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UNITED STATES COPYRIGHT CLAIMS BOARD

DAVID G. OPPENHEIMER, Claimant, vs. DOUGLAS A. PRUTTON, Respondent.	Claim No. 22-CCB-0045 **PARTY STATEMENT OF CLAIMANT DAVID G. OPPENHEIMER**

1. **Background:**

Claimant David G. Oppenheimer is a long-standing professional photographer, based in North Carolina and noted for his live performance photography and aerial photography of cityscapes and landmarks. Of relevance to this case is an image taken from a helicopter of the Ronald V. Dellums Federal Building in Oakland, California (the "Photograph," attached as Exhibit A to Oppenheimer Declaration).

The Photograph is registered (and was registered prior to infringement) per the certificate of registration. (Exhibit B, Oppenheimer Decl.)

Defendant is a practicing personal injury attorney in the East Bay and proprietor of the website www.pruttonlaw.com. Wanting a photograph of the Federal Building in Oakland to illustrate the webpage "Where We Practice," and obviously preferring a quality aerial image to appeal to his market, Defendant scraped the Photograph from an Oppenheimer-authorized website, cropped the image (removing one of the watermarks on the Photograph shown in Exhibit C), and he put it up on his website to promote his legal practice. (Exhibit D, Oppenheimer Decl.)

Oppenheimer makes his photographic works available for print sales and licensing online at his website https://performanceimpressions.com. As is his practice, Oppenheimer clearly marked copies of the Photograph that he displayed with his copyright management information ("CMI") on the face of the work, embedded as metadata, and/or in adjacent legible captions. Oppenheimer's CMI on watermarks and captions of the Photograph both contain legible proper notice of copyright, and the CMI in the metadata includes notice of copyright, a declaration stating "All Rights Reserved," and usage licensing instructions in addition to Oppenheimer's address, phone number, email, and the Performance Impressions website URL. Defendant, himself or through his agent or employee, scraped the Photograph from World Wide Web, or from a search engine directly and placed it on Defendant's website to advertise and promote his legal services.

There are no defenses. Defendant, who is an attorney, has repeatedly sought to take personal cover by saying his daughter sourced the image from the Internet and uploaded the image, suggesting he was blameless because she hadn't alerted him that she (obviously his agent) had not obtained a license. Repeated requests were made to Defendant to make available for inspection the native file evidencing where the image came from and showing the CMI subsequently deleted. Defendant has never produced any native file, making Oppenheimer's evidence unrebutted.

2. Monetary Relief

Oppenheimer seeks statutory damages for infringement of the copyright in the Photograph.

As is well-established, statutory damages for infringement need not be grounded in actual damages, or for that matter, a denominator that must be a predictable multiple of a numerator of such proven damages. "A plaintiff may elect statutory damages regardless of the adequacy of the evidence offered as to his actual damages and the amount of the defendant's profits." *Columbia Pictures Indus., Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186, 1194 (9th Cir. 2001) (citation omitted). Those damages must be between $750-$30,000 for non-willful infringement.

There is NO relationship between a license fee and statutory damages that may be awarded. The full amount of statutory damages is available regardless of the actual losses. *See e.g., Capitol Records, Inc. v. Thomas–Rasset*, 692 F.3d 899, 908 (8th Cir. 2012) (finding statutory damages of $9,250 per work infringed reasonable despite lost license fee of $1.29 per work); *Sony BMG Music Entertainment v. Tenenbaum*, 719 F. 3d 67, 71 (1st Cir. 2013) (*citing St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66 (1919) ("Nor does giving the penalty to the aggrieved [party] require that it be confined or proportioned to his loss or damages; for, as it is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state")). See also the Supreme Court's opinion in *F.W. Woolworth Co. v. Contemporary Arts*, 344 U.S. 228, 233, 73 S. Ct. 222, 97 L. Ed. 276 (1952) ("The statutory rule, formulated after long experience, not merely compels restitution of profit and reparation for injury but also is designed to discourage wrongful conduct. The discretion of the court is wide enough to permit a resort to statutory damages for such purposes. Even for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy").

The evidence of willfulness is plain. Although no DMCA claim is made, the deliberate removal of the watermark and infringing despite notice of copyright is powerful evidence of willful infringement (and completely eliminates any claim of innocent infringement under 17 U.S.C. Section 401(d) as a matter of law). Mr. Prutton is an attorney; his efforts to deny knowledge of the law and skirt responsibility by saddling his daughter, who brought him the image, with the ultimate blame for the infringement is shameful.

Apart from Claimant's own longstanding experience in the photography licensing business, a primary source of the above estimate of value was from the use of the software program fotoQuote. The latter is well-recognized in the industry as the leader in helping photographers price, quote, and keyword their photographs. There is no "one size fits all" when using fotoQuote and, as required by the product user information, the following factors relevant

to the Photograph must be taken into consideration as affecting value:

-Aerial photograph (extra value with unique view)
-High risk (manned flight)
-High costs (out of state travel, helicopter charter)
-Use without attribution
-Use without watermark (not considering DMCA damages)
-1- year use
-Up 1/4 web page size
-Commercial Website – Promotional Regional Market

As set forth in the Declaration of David Oppenheimer, the annual license fee is calculated to be $2775, and hence the two-year license to be applied under the facts of this case would be $5500. (Exhibit E, Oppenheimer Decl.) As made clear in the Declaration of David Oppenheimer, Claimant is not seeking actual damages – only statutory damages. However, to the extent the Board wishes to consider the value of the use made by Respondent, this information is provided. Based on evidence of willfulness alone and the need for deterrence, particularly concerning those who are best equipped to behave lawfully, the evidence justifies the maximum award of $30,000.

Dated: November 28, 2022 LAW OFFICES OF LAWRENCE G. TOWNSEND

s/Lawrence G. Townsend
Lawrence G. Townsend
Attorney for Claimant
DAVID G. OPPENHEIMER

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UNITED STATES COPYRIGHT CLAIMS BOARD

DAVID G. OPPENHEIMER, Claimant, vs. DOUGLAS A. PRUTTON, Respondent.	Claim No. 22-CCB-0045 **DECLARATION OF DAVID G. OPPENHEIMER IN SUPPORT OF CLAIM**

I, David G. Oppenheimer, declare as follows:

1. I am the Claimant, and I make the following declaration in support of my claim.

2. I am a longtime professional photographer who is based in North Carolina, and I create photographs throughout the United States. I own all rights, including the copyright, in the photographic image asserted in this claim referred to herein as the "Work." The Work is an aerial photograph I took of the Ronald Dellums Federal Building in Oakland, California. A true and correct copy of the Work is attached hereto as Exhibit A.

3. I personally filed the application to register the Work with the United States Copyright Office that resulted in Registration No. VAu 1-282-763, issued and effective July 29, 2017. A true and correct copy of the copyright registration certificate is attached as Exhibit B and incorporated by reference. The copy of the Work relevant to this action that was deposited with the copyright registration application is shown as Exhibit A.

4. I make my photographic works available for print sales and licensing online at my website https://performanceimpressions.com and at the third-party websites of FineArtAmerica/Pixels, example displays of which are included as Exhibit C displayed the Work

with notices of copyright on the face of the work, embedded within its metadata, and/or in adjacent captions, to where Defendant was on notice that the Work was protected by copyright. Defendant copied and uploaded my Work for display on his website at www.pruttonlaw.com to promote his law practice. I know that Defendant copied and uploaded the Work onto his website for the reasons that follow.

5. On approximately June 4, 2018, I discovered the Work being displayed on the Defendant's website that was created to promote his legal practice. A true and correct copy of the Work as it appeared on Defendant's website is attached hereto as Exhibit D and incorporated by reference. The infringing copy of the Work that appeared on Defendant's website had none of my notices of copyright intact, and the bottom was cropped so there was no identifying watermark..

6. My complaint in federal court was filed on February 25, 2021. In the federal court action, where this claim originated, I waived recovery of actual damages, reserving my right to statutory damages under both 17 U.S.C. Section 504 and for DMCA violations under Section 1203. Although there are no DMCA claims in this forum and in the federal action I waived my right to recover actual damages, limiting my claim to statutory damages only, I do wish to call attention to what the actual damages would have been to the extent they may be considered in arriving at a just award of statutory damages in this claim.

7. Apart from my long-standing experience in the photography licensing business, the primary source of the estimate of value show below comes from the use of the software program fotoQuote. The latter is well-recognized in the industry as the leader in helping photographers price, quote, and keyword their photographs. There is no "one size fits all" when using fotoQuote and, as required by the product's user information, I ask that the following factors relevant to the Work be taken into consideration as affecting value:

-Aerial photograph (extra value with unique view)
-High risk (manned flight)
-High costs (out of state travel, helicopter charter)
-Use without attribution
-Use without watermark
-1-year use

-Up 1/4 web page size
-Commercial Website – Promotional Regional Market

8. The annual license fee is calculated to be $2775, and therefore the two-year license to be applied under the facts of this case would be $5500. A true and correct copy of the fotoQuote generated quote is attached as Exhibit E.

I declare under penalty of perjury under the laws of the United States that the above is true and correct and, if called upon to testify, I could and would competently testify thereto.

Executed in Asheville, North Carolina, on November 28, 2022.

DAVID G. OPPENHEIMER

EXHIBIT A

© 2017 David Oppenheimer

EXHIBIT B

Certificate of Registration

This Certificate issued under the seal of the Copyright Office in accordance with title 17, *United States Code*, attests that registration has been made for the work identified below. The information on this certificate has been made a part of the Copyright Office records.

Acting United States Register of Copyrights and Director

Registration Number

VAu 1-282-763

Effective Date of Registration:
July 29, 2017

Title

Title of Work: Aerial and Travel Photography from June of 2017 by David Oppenheimer

Previous or Alternate Title: Individual Unpublished Works - Aerial and Travel Photographs of San Francisco and Northern California and to/from California

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Ronald V. Dellums Federal Building and U.S. Courthouse Buildings in Oakland

Ronald V. Dellums Federal Building and U.S. Courthouse buildings at Oakland City Center in Oakland, California aerial - © 2017 David Oppenheimer - Performance Impressions aerial photography archives - www.performanceimpressions.com

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Ronald V. Dellums Federal Building and U.S. Courthouse Buildings in Oakland

by David Oppenheimer

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Lifestyle $35
Stationery $6
Phone Cases $32
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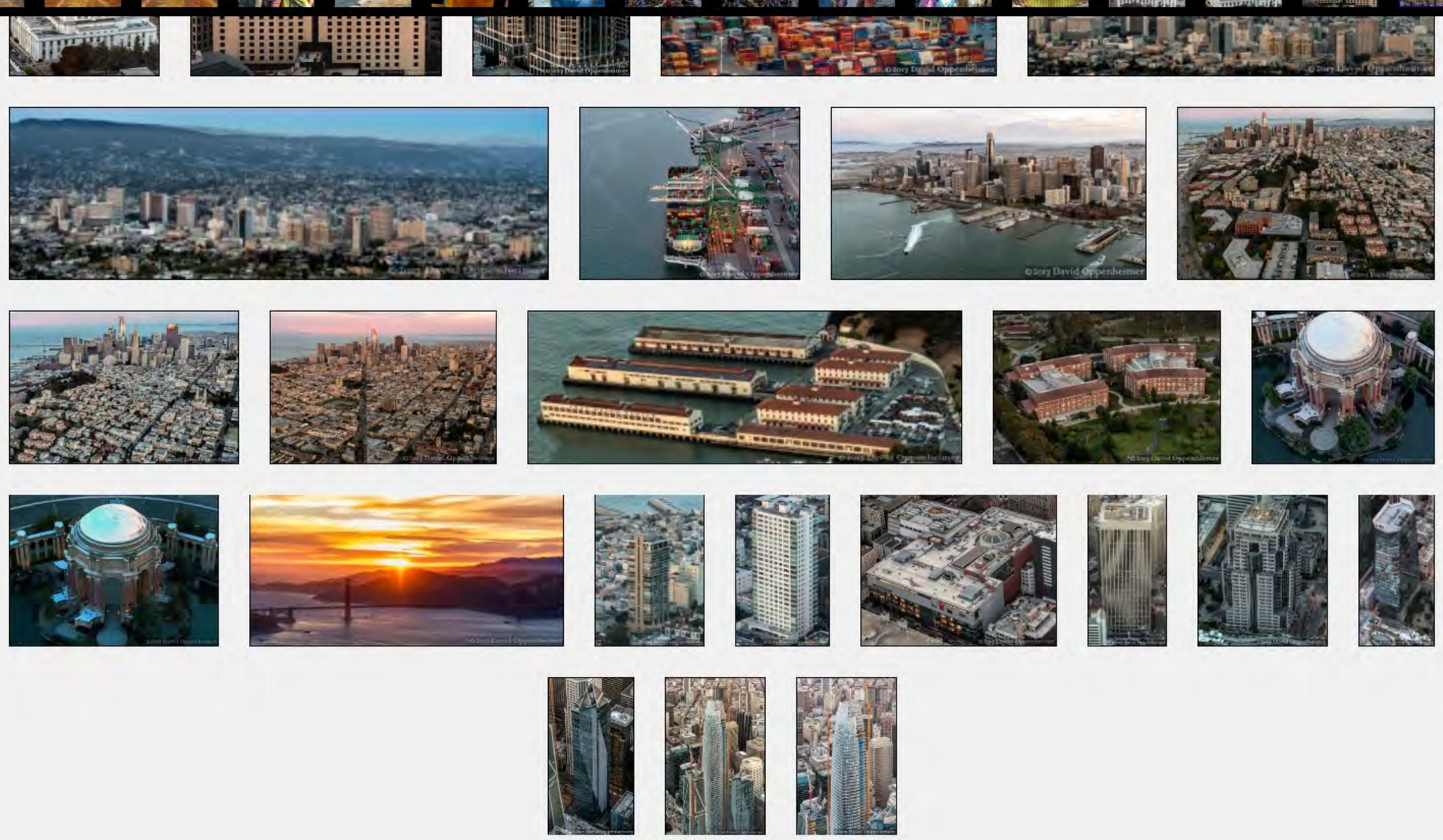

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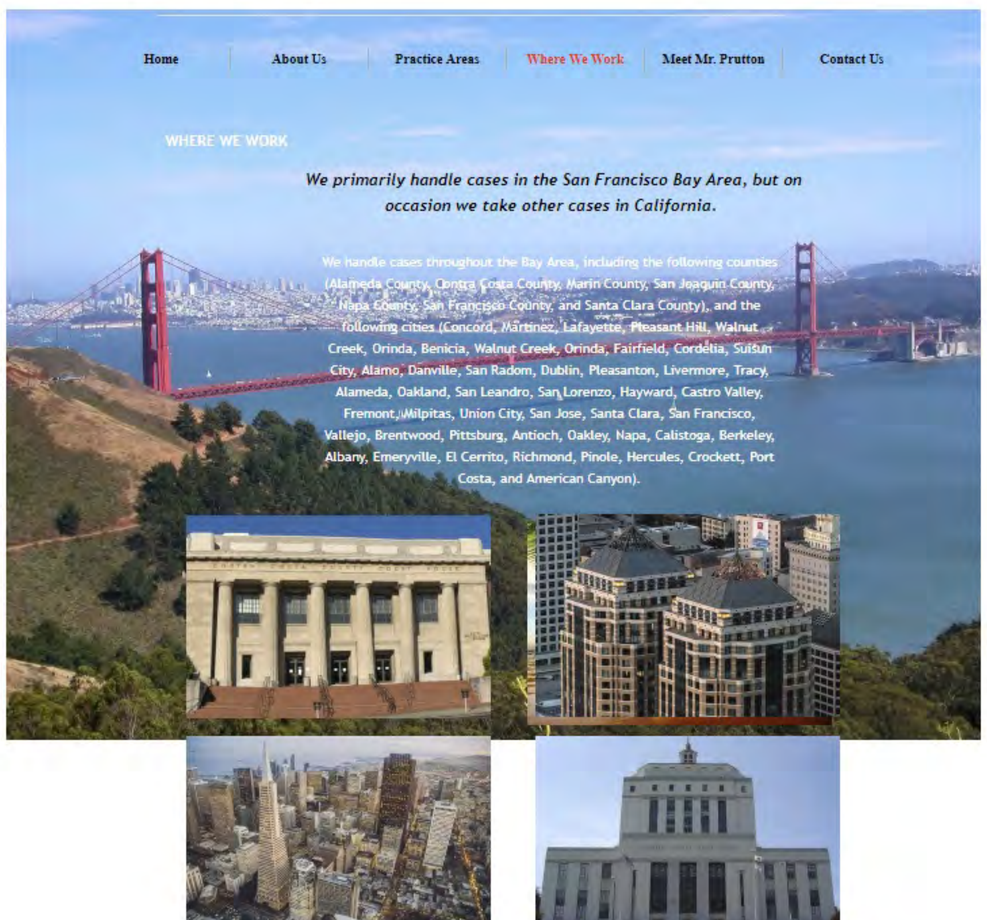

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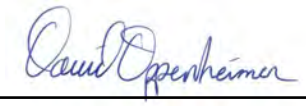

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