for violation of the Digital Millennium Copyright Act for the
11 falsification, removal or alteration of copyright management information. This
12 motion is made on the ground that there is no genuine issue as to any material fact and
13 that the moving party is entitled to judgment as a matter of law, F.R.C.P. 56(a), for the
14 following reasons:

15 Falkner’s First Claim for Relief for copyright infringement fails as a matter of
16 law, because the allegedly infringed mural is incorporated into a building, and
17 pursuant to 17 U.S.C. §120(a), photographing, distributing or reproducing
18 photographs of an architectural work such as a building and any artistic works that are
19 part of the building as a whole shall not constitute copyright infringement, *Leicester v.*
20 *Warner Bros.*, 232 F.3d 1212 (9th Cir. 2000); and

21 Falkner’s Second Claim for Relief for falsification, removal or alteration of
22 copyright management information in violation of the Digital Millennium Copyright
23 Act fails as a matter of law, because Plaintiff’s mural that was allegedly infringed
24 spans two perpendicular walls of an outdoor building, and the photographer of the
25 allegedly infringing photograph took a picture of one wall, without knowing that the
26 other wall, which was perpendicular to the first wall and was not visible in the
27 photograph, contained the artist’s alleged signature “Smash137”; thus, neither GM nor
28 the person who took the allegedly infringing photograph intentionally removed or

1 altered any copyright management information; the person who took the photograph
2 was not an employee of GM, and GM did not have the right or ability to control the
3 activities of the photographer; and neither GM nor the person who took the allegedly
4 infringing photograph distributed copies of the photograph knowing that copyright
5 management information was removed or altered or false, per 17 U.S.C. §1202(b), nor
6 did they distribute the photograph “knowing” or having “reasonable grounds to
7 know,” that the distribution of the photograph would “induce, enable, facilitate, or
8 conceal an infringement of any right under this title.” *Stevens v. CoreLogic, Inc.*, 194
9 F.Supp.3d 1046, 1051 (S.D. Cal. 2016), aff’d F.3d ____ (Dkt. No. 16-56089, 9th Cir.
10 6/20/18), Sl. Op. at 13

11 In the alternative, if the Court finds a genuine issue of material fact on any
12 claim(s) in the First Amended Complaint, Defendant will and hereby does move the
13 Court for partial summary judgment on the remaining claims, pursuant to Federal
14 Rule of Civil Procedure 56(g). In addition, Defendant will and hereby does move the
15 Court for partial summary judgment on Falkner’s claim for punitive damages
16 regarding each of his two claims for relief, on the ground that punitive damages are
17 not available under the Copyright Act.

18 This motion is made following the conference of counsel pursuant to L.R. 7-3
19 which took place via teleconference on June 13, 2018.

20 This motion is based upon this Notice of Motion and Motion, the accompanying
21 Memorandum of Points and Authorities, the declarations of Alex Bernstein, Paul
22 Margolis and Donny Nordlicht, the Statement of Uncontroverted Facts and
23 Conclusions of Law, the Proposed Judgment, all pleadings and papers on file in this
24 action, and upon such other matters as may be presented to the Court at the time of the
25 hearing.

26 DATED: June 25, 2018

/s/ Louis P. Petrich
LOUIS P. PETRICH
ELIZABETH L. SCHILKEN
LEOPOLD, PETRICH & SMITH, P.C.
Attorneys for Defendant
GENERAL MOTORS LLC

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant General Motors LLC (“Defendant” or “GM”) hereby submits this
3 Memorandum of Points and Authorities in support of its Motion for Summary
4 Judgment, or in the Alternative, Summary Adjudication (“MSJ”), as to the two claims
5 alleged in Plaintiff Adrian Falkner’s (“Plaintiff’s”) Corrected First Amended
6 Complaint (“FAC”) Dkt. 22.

7 **I. INTRODUCTION**

8 Plaintiff painted a large mural on two outside walls of the top floor of a parking
9 structure open to the public in Detroit, Michigan. In 2016, a Los Angeles freelance
10 automotive photographer who happened to be traveling in the city borrowed a 2017
11 model Cadillac car from Defendant and took a picture of the car next to one of the
12 outside walls of a public parking structure, with the city skyline in the background.
13 The photographer sent four photographs to GM, and Defendant posted the subject
14 photograph on its Facebook, Twitter and Instagram accounts. The photo prominently
15 featured the Cadillac automobile, the Detroit skyline and the portion of the public
16 structure and embedded mural that sat in front of the skyline, which included the
17 historic Wurlitzer building and Broderick Tower, including the humpback whale
18 mural on the side of Broderick Tower. Defendant included the tagline “The Art of the
19 Drive” in its posts. Plaintiff sued Defendant for copyright infringement and violation
20 of 17 U.S.C. §1202 prohibiting the removal or alteration of copyright management
21 information, and his lawsuit seeks punitive damages.

22 Plaintiff’s claim of copyright infringement is in direct contravention of the
23 rights granted to the public under copyright statute 17 U.S.C. §120(a), which provides
24 that anyone may make pictorial representations – such as photographs – of
25 architectural works without liability for infringement. This right to photograph an
26 architectural work extends to those portions of the work containing pictorial, graphic
27 or sculptural (“PGS”) elements. *Leicester v. Warner Bros.*, 232 F.3d 1212, 1219 (9th
28 Cir. 2000). Because Plaintiff’s mural is painted onto an architectural work it falls

1 squarely within the “pictorial representation” exemption, and his copyright
2 infringement claim should be dismissed.

3 As *Leicester* makes clear, in enacting the Architectural Works Copyright
4 Protection Act (AWCPA) – which granted independent copyright protection to
5 buildings for the first time – Congress did not intend for the pictorial representation
6 exemption to apply only to selected portions of an architectural work. *Leicester*, at
7 1219-1220, 1221, 1222. Rather, the AWCPA was intended to allow all parts of a
8 building to be photographed by the public. *Id.* at 1219-1220. As such, the
9 photographer (not a party to this action) was freely within his rights to photograph the
10 parking structure, including the wall containing Plaintiff’s mural. Similarly,
11 Defendant GM was free to distribute his photograph on its social media accounts
12 without liability for infringement.

13 Plaintiff’s second claim, invoking 17 U.S.C. §1202(b)(1-3) and alleging
14 removal or alteration of copyright management information (“CMI”), fails for several
15 separate reasons.

16 Although the allegedly infringing photograph does not include that portion of
17 the mural containing Plaintiff’s signature¹ – because the portion of the mural
18 containing Plaintiff’s signature is located on a wall not visible in the photograph, a
19 fact unknown to the photographer – the photographer did not “intentionally remove or
20 alter any” CMI as required to violate section 1202(b)(1) of the Act. The section of the
21 wall in the photograph is an exact depiction of that wall of the mural.

22 Even assuming that the photographer violated section 1202(b)(1), which he did
23 not, the photographer was neither an employee nor agent of Defendant GM;
24 Defendant GM is not vicariously liable for the taking of the photograph. The general
25 copyright rule regarding vicarious liability is not applicable here because unlike
26

27 _____
28 ¹ After this case was filed, GM determined that the photograph does contain a plaque
containing copyright management information – which would have complied with
such a requirement. Statement of Uncontroverted Facts (“SUF”) 30.

1 general copyright law where liability may exist without fault, section 1202(b)(1)
 2 requires that a defendant act “intentionally” and with knowledge.

3 When Defendant GM distributed the photograph, unaware that the photo did
 4 contain a plaque with CMI that was illegible and that a surface of the mural that
 5 contained CMI was not in the photo, GM did not act “knowing” that CMI had been
 6 removed or altered, as prohibited by section 1202(b)(2). Therefore, no removal or
 7 alteration occurred.

8 When Defendant GM distributed or publicly performed the photograph on the
 9 social network, it did not act “knowing” that CMI had been removed or altered
 10 without authority of “the law” in violation of section 1202(b)(3). Again, no removal
 11 or alteration occurred.

12 Finally, all three statutory prohibitions *additionally* require a showing under the
 13 last phrase of section 1202(b) that the New York-based employees of Defendant GM
 14 acted “knowing” or having “reasonable grounds to know,” that its distribution of the
 15 photograph would “induce, enable, facilitate, or conceal an infringement of any right
 16 under this title” but that was impossible because GM’s distribution was permitted by
 17 the section 120 exemption of the Act. *Stevens v. CoreLogic, Inc.*, ___ F.3d ___ (9th
 18 Cir. 6/20/18), Sl. Op. at 13 (“[T]he plaintiff must provide evidence from which one
 19 can infer that future infringement is likely...”).²

20 Plaintiff’s claims for punitive damages on both claims fail because such
 21 remedies are not available under the Copyright Act. For these reasons, set forth in
 22 detail below, the Court should grant Defendant’s Motion.

23 **II. STATEMENT OF FACTS**

24 **A. Plaintiff’s Claims**

25 According to Plaintiff’s FAC, ¶ 10, he is a resident of Switzerland, and a
 26 renowned artist, producing works under the pseudonym “Smash 137.” SUF 1. In
 27

28 ² Any claim that GM employees in question would have had intimate familiarity with
 the 10th floor of a parking structure in Detroit is speculative. *See Stevens, supra.*

1 2014, he was invited by a Detroit Art gallery to create “an outdoor mural as part of a
2 marketing project ... throughout a private parking garage.” SUF 2. He created the
3 “Mural on two perpendicular walls on a structure at 1234 Library Street in Detroit,
4 Michigan. Prominently placed on the left side of one of the Mural walls, Plaintiff
5 signed his name ‘SMASH 137’.” SUF 3-4.

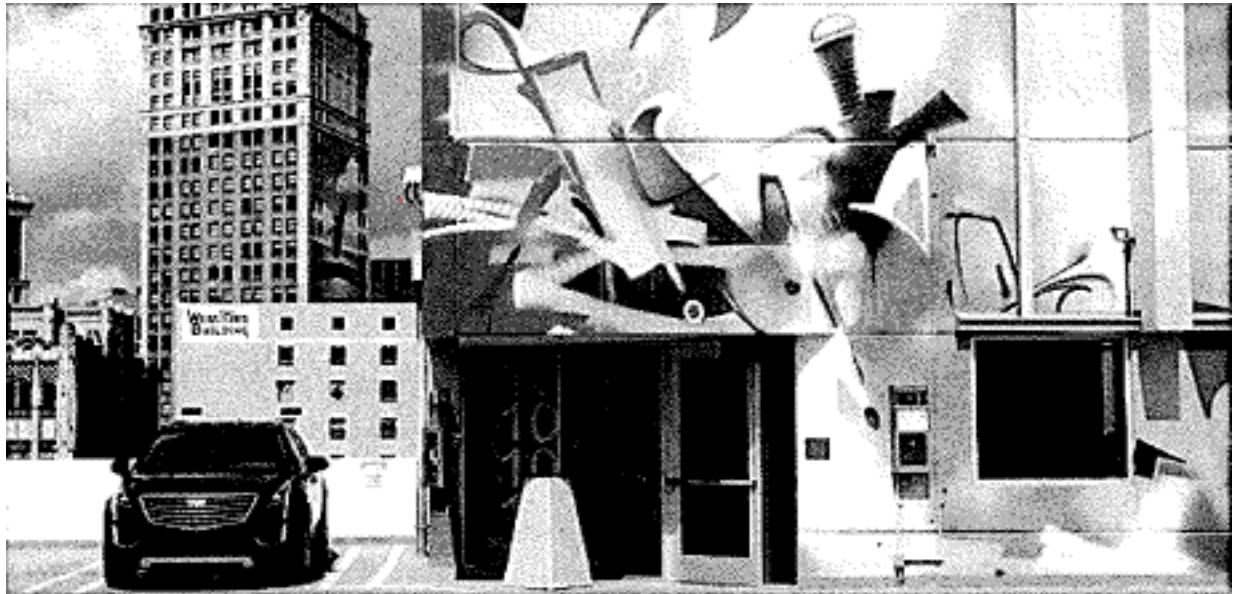
6 Plaintiff’s FAC asserts two federal claims. First, he alleges that in November
7 2016 Defendant GM infringed plaintiff’s copyright in the Mural by copying and
8 reproducing it on Cadillac’s Facebook, Instagram and Twitter accounts as part of a
9 campaign to advertise the new Cadillac XT5 vehicle, *id.*, FAC, ¶¶ 17-18, 32. Second,
10 he claims a violation of section 1202 of the DMCA asserting that GM “intentionally
11 removed that copyright information in the image used in the Campaign, in that the
12 Defendants’ photograph of the Mural is taken from an angle that renders the signature
13 not visible.” *Id.*, ¶40. He also alleges that GM acted “intentionally, knowingly, and
14 with the intent to conceal Defendants’ infringement of Plaintiff’s copyright in the
15 Mural.” *Id.*, ¶43.

16 Plaintiff claims to have applied for a federal registration of the Mural on
17 January 8, 2018. *Id.*, ¶30.

18 **B. The Photographing Of The Mural**

19 In August 2016, Alex Bernstein, a professional automotive photographer, who
20 works freelance traveled from Los Angeles to Detroit for the purpose of meeting with
21 various advertising agencies and presenting his photographic portfolio. SUF 8.
22 Bernstein, who had previously worked for automotive magazines as an editor and
23 photographer, was aware that automotive companies generally maintain “press fleets”
24 of vehicles for publicity purposes. These purposes include providing new model autos
25 to journalists for review. Needing a car to get around in Detroit, Bernstein contacted
26 Cadillac, a division of GM, and asked whether they had an auto available for him to
27 drive during his trip his visit in Detroit. SUF 9. He also mentioned that he could take
28 a few photographs of the vehicle as he was driving around Detroit and give those

1 photos to Cadillac. SUF 11. Cadillac provided him with a 2017 XT5 auto. Cadillac
 2 did not, however, provide any instruction to him as to what sort of photographs to take
 3 or how many. Cadillac did not have any control over the composition of the
 4 photographs he took. SUF 10, 12. Bernstein took four photographs of the XT5,
 5 including one at a 10-story public parking garage in downtown Detroit. SUF 13. He
 6 had been told there was a good view of the city skyline from the rooftop. Bernstein
 7 parked the XT5 on the roof, next to the portion of the parking structure that housed the
 8 elevator. He photographed the car with part of the city skyline in the background in
 9 the left third of the photograph, and a wall of the parking structure in the right two-
 10 thirds of the photograph. A portion of Plaintiff's mural appears on the wall in the
 11 photograph. A color copy of the picture is attached as Exhibit B to the Declarations of
 12 Alex Bernstein and Paul Margolis and the picture is reproduced in black and white
 13 below. SUF 14-16.



24 Plaintiff's mural in fact covers *two* walls – i) the wall appearing in the
 25 photograph; and ii) the wall perpendicular to it and beside the parked car. As can be
 26 seen above, the perpendicular wall is not visible in the photograph. It is the
 27 perpendicular wall which contains, in the lower corner closest to the back wheels of
 28 the car, the Plaintiff's "Smash137" signature. SUF 17. Bernstein did not know there

1 was a signature on this wall. Not knowing the mural was even signed, he had no
2 intention to exclude Plaintiff's signature in framing the photograph. He framed the
3 picture in the manner depicted above because he liked its composition and because it
4 included a portion of the city skyline. SUF 8, 18, 19, 20, 21.

5 Additionally, there is a small grey-colored plaque located on the wall just to the
6 left³ of the glass door in the photograph. This plaque contains the following text:

7 Adrian Falkner/Smash 137
8 Basel, Switzerland
'Between Tigers And Lions'

9 Bernstein has no recollection of noticing or reading this plaque. Although the plaque
10 is included in Bernstein's photograph, it is so small in the photograph that the text is
11 not visible. SUF 26.

12 After Bernstein turned the car back in to General Motors, Bernstein emailed to
13 a Cadillac representative in New York, who helped arrange the car loan for him, the
14 four photos he took of the XT5, including the parking structure photo. SUF 22.

15 **C. The Distribution And Public Display By GM Of Bernstein's**
16 **Photograph**

17 Defendant General Motors instructed its advertising agency to post the photo on
18 GM's Twitter, Instagram and Facebook accounts alongside Cadillac's logo and the
19 tagline, "The Art of the Drive." No one at General Motors who was responsible for
20 the photo's being posted was aware that: i) the mural covered an additional wall not
21 pictured in the photograph; ii) the portion of the mural on the additional wall
22 contained the "Smash137" signature or Plaintiff's name; or iii) there was a plaque
23 pictured in the photograph containing the title and name of the artist. SUF 22, 23, 26.

24 Plaintiff alleges that Defendant GM launched a campaign in November 2017 to
25 use the Mural in social media promotions. FAC, ¶¶17-18. Defendant GM received a
26 demand letter from Plaintiff's counsel in December 2017 and took down the photo.
27 SUF 24. This civil action was commenced on January 22, 2018. SUF 25; Dkt. 1.

28 _____
³ The plaque is to the right of the glass door, from the photographer's perspective.

1 **III. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT AS A**
2 **MATTER OF LAW ON PLAINTIFF’S CLAIMS FOR COPYRIGHT**
3 **INFRINGEMENT AND VIOLATION OF THE DMCA, AND ON**
4 **PLAINTIFF’S PUNITIVE DAMAGES CLAIMS**

5 **A. Legal Standard For Summary Judgment**

6 Rule 56(c) of the Federal Rules of Civil Procedure “mandates the entry of
7 summary judgment . . . against the party who fails to make a showing sufficient to
8 establish the existence of an element essential to that party’s case, and on which that
9 party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317,
10 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

11 If, on the other hand, the moving party has the burden of proof at trial, such as
12 on an affirmative defense, “the moving party must make a showing sufficient for the
13 court to hold that no reasonable trier of fact could find other than for the moving
14 party.” *Maynard v. State Farm Mut. Auto. Ins. Co.*, 499 F.Supp.2d 1154, 1159 (C.D.
15 Cal. 2007) (citing *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986)).

16 The nonmoving party must respond to the motion with “significant probative
17 evidence.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 91
18 L.Ed.2d 202 (1986). “The nonmoving party cannot avoid summary judgment by
19 relying solely on conclusory allegations that are unsupported by factual data....
20 Instead, the opposition must go beyond the assertions and allegations of the pleadings
21 and set forth specific facts by producing competent evidence that shows a genuine
22 issue for trial.” *Jacobson v. Schwarzenegger*, 650 F.Supp.2d 1032, 1044 (C.D. Cal.
23 2009) (citations omitted).

24 Under Rule 56(a), a party may move for summary judgment or partial summary
25 judgment, “identifying each claim or defense – or the part of each claim or defense –
26 on which summary judgment is sought.”

27 **B. Plaintiff’s First Claim For Relief For Copyright Infringement Is**
28 **Barred By 17 U.S.C. §120(a)**

Plaintiff’s infringement claim fails as a matter of law because the parking

1 structure and any pictorial, graphic or sculptural works that are incorporated into it
 2 may be freely photographed without liability pursuant to the Architectural Works
 3 Copyright Protection Act (“AWCPA”). 17 U.S.C. §120(a) (the “pictorial
 4 representation exemption”). The pictorial representation exemption codified in 17
 5 U.S.C. §120(a) provides:

6 The copyright in an architectural work that has been constructed does
 7 not include the right to prevent the making, distributing, or public
 8 display of pictures, paintings, photographs, or other pictorial
 9 representations of the work, if the building in which the work is
 10 embodied is located in or ordinarily visible from a public place.

11 *Id.* (emphasis added).⁴ A pictorial, graphic or sculptural (“PGS”) feature embedded or
 12 incorporated into a building⁵ is subject to the same pictorial representation exemption
 13 as the underlying architectural work. *Leicester v. Warner Bros.*, 232 F.3d 1212, 1219
 14 (9th Cir. 2000). That is, a member of the public may photograph a PGS work
 15 embedded in the architectural work without liability for copyright infringement. *Id.*
 16 This is true regardless of whether the PGS work is “conceptually separable” from the
 17 architectural work itself. *See id.* at 1222 (Tashima, J., concurring).

18 In *Leicester*, motion picture studio Warner Bros. filmed an office building at the
 19 corner of Figueroa and Eighth Streets in downtown Los Angeles for the blockbuster
 20 movie *Batman Forever*. *Id.* at 1214, 1215. Four highly stylized sculptural towers on
 21 the building site were pictured in a few scenes of the movie. *Id.* at 1215. The artist
 22 who created the towers sued Warner Bros. for copyright infringement, and Warner
 23 Bros. argued that there was no liability for distributing pictorial representations of the
 24 towers, relying on the Section 120(a) exemption. *Id.* at 1215. The court held that
 25 because the four towers were part of the underlying architectural work (the office

26 ⁴ The pictorial representation exemption in §120(a) is not intended to protect only
 27 tourists and casual photographers but also those who undertake to photograph a
 28 building for profit (i.e., creating posters, *see Leicester v. Warner Bros.*, 232 F.3d
 1212, 1217 (9th Cir.) (quoting H.R. Report No. 101-735) 1990).

⁵ The parking structure constitutes an architectural work because it is a building. 17
 U.S.C. §101 (architectural works include “building[s]”). Buildings include “structures
 ‘that are used, but not inhabited by human beings....’” *Leicester*, 232 F.3d at 1218.

1 building), Section 120(a) applied to the four towers and Warner Bros. was not liable
2 for infringement. *Id.* at 1219.

3 In an attempt to avoid the Section 120(a) exemption, the plaintiff argued that
4 the sculptural towers were entitled to protection as separately copyrightable PGS
5 works, independently of the building. Prior to the enactment of the AWCPA, a PGS
6 feature that was embedded into a building⁶ was protected separately under copyright if
7 it was “conceptually separable” from the useful article itself – meaning that the PGS
8 feature could stand on its own as a work of art traditionally conceived, and the
9 building in which it was embodied would be equally useful without it. *See id.* at 1219,
10 n.3. The artist contended that the sculptural towers were conceptually separable from
11 the building as a whole, and thus entitled to separate protection as PGS works. As
12 separately copyrightable PGS works, plaintiff argued, the Towers were not subject to
13 the pictorial representation exemption for architectural works.

14 The Ninth Circuit rejected this argument. The majority opinion, written by
15 Circuit Judge Rymer, stated that the towers were not “conceptually separable” from
16 the underlying architectural work. However, Circuit Judge Tashima, who agreed with
17 the majority opinion that Warner Bros. did not commit infringement⁷, wrote a separate
18 concurring opinion stating that the conceptual separability analysis was not relevant at
19 all under the facts of the case. He explained that since the enactment of §120(a) in
20 1990, the conceptual separability doctrine did not apply to PGS features embedded in
21 architectural works:

22 [T]he district court found it unnecessary to decide whether the
23 streetwall towers were conceptually separable because it concluded as
24 a matter of law that **“the enactment of Section 120(a) had the effect
of limiting the conceptual separability concept to situations not
involving architectural works.”** The district court concluded its

25
26 ⁶ PGS features incorporated into buildings can include such items as: stained glass
27 windows; murals; graffiti; gargoyles; bas relief sculptures; advertisements painted
28 on architectural works.

⁷ Judge Rymer wrote the majority opinion; Judge Tashima wrote the concurring
opinion, and Judge Fisher dissented.

1 analysis of the Architectural Works Copyright Protection Act
 2 thusly:

3 If this interpretation is correct, the former doctrine of
 4 ‘conceptual separability’ as it applied to pictorial, graphic or
 5 sculptural work embedded as part of a building, has been
 6 modified by the 1990 amendments. The court adopts this
 7 interpretation of the Act.

8 ...I agree with this conclusion as applied to the facts of this case.

9 *Id.* at 1221 (emphases added). Judge Tashima thus agreed with the District Court’s
 10 conclusion that the conceptual separability analysis no longer applied to PGS elements
 11 embedded in buildings. Such works were subject to the same “pictorial
 12 representation” exemption as the underlying building, whether they were conceptually
 13 separable or not. A contrary reading of Section 120(a), he wrote, would frustrate the
 14 legislative purpose behind the enactment of Section 120(a):

15 Under the dissent’s reading of the [statute], any copyrightable
 16 architectural work containing conceptually separable PGS elements
 17 (e.g., stained glass windows) would receive full copyright protection
 18 ..., while those containing “original design elements” which are not
 19 separable would be subject to the “pictorial representation”
 20 exemption. The difficulty with this interpretation is that it is
 21 completely unclear how a potential infringer—or an artist or architect,
 22 for that matter—would be able to distinguish between the two,
 23 especially considering that this circuit has never addressed the
 24 conceptual separability doctrine and there is no uniform standard
 25 elsewhere. To require one to wade through the morass of conceptual
 26 separability before he can exercise the right granted by § 120(a) and
 27 be assured that his pictorial representation is non-infringing cannot be
 28 what Congress intended. See H.R. REP. NO. 101–735, at 6952 (1990)
 (stating that protection for architectural works should be determined
 “free of the separability conundrum presented by the useful articles
 doctrine applicable for [PGS] works”).

29 *Id.* at 1222 (first brackets added). Judge Tashima noted that “one of the goals of the
 30 1990 amendments [to the Copyright Act] was to protect architectural works ‘free from
 31 entanglement in the controversy over design protection and conceptual separability.’”

32 *Id.* at 1223 (brackets added) (quoting the Congressional Record). Responding to the
 33 dissent’s argument that the conceptual separability analysis should apply, Judge
 34 Tashima wrote, “[T]he dissent’s approach would necessitate – in every case in which
 35 ornamental elements appear in an architectural work – a determination of whether any

1 part of the work constitutes a conceptually separable sculptural work entitled to PGS
2 protection, which is precisely the result Congress sought to avoid.” *Id.* at 1224. In
3 other words, the public should not be forced to engage in an analysis of whether any
4 features of an architectural work are “conceptually separable” whenever snapping a
5 photograph of a building.

6 Here, similar to the sculptural towers in *Leicester*, the mural is part of the
7 underlying architectural work (the parking structure). The public may photograph the
8 structure and distribute those photographs pursuant to §120(a), including PGS features
9 that are incorporated into the structure. Moreover, the public’s right to photograph the
10 structure includes the right to photograph all sides of the structure. The public’s right
11 to photograph buildings under §120(a) would be drastically impaired if, for example,
12 the front façade of a building could not be photographed due to the presence of
13 sculptural embellishments, or if a side of the building dotting a downtown skyline
14 could not be photographed due to the presence of a painted advertisement. (Indeed,
15 another large pictorial artwork appears on the side of the building photographed by
16 Bernstein, in the background of the allegedly infringing photo.) SUF 19. As noted
17 by Judge Rymer, writing for the majority in *Leicester*:

18 When copyright owners in architectural works were given protection for
19 the first time in 1990, the right was limited by §120(a) so that publicly
20 visible buildings could freely be photographed. Having done this, it
would be counterintuitive to suppose that Congress meant to restrict
pictorial copying to some, but not all of, a unitary architectural work.

21 *Id.* at 1219-1220 (emphasis added). Here, if separate copyright protection existed in
22 the mural, the public would be required to obtain a license from the artist before
23 photographing certain outdoor walls of the structure.⁸

24
25
26 ⁸ Even the dissenting judge in *Leicester*, Circuit Judge Fisher, who advocated that the
27 conceptual separability analysis *should* apply to PGS works embedded in buildings,
28 felt that a work that fully “dominates” a building should not be deemed “conceptually
separable” and thus not entitled to separate copyright protection. *See id.* at 1233
 (“[W]here a PGS work so fully dominated an architectural work that reproduction of
the architectural work would be impossible without infringing the artist’s PGS
copyright ... a trial court could find that the PGS work was so integrated into the

1 As noted in *Leicester*, in enacting the AWCPA Congress sought to avoid
2 application of the conceptual separability analysis to architectural works and, by
3 extension, to any PGS features incorporated therein. *Id.* at 1223. This is the only
4 interpretation of Section 120(a) that is practicable, given the prevalence of PGS
5 features on architectural works. The right to make pictorial representations would be
6 severely diminished if the public were required to do a “conceptual separability”
7 analysis of decorative elements such as bas relief sculptures before photographing a
8 building. Moreover, the right to photograph buildings would be severely diminished
9 if the public had to obtain a copyright license from the artist who created the
10 decorative element, or else face liability for infringement. Congress intentionally
11 created a bright line broad exemption – instead of relying on “fair use” or
12 separability – to protect the public’s right to keep city skylines truly public. The
13 owners of The Chrysler Building, the Empire State Building, the U.S. Bank Tower,
14 the Wilshire Grand Center, or Disney Concert Hall have no power to make their
15 buildings un-photographical without a license through the expedient of painting a
16 mural on them.⁹

17 The photographer who took a picture of Plaintiff’s mural was engaging in
18 conduct meant to be protected under the statute – taking a photograph of a building
19 located in or visible from a public place. He was not a trespasser. Section 120(a) and
20 *Leicester* provide that such conduct is immunized from liability for infringement,
21 regardless of whatever PGS elements may be incorporated into the building.
22 Plaintiff’s copyright infringement claim therefore fails as a matter of law.

23
24
25
26 architectural work that it was not conceptually separable and, therefore, effectively
27 lost its PGS status.”).

28 ⁹ The photograph which is the subject of this litigation also includes a depiction of the
historic Wurlitzer building and Broderick Tower, with its mural of a humpback whale.
SUF 19.

1 **C. Plaintiff’s Claim For Violation Of Section 1202 Of The DMCA Fails**
2 **As A Matter Of Law, Because Defendant Did Not Act Intentionally**
3 **Or Knowingly To Remove Or Alter Copyright Management**
4 **Information**

5 Plaintiff’s First Amended Complaint pleads a claim for violation of the
6 provisions of the Digital Millennium Copyright Act (“DMCA”) governing the
7 falsification, removal or alteration of copyright management information (“CMI”).¹⁰
8 Section 1202(b) prohibits the removal or alteration of CMI, as follows:

9 No person shall, without the authority of the copyright owner or the
10 law –

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

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

17 or

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

22 knowing, or, with respect to civil remedies under section 1203, having
23 reasonable grounds to know, *that it will induce, enable, facilitate, or*
24 *conceal an infringement of any right under this title.*

25 *Id.* (emphases added). The statute expressly requires that a defendant “intentionally”
26 remove or alter CMI, or distribute works “knowing” that CMI has been removed or
27 altered, in order to face liability. *Id.*; *see, Stevens v. Corelogic, Inc.*, 194 F.Supp.3d
28 1046, 1052-1053 (S.D. Cal. 2016) , *aff’d* ___ F.3d. ___ (9th Cir. 6/20/18) (where
software company’s software allegedly deleted metadata containing CMI from
Plaintiffs’ photographs, liability did not attach because “Plaintiffs present no evidence
that [defendant] intentionally removed CMI, as opposed to removal being an

¹⁰ Although Plaintiff’s FAC suggests that this count includes allegations of
“falsification” of copyright management information, *see* FAC at 8:21, 10:5, no such
falsification allegations appear anywhere in the FAC. The FAC only alleges removal
or alteration of copyright management information.

1 unintended side effect of the fact that the software platform was based on a library that
 2 failed to retain metadata by default.”) (citing *Kelly v. Arriba Soft Corp.*, 77 F.Supp.2d
 3 1116 (C.D. Cal. 1999)). “[I]t can be safely stated that a person who removes CMI by
 4 accident lacks the necessary mental ingredient.” 4 M. & D. Nimmer, *Nimmer on*
 5 *Copyright* §12A.10[B][1][b] (Matthew Bender, rev. ed. 2018)(“*Nimmer*” hereafter).
 6 As noted by the Nimmer treatise, each of the prohibitions set out in subsections (1) –
 7 (3) requires proof of the elements in those subsections and also requires proof under
 8 the closing clause applicable to each of them:

9 knowing, or, with respect to civil remedies under section 1203, having
 10 reasonable grounds to know, that it will induce, enable, facilitate, or
 11 conceal an infringement of any right under this title.

12 4 *Nimmer*, §12A.10[B][1][b] at 12A-192 (emphasis added).

13 1. No Violation Of Section 1202(b)(1)

14 Section 1202(b)(1) imposes liability on one who “(1) ***intentionally*** remove[s] or
 15 alter[s] any copyright management information.” (bracketed material added). The
 16 only evidence is that Alex Bernstein took the photo and delivered it to GM which
 17 distributed it in the form it received the photo. SUF 6, 13, 20, 22, 23.

18 a. The Photographer, Alex Bernstein, Was Not An 19 Employee or Agent of Defendant GM At Any Relevant 20 Time

21 It is undisputed that Bernstein was not an agent or employee of GM in 2016
 22 when the photography occurred. SUF 6, 10.

23 b. The Photographer Did Not Intentionally Remove Or 24 Alter CMI In Taking the Photograph

25 Plaintiff alleges that Defendant “intentionally” removed or altered CMI because
 26 the photograph does not include the wall containing Plaintiff’s signature. FAC, ¶40
 27 (“Defendants intentionally removed that copyright management information in the
 28 image ..., in that Defendants’ photograph of the Mural is taken from an angle that
 renders the signature not visible.”). As Bernstein’s declaration establishes beyond
 dispute, Bernstein was not aware there was a signature on the other wall of the mural

1 when he took the photograph. He framed the photograph the way he did because he
 2 liked its composition and because it included part of the city skyline. Additionally, he
 3 does not remember seeing or reading the plaque with the mural's title and name of the
 4 artist¹¹ which nevertheless is reproduced in the photograph. Thus, because he did not
 5 intentionally remove or alter any CMI, there is no violation of Section 1202(b)(1).
 6 SUF 6, 8, 10, 12, 13, 14, 16-22.

7 **c. Defendant GM Cannot Be Vicariously Liable For**
 8 **Bernstein's Conduct**

9 Even assuming *arguendo* that Plaintiff could produce any evidence that
 10 Bernstein was aware of the existence of Plaintiff's signature on the perpendicular wall
 11 (he can't) and that Plaintiff could cite authority that taking a photograph from a
 12 natural angle or perspective that leaves out CMI is actionable (there is no such
 13 authority), defendant GM is not vicariously liable for the photographer's conduct. *Cf.*
 14 *Gordon v. Nextel Communications and Mullen Advertising, Inc.*, 345 F.3d 922, 925,
 15 926 (6th Cir. 2003) (holding, in *dicta*, that defendants could be liable for the DMCA
 16 violations of the production company they hired to film TV advertisement, where
 17 vicarious liability existed due to (i) the right and ability to supervise the unlawful
 18 conduct of the production company, and (ii) a direct financial interest in the
 19 production company's conduct.); *but see Masterfile Corp. v. Bigsy Music, Inc.*, 2012
 20 WL 13015119, *9, n.6 (E.D. Pa.) (criticizing *Gordon* and stating, "We are unsure ...
 21 of the wisdom of applying [vicarious liability] to a statute that so clearly requires
 22 knowledge (whether actual or constructive) as a predicate for liability....") (brackets
 23 added).

24 What the *Gordon* court overlooked is that the imposition of vicarious liability
 25 without fault, i.e., without knowledge that an activity is infringing, in a general

26 _____
 27 ¹¹ Moreover, although the plaque as pictured in the photograph is too small to read,
 28 photographing it close enough to make the text visible would mean that Bernstein
 could not have composed the photograph the way he did, with the car and the city
 skyline in the background.

1 copyright infringement case is permitted because “lack of knowledge that the primary
 2 actor is actually engaged in infringing conduct is not a defense under these
 3 circumstances.” 4 *Nimmer*, §12.04[A][2] at 12-79 & n. 51 (citing cases). The DMCA
 4 provisions of section 1202 are conspicuously different; they only impose liability on
 5 proof of “intentional” and “knowing” conduct. *See Stevens v. CoreLogic, supra*.

6 Here, even if the Court chooses to entertain the possibility of vicarious liability
 7 for violations of §1202, GM had no right and ability to control the allegedly unlawful
 8 conduct of Bernstein. SUF 10-12, 22. Thus, even if Plaintiff had evidence that
 9 Bernstein acted intentionally – and Plaintiff does not – Defendant would not be liable
 10 for Bernstein’s actions.

11 2. No Violation of Section 1202(b)(2)

12 Section 1202(b)(2) provides that:

13 No person shall, without the authority of the copyright owner or the
 14 law –

15 (2) distribute or import for distribution copyright management
 16 information *knowing* that the copyright management
 information has been removed or altered without authority of
 the copyright owner or the law. (emphasis added).

17 When GM received the photograph from Bernstein, GM had no way of
 18 knowing there was even another side to the mural, much less that that side
 19 contained a signature. SUF 13, 17-22.

20 GM was also unaware until recently that there was a plaque depicted
 21 in the photograph with the mural’s title and name of the artist. GM’s
 22 distributed photograph thus reproduced the plaque as depicted in the photo; it
 23 did not alter or remove the CMI in it. SUF 26.

24 Thus, GM did not distribute the photograph with knowledge that any
 25 CMI had been removed or altered. Accordingly, there is no liability under
 26 Section 1202(b)(2).¹²

27
 28 ¹² The FAC contains no factual allegations that Defendant violated Section 1202(b)(2)
 or (3), which prohibits the *distribution* of removed/altered CMI or of works

1 **3. No Violation of Section 1202(b)(3)**

2 Section 1202(b)(3) provides:

3 No person shall, without the authority of the copyright owner or the law –
4 ...

5 (3) distribute, import for distribution, or publicly perform
6 works, copies of works, or phonorecords, knowing that
7 copyright management information has been removed or altered
8 without authority of the copyright owner or the law, (Emphasis
9 added).

10 When GM distributed the photograph on the social network, it did not act
11 “knowing” that CMI had been removed or altered.

12 **4. The Final Clause of Section 1202(b) Also Defeats The Claims
13 Under Subsections (1)-(3).**

14 Finally, Plaintiff cannot carry his burden of proving that Defendant GM acted
15 “knowing” or having “reasonable grounds to know” that its distribution or public
16 performance would “induce, enable, facilitate, or conceal an infringement of any right
17 under this title” as prohibited by the last phrase of section 1202(b). *Stevens v.*
18 *CoreLogic, supra.* GM had no such state of mind and any such state of mind would
19 have been legally impossible because distribution was exempted from liability by
20 section 120 of the Act.

21 For the all the foregoing reasons, the Second Claim for Relief against
22 Defendant for removal or alteration of CMI fails as a matter of law.

23 **D. Plaintiff’s Punitive Damages Claims Fail as a Matter of Law Because
24 Punitive Damages Are Not Available Under the Copyright Act**

25 Plaintiff’s FAC requests an award of punitive damages. FAC, ¶27; 11:5-6. As
26 there are only two claims in the FAC, both arising under the federal Copyright Act, as

27 containing removed/altered CMI, by one who has knowledge of the removal/
28 alteration. The FAC contains only allegations that Defendant violated Section
 1202(b)(1), which prohibits the intentional *removal or alteration* of CMI.
 Nevertheless, Defendant cannot be liable pursuant to subsections (2) or (3) for the
 reasons stated above.

