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10 UNITED STATES DISTRICT COURT  
11 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

12

13 ADRIAN FALKNER, an individual;

14 Plaintiff,

15 v.

16 GENERAL MOTORS LLC; and DOES  
1-10 inclusive.

17 Defendant.

18

Case No. 2:18-cv-00549-SVW-JPR

Honorable Stephen V. Wilson

**PLAINTIFF’S OPPOSITION TO  
MOTION FOR SUMMARY  
JUDGMENT**

Date: July 23, 2018

Time: 1:30 pm

Courtroom: 10A

19

Plaintiff Adrian Falkner respectfully submits this memorandum in opposition  
20 to Defendant General Motors LLC’s (“GM”) Motion for Summary Judgment, Or  
21 In The Alternative, Partial Summary Judgment (the “Motion”). GM’s Motion is  
22 based on two grounds: (1) that 17 U.S.C. § 120(a) (“Section 120(a)”), a statute  
23 permitting photography of works protected by architectural copyrights, represents a  
24 complete defense to Plaintiff’s copyright infringement claim and can be established  
25 as a matter of law; and (2) that Defendant can conclusively negate the intent element  
26 of Plaintiff’s 17 U.S.C. 1202(b) (“Section 1202”) claim for removal of copyright  
27 management information (“CMI”).

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## I. INTRODUCTION

Both of GM's grounds for summary judgment fail.

Section 120(a)'s photography exception does not apply to Plaintiff's mural.

As a threshold matter, GM cannot rely on the Section 120(a) defense because it has not shown that the parking garage housing Plaintiff's mural (the "Mural") qualifies as a protected "architectural work." Section 120(a) does not apply to all structures. To qualify, the work must include some degree of originality, and be something more than a functional combination of "standard features." Further, as the Federal Circuit found in 2010, structures that humans "access" but do not "occupy" (such as bridges and pedestrian walkways) are excluded from copyright protections. GM is not entitled to summary judgment because it makes no attempt to show these fact-intensive standards are met.

Even if the parking garage were an architectural work, GM's Section 120(a) defense would fail because it relies on a fundamental misunderstanding of the Architectural Works Copyright Protection Act (the "AWCPA," which added Section 120(a) to the code), and because under no stretch of the imagination, could Plaintiff's Mural be such an integral part of the parking garage architecture that they become part of one unitary architectural work.

In 1990, Congress for the first time expanded copyright protection to architectural works via the AWCPA—as was required for the U.S. to become a signatory to the Berne Convention. The legislation only *expanded* copyright protection—although it took back a bit of what it gave. Not wanting to turn every tourist at Walt Disney Concert Hall into an infringer, legislators wisely limited this expansion of copyright protection by specifically allowing photography *of architectural works* (which Congress determined was consistent with Berne). In other words, the legislation was not motivated by a desire to protect outdoor photography. Rather, it was legislation designed to protect architectural works to the extent required to comply with Berne.

1 This interpretation of the AWCPA is clear from the statutory language, the  
2 legislative history, and all applicable legal authorities. GM’s argument that the  
3 *Leicester* case holds otherwise could not be more incorrect. The contrary view that  
4 GM clings to—that the AWCPA eliminated protection for other works contained in  
5 a photograph of an architectural work—is a vastly oversimplified caricature of a  
6 view expressed only in Judge Tashima’s *Leicester* concurrence. The majority  
7 opinion and dissent each reject this view.

8 No court has ever applied Section 120(a) to somehow immunize infringement  
9 of a “pictorial, graphic or sculptural (‘PGS’) work” work simply because it appears  
10 in the same picture as an architectural work.<sup>1</sup> The *Leicester* case actually illustrates  
11 this point. There, the plaintiff/artist described his work as sculptural—but the court  
12 applied the Section 120 exception only because it found that there was no PGS  
13 work—but rather that the work in question was an integral part of a 24-story office  
14 building’s architecture, and thus simply one part of a unitary architectural work.

15 Given the extraordinary degree of integration of the plaintiff’s purported  
16 “sculptural work” into the building’s architecture, *Leicester* shows just how rare it  
17 will be that a purportedly independent work will be “part of” the architecture in this  
18 way. As a threshold matter, this was no mere sculpture. Rather it was a courtyard,  
19 garden, public space (including public benches), contained free-standing elements  
20 such as a fountain, which was contained by large walls that included decorative  
21 three-story high towers (the “Courtyard”). Many of the particulars of the work were  
22 mandated by architectural codes imposed by a development agency, and the work  
23 was built and planned along with the building. The Courtyard (especially the  
24 streetwall and towers) even matched the building’s architecture and were made of

25

26 <sup>1</sup> The legislative history of the AWCPA shows that Congress was aware of this issue. In a footnote  
27 about the special case of stained glass windows (which have a much greater claim to being part  
28 and parcel of the building), Congress found that treating the 2-D design as part of the architecture  
was inappropriate if the artist was someone other than the architect).

1 many of the same materials. In fact, the architect collaborated in the Courtyard to  
2 such an extent that he was deemed a joint author—and the artist even contractually  
3 acknowledged that the Courtyard was a product of his “collaborative design efforts”  
4 with the architect. In other words, it was quite a stretch for the artist to call the  
5 Courtyard his own sculptural work, as opposed to part of the architecture. *Leicester*  
6 *v. Warner Bros.*, 232 F.3d 1212, 1214 (9th Cir. 2000). Given that the Ninth Circuit  
7 panel was applying a clear error standard, it’s certainly no surprise that it found  
8 “powerful evidence” that the artist’s work was “part of the functional and  
9 architectural vocabulary of the building.” *Id.* at 1219.

10 Plaintiff’s Mural could not be more dissimilar. It was conceived of after the  
11 parking structure was built, has no relationship to the architecture, and plays no  
12 functional role. Its only relation to the architecture of the parking garage is that it is  
13 *on* an elevator shed.

14 GM has not conclusively established its lack of intent under Section 1202

15 GM’s argument that it has negated the “intent” element of Plaintiff’s Section  
16 1202(b) claim (for removal of copyright management information) fails because  
17 GM has not conclusively demonstrated lack of the required intent. To the contrary,  
18 GM’s sole support for its motion—self-serving declarations of the photographer and  
19 a GM spokesman claiming general ignorance as to Plaintiff’s signature on the  
20 Mural—lack credibility and are insufficient as a matter of law to establish the  
21 absence of intent. Under well-established principles, summary judgment is  
22 inappropriate when based on self-serving reports of lack of intent, and when  
23 credibility is at issue. Plaintiff does not rely on general principles: he offers specific  
24 evidence that calls into question the accounts of GM’s declarants. At very least,  
25 Plaintiff is entitled to discovery on these issues.

26 **II. GM IS NOT ENTITLED TO SUMMARY JUDGMENT ON**  
27 **PLAINTIFF’S COPYRIGHT INFRINGEMENT CLAIM.**

28 GM is not entitled to summary adjudication on Plaintiff’s copyright



1 infringement claim because it has not established that Section 120(a)'s architectural  
2 photography exception applies.

3 **A. GM bears a heavy burden.**

4 Where the moving party has the burden—as a defendant does on an  
5 affirmative defense—his showing must be sufficient for the court to hold that no  
6 reasonable trier of fact could find other than for the moving party. *Southern Calif.*  
7 *Gas Co. v. City of Santa Ana*, 336 F3d 885, 888 (9th Cir. 2003).

8 **B. Background of Section 120(a)'s architectural photography exception.**

9 Prior to 1990, the Copyright Act afforded no protection to architectural  
10 works. *Leiceste.*, *supra*, 232 F.3d at 1217. Buildings were considered “useful  
11 articles,” like apparel or furniture, which are not protected by copyright. *Id.*

12 While the cut of a tee shirt is not protected by copyright (because it is a useful  
13 article), a graphic design on a tee shirt is straightforwardly protected. Artistic  
14 elements on or attached to a useful article can be protected by copyright if they  
15 incorporate pictorial, graphic, or sculptural features that “can be identified  
16 separately from, and are capable of existing independently of, the utilitarian aspects  
17 of the article.” *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1008  
18 (2017). Thus, to take a simple and seminal example, even though a lamp is a useful  
19 article, a lamp base in the form of a Balinese dancer is copyrightable because one  
20 can imagine it existing on its own. *Mazer v. Stein*, 347 U.S. 201 (1954). In the same  
21 way, a painting on a building has always been copyrightable.

22 On March 1, 1989, the United States joined the Berne Convention for the  
23 Protection of Literary and Artistic Works. The Berne Convention required signatory  
24 countries to provide copyright protection for “three-dimensional works relative to ...  
25 architecture.” 1 Nimmer on Copyright, § 2.20, at 2–213 (quoting Berne Convention  
26 (Paris text), art. 2(1)). To comply with this treaty obligation, Congress passed the  
27 AWCPA. See H.R. Rep. 101–735, at 4–10 (attached as Exhibit O to Patterson  
28 Decl.). The AWCPA added a new category of protected work to the seven that

1 already existed in 17 U.S.C. 102: architectural works. The definition of  
2 “architectural work” (explained in detail below) was added to 17 U.S.C. 101 and  
3 supplemented in the Federal Register.

4 The legislative history of the AWCPA makes clear that its purpose was to do  
5 just enough to comply with Berne. H.R. Rep. 101-735, p. 10 (“The implementing  
6 legislation [of the Berne Convention] had one simple, but important objective: to  
7 make only those changes in U.S. law required to place the United States in  
8 compliance with our treaty obligations.”)

9 Worried that full protection for architectural works (like that afforded to all  
10 other categories, such as PGS works) would go too far, and finding that Berne did  
11 not require such full protection, Congress also enacted a significant limitation on the  
12 copyright protection afforded architectural works by also adding 17 U.S.C. 120 to  
13 the Act (also as part of the AWCPA). Section 120(a) provides that the holder of one  
14 of these new species of copyrights is not entitled to prevent photography of the  
15 architectural work (whereas all other copyrights do allow the holder to prohibit  
16 distribution photos). Section 120 reads:

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

20 The House Report explains the reason for exempting pictorial representations  
21 of architectural works from copyright infringement:

22 Architecture is a public art form and is enjoyed as such. Millions of  
23 people visit our cities every year and take back home photographs,  
24 posters, and other pictorial representations of prominent works of  
25 architecture as a memory of their trip. Additionally, numerous scholarly  
26 books on architecture are based on the ability to use photographs of  
27 architectural works. [¶] These uses do not interfere with the normal  
28 exploitation of architectural works. Given the important public purpose  
served by these uses and the lack of harm to the copyright owner’s  
market, the Committee chose to provide an exemption, rather than rely  
on the doctrine of fair use, which requires ad hoc determinations. After  
a careful examination of the provisions of the Berne Convention, the  
laws of other Berne member countries, and expert opinion, the  
Committee concluded that this exemption is consistent with our

obligations under the Convention. [H.R. Rep. 101–735, at 22.]

1  
2 **C. As a threshold matter, GM fails to demonstrate the parking garage is an**  
3 **architectural work.**

4 GM’s Section 120(a) argument relies on the premise that the parking garage  
5 which houses the Mural is indeed an architectural work. But its facile analysis fails  
6 to reflect the complexity of the question of whether any given non-traditional  
7 structure so qualifies. Not only does GM fail to explain the fact-intensive analytical  
8 framework, it offers no evidence (such as images of the structure) in support of its  
9 position. Indeed, GM’s entire analysis is contained in its footnote 5:

10 The parking structure constitutes an architectural work because it is a  
11 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. [Motion, at p. 8, fn. 5.]

12 **1. The definition of “architectural work” excludes utilitarian**  
13 **structures, such as bridges and walkways, that humans “access”**  
14 **but do not “occupy.”**

15 Copyright protection is limited to “original” works. *Feist Publ’ns, Inc. v.*  
16 *Rural Tel. Serv. Co.*, 499 U.S. 340, 349-50. “Originality” requires independent  
17 creation and at least “a modicum of creativity.” *Id.* at 346. The post-1990 Copyright  
18 Act defines an architectural work as “the design of a building as embodied in any  
19 tangible medium of expression, including a building, architectural plans, or  
20 drawings.” 17 U.S.C. § 101. It includes “the overall form as well as the arrangement  
21 and composition of spaces and elements in the design, but does not include  
22 individual standard features.” *Id.*

23 Administrative regulations supplement Section 101’s definition. They further  
24 define “buildings” (for purposes of Section 12(a) as “humanly habitable structures  
25 that are intended to be both permanent and stationary, such as houses and office  
26 buildings, and other permanent and stationary structures designed for human  
27 occupancy, including but not limited to churches, museums, gazebos, and garden  
28 pavilions.” 37 C.F.R. § 202.11(b)(2). The definition excludes “[s]tructures other

1 than buildings, such as bridges, cloverleaves, dams, walkways, tents, recreational  
2 vehicles, mobile homes, and boats;” and “standard features, such as windows, doors,  
3 and other staple building components.” *Id.* § 202.11(d)(1).

4 The legislative history sheds light on the outer limits of what can be  
5 considered an architectural work. Congress tweaked the definition of “architectural  
6 works” while considering the new law. In an early draft of the legislation, an  
7 “architectural work” was defined as “the design of a building *or other three-*  
8 *dimensional structure*, as embodied in that building or structure.” Congress had  
9 intended the phrase “three-dimensional structure” to cover cases where architectural  
10 works were embodied in innovative structures that defy easy classification. [H.R.  
11 101-735, at 19, 20.] The phrase was removed, however, out of concern that it could  
12 be interpreted as covering structures that are almost purely utilitarian—including  
13 bridges, cloverleaves, and pedestrian walkways. [*Id.*, at 20.] The committee  
14 determined that copyright protection for such works is not necessary to stimulate  
15 creativity or prohibit unauthorized reproduction. [*Id.*] Further, the committee  
16 determined that protection for such non-habitable utilitarian structures was not  
17 required in order to comply with the Berne Convention—which was the sole  
18 purpose of the law in the first place.<sup>2</sup> [*Id.*]

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19  
20  
21 <sup>2</sup> From the Committee Report: The Subcommittee made a second amendment in the definition of  
22 architectural work: the deletion of the phrase “or three- dimensional structure.” This phrase was  
23 included in H.R. 3990 to cover cases where architectural works embodied in innovative structures  
24 that defy easy classification. Unfortunately, the phrase also could be interpreted as covering  
25 interstate highway bridges, cloverleaves, canals, dams, and pedestrian walkways. The  
26 Subcommittee examined protection for these works, some of which form important elements of  
27 this nation’s transportation system, and determined that copyright protection is not necessary to  
28 stimulate creativity or prohibit unauthorized reproduction. [¶]The sole purpose of legislating at  
this time is to place the United States unequivocally in compliance with its Berne Convention  
obligations. Protection for bridges and related nonhabitable three-dimensional structures is not  
required by the Berne Convention. Accordingly, the question of copyright protection for these  
works can be deferred to another day. As a consequence, the phrase “or other three-dimensional  
structures” was deleted from the definition of architectural work and from all other places in the  
bill.

1           In *Gaylord v. United States*, the Federal Circuit considered the issue of  
2 whether the Korean War memorial in Washington D.C. met the definition of an  
3 “architectural work” under Section 101. In that case, a sculptor had sued the US  
4 Postal Service for copyright infringement based on the sale of stamps bearing a  
5 photograph of the sculptural work he created for the Korean War memorial in  
6 Washington D.C. *Gaylord v. United States*, 595 F.3d 1364, 1371 (Fed. Cir. 2010).  
7 The memorial covers 2.2 acres on the National Mall. It is made up of a 30-foot wide  
8 pool framed by two walls—the mural wall, containing images of soldiers,  
9 equipment, and people involved in the war; and the United Nations wall, containing  
10 the names of the 22 member nations that contributed troops or medical support to  
11 the Korean War effort. Between these walls, leading up to the pool, is a series of 19  
12 statues representing a platoon on patrol amidst blocks of granite depicting the  
13 rugged terrain of Korea.

14           The Postal Service argued that the memorial was an “architectural work,” and  
15 thus only afforded limited protection under Section 120. *Id.* The lower court rejected  
16 this argument because it found that the memorial (or at least the portion depicted in  
17 the photograph) was not a “building,” and therefore not an architectural work  
18 subject to Section 120. *Id.*, at 1381. The court reasoned that the memorial was akin  
19 to a walkway or a bridge in that it “permits individuals to access through it, but is  
20 not intended for occupancy.” *Id.* In affirming the decision, the Federal Circuit found  
21 no error in this reasoning, and quoted it with approval. *Id.*

22           **2. The definition of “architectural work” excludes non-creative**  
23           **design and “standard features.”**

24           As mentioned above, the definition of “architectural works” also explicitly  
25 excludes any “standard features” in a building’s design, such as “common windows,  
26 doors, and other staple building components.” 37 C.F.R. § 202.11(d)(2). The  
27 legislative intent behind this restriction was to avoid impeding the progress of  
28 architectural innovation by limiting the scope of copyright protection to those

1 elements of a building’s design that reflect the architect’s creativity. [H.R. 107-735,  
2 at p. 18.]

3 The legislative history further explains that the Act affords protection only if  
4 “the design elements are not functionally required”:

5 A two-stop analysis is envisioned. First, an architectural work should be  
6 examined to determine whether there are original design elements  
7 present, including overall shape and interior architecture. If such design  
8 elements are present, a second step is reached to examine whether the  
9 design elements are functionally required. If the design elements are not  
10 functionally required, the work is protectable without regard to physical  
11 or conceptual separability. [H.R. Rep. No. 101-735, at pp. 20, 21.]

12 **3. GM fails to establish that the parking garage or elevator shed are**  
13 **not just standard features and function-dictated design.**

14 It is anything but clear that the AWCPA extends copyright protection to the  
15 parking garage in question, and/or its elevator shed. Relying on its oversimplified  
16 analysis, GM does not bother to describe any creative elements of the garage, or  
17 provide any legal analysis on the issue. Accordingly, GM has not established that  
18 the parking garage is a copyright-protected architectural work.

19 Indeed, there are theoretical reasons to doubt that a parking structure could  
20 qualify as an architectural work. Parking structures are precisely the type of  
21 structure that Congress was concerned would be unnecessarily and improperly  
22 protected under the subsequently omitted phrase “other three-dimensional  
23 structures.” Unlike the “innovative structures” that Congress initially intended to  
24 (but ultimately did not) protect, parking structures are not difficult to classify—they  
25 are utilitarian structures, the design of which is often dictated almost exclusively by  
26 their function: providing convenient parking spots to as many cars as possible.  
27 Unlike a house, office building, church, museum, gazebo, or garden pavilion, a  
28 parking structure is not designed for human occupancy. Rather, a parking structure  
is more akin to those structures excluded from the definition of a “building” (i.e.  
bridges, cloverleaves, dams, walkways) that are not designed for human occupancy,



1 but rather to facilitate human transportation and access. Thus, until GM presents far  
2 more evidence regarding the design of the garage, it is not established to be an  
3 architectural work.

4 **D. Even if the parking garage is an architectural work, Section 120(a)**  
5 **doesn't apply here because the Mural is not an integral part of the**  
6 **architecture.**

7 GM appears to believe that Section 120(a) allows anyone to distribute a  
8 photograph of a building, even if the photograph contains other PGS works that  
9 would normally be protected by copyright. GM even describes the statute as  
10 granting “immunity.” [Motion, 2:19-21.] In this way, GM contends that the  
11 AWCPA significantly restricts copyrights in non-architectural works. Indeed, if  
12 GM’s view prevailed, all graffiti art that exists on a building—that is, *most* graffiti  
13 art—would suddenly be unprotected by copyright.

14 **1. The plain statutory language, as well as the legislative history,**  
15 **shows that Section 120(a)’s exception limits only the copyrights in**  
16 **architectural works.**

17 The statute provides that “The copyright *in an architectural work that has*  
18 *been constructed* does not include the right to prevent the making, distributing, or  
19 public display of pictures, paintings, photographs, of the work.” 17 U.S.C. 120(a). In  
20 other words, if someone claims the benefits of one of the newly-minted architectural  
21 copyrights, he or she must allow photography of such work. The statute does not  
22 suggest that the copyright in any other works, such as a PGS work on or attached to  
23 a building, would be limited in any way. The new law was clearly intended only as  
24 expanding the scope of protectible works to include new subject matter. There is no  
25 indication that anything previously protected by copyright is not still protected.  
26 *Davidson v. United States*, 2017 U.S. Claims LEXIS 841 (“the addition of Section  
27 120 was intended to extend copyright protections, however, not truncate them.”);  
28 see also Jane C. Ginsberg, *Commentary on the Visual Artists Rights Act and the*

1 *Architectural Works Copyright Protection Act of 1990*, 14 COLUM.- VLAJ.L.  
2 & ARTs 477,495 (1990) (“if a building contains elements separately protectable as  
3 pictorial, graphic or sculptural works (for example, a gargoyle), the unauthorized  
4 pictorial representation of that element may be an infringement of the pictorial,  
5 graphic or sculptural work (not of the work of architecture).”)

6 **2. The legislative history compels this interpretation.**

7 There is no question that the AWCPA was enacted for the sole reason that it  
8 was required for the U.S. to become a signatory to Berne Convention. H.R. Rep.  
9 101-735, at p. 20 (“The sole purpose of legislating at this time is to place the United  
10 States unequivocally in compliance with its Berne Convention obligations.”) The  
11 legislative history also leaves no question that Congress intended to do the minimum  
12 required to meet Berne’s requirements:

13 The implementing legislation [of the Berne Convention] had one simple,  
14 but important objective: to make only those changes in U.S. law required  
15 to place the United States in compliance with our treaty obligations. H.R.  
16 Rep. 101-735, p. 10.

17 In other words, Congress did not intend to change the protectability of pictorial,  
18 graphic or sculptural works attached to buildings.

19 This is confirmed by other express language in the legislative history of the  
20 AWCPA. Indeed, the House Report states quite directly that separately protectable  
21 PGS works may be permanently embodied in architectural works:

22 “The Subcommittee was aware that certain works of authorship which  
23 may separately qualify for protection as pictorial, graphic, or sculptural  
24 works may be permanently embodied in architectural works. Stained  
25 glass windows are one such example.” H.R. Rep. 101-735, p. 19, fn. 41.

26 Of such works, the Report makes clear that as long as the architect and artist are  
27 different people, each can recover for copyright infringement. *Id.*, at p. 20, fn. 41.

28 **3. The Ninth Circuit’s *Leicester* case compels this interpretation.**

In *Leicester v. Warner Brothers*, 232 F.3d 1212 (9th Cir. 2000), an artist  
collaborated with an architect to design a courtyard, and garden, surrounded by a  
“streetwall” featuring a number of towers topped with decorative designs. *Leicester*,



1 232 F.3d at 1214 . The Courtyard and surrounding wall were part of the design of an  
2 adjoining office building. *Id.* When elements of the streetwall appeared in the  
3 defendant’s Batman motion picture, the artist sued for infringement of his purported  
4 sculptural work. *Id.* at 1213. The court rejected this claim, finding that this was not a  
5 sculptural work attached to an architectural work—but rather one unitary  
6 architectural work that included the photographed elements. *Id.*, at 1219.  
7 Accordingly, the court found unauthorized photography of the architectural work  
8 (including the streetwall claimed by the artist plaintiff) was permitted. *Id.*, at 1219-  
9 1220.

10 GM’s heavy reliance on the *Leicester* case is misplaced. First, the fact  
11 differences in the cases demonstrate why GM’s motion fails. In *Leicester*, the  
12 building’s architecture and the claimed sculptural work (i.e. the streetwall, including  
13 the towers) were so intertwined as to be a single work. Perhaps aware of the  
14 fundamental and material factual differences, GM turns to abstract legal doctrine  
15 they claim can be found in *Leicester*. The problem with this approach is that GM  
16 cites largely to Judge Tashima’s concurrence on key points on which the other two  
17 Judges disagreed. Where GM cites to the majority opinion, it inexplicably interprets  
18 it as echoing the concurrence.

19 **a. *Leicester* is distinguishable because the purported sculptural**  
20 **work was simply part and parcel of the architecture.**

21 Mr. Leicester’s claim failed because his purported sculptural work was just a  
22 part of a unitary architectural work (comprising the building and Courtyard), rather  
23 than an independent PGS work. This conclusion was based on the extraordinary  
24 degree of integration of the Courtyard into the building, including:

- 25 • The building owner was required by the Los Angeles Community  
26 Redevelopment Agency (from which it purchased the land) to install public art,  
27 and to install a “streetwall” to box in the areas between the building and the  
28

1 street. *Leicester*, at 1214. The owner chose to meet these obligations by  
 2 commissioning the Courtyard project. *Id.*

- 3 • The Courtyard fulfilled obviously architectural functions, including those  
 4 mandated by the CRA. *Id.* For example, the CRA required the streetwall to  
 5 recreate the feeling of traditional downtown streets in which buildings touch each  
 6 other so as to create a continuous wall on both sides of the street. *Id.*
- 7 • The architect and artist worked together on the Courtyard, and entered into a  
 8 written contract acknowledging that the Courtyard was a product of the  
 9 collaborative design efforts of the artist and architect. *Id.*, at 1215. Indeed, the  
 10 trial court even found that the artist and architect were joint authors of some  
 11 aspects. *Id.*, at 1218.
- 12 • The CRA mandated that the Courtyard and building share common artistic and  
 13 architectural elements—and indeed, the court spent considerable time detailing  
 14 the ways in which the courtyard aesthetically matched the building. *Id.*, at 1217-  
 15 1219. To take a one example among many, the court noted that “The streetwall  
 16 matches the building and gives the impression that the building continues to the  
 17 end of the property line. The streetwall towers are designed to appear as part of  
 18 the building.” *Id.*<sup>3</sup>

19 **b. Two of the three *Leicester* opinions find that a protectable**  
 20 **PGS work can exist on or attached to an architectural work.**

21 GM also badly mischaracterizes *Leicester*’s three legal opinions. GM cites  
 22 *Leicester* for the general proposition that Section 120(a) permission to photograph  
 23 architectural works extends even to bona fide PGS works in the same image. If a  
 24

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25  
 26 <sup>3</sup> The court also noted “The streetwall towers were designed to extend the building visually, which  
 27 they do along both Figueroa and Eighth. The Eighth Street smoke towers are equally integrated  
 28 and serve the same purpose on Eighth as the Figueroa Street smoke towers do on Figueroa. This is  
 powerful evidence that they (together with the additional two lantern towers on Figueroa) are part  
 of the functional and architectural vocabulary of the building.” *Leicester*, 232 F.3d, at 1218.

1 poem were penned on the side of a building, GM believes it would be free to  
2 distribute a photograph thereof. More specifically, GM makes the following bold  
3 (and utterly misguided) assertions:

- 4 • “This right to photograph an architectural work extends to those portions of  
5 the work containing pictorial, graphic or sculptural (“PGS”) elements.” [1:25-  
6 27, citing *Leicester* at 1219.]
- 7 • A pictorial, graphic or sculptural (“PGS”) feature embedded or incorporated  
8 into a building is subject to the same pictorial representation exemption as the  
9 underlying architectural work. That is, a member of the public may  
10 photograph a PGS work embedded in the architectural work without liability  
11 for copyright infringement. *Id.* This is true regardless of whether the PGS  
12 work is “conceptually separable” from the architectural work itself. [8: 9-15,  
13 again citing *Leicester* at 1219.]

14 Based on these assertions, GM finds that “Because Plaintiff’s mural is painted  
15 onto an architectural work it falls “squarely within the ‘pictorial representation’  
16 exemption, and his copyright infringement claim should be dismissed” [Motion,  
17 1:28-2:2] and “is immunized from liability for infringement, regardless of whatever  
18 PGS elements may be incorporated into the building.” [Id., at 12:20-21.]

19 But as explained below, *Leicester* says no such thing. In fact, these  
20 propositions are pulled only from Judge Tashima’s concurrence. Not only was Judge  
21 Tashima alone in so reasoning, he stopped well short of endorsing the categorical  
22 proposition that GM attributes to him (and inexplicably to the majority).

23 To explain, some explanation of *Leicester*’s confusing three-way split is in  
24 order. The question that divided the justices (and which arises here) was indeed  
25 whether a PGS work that is attached to, or on, an architectural work enjoys the same  
26 copyright protection that it did before the AWCPA. The majority opinion did not  
27 need to take a position on this abstract issue, because it found there was no PGS  
28 work to consider—rather, there was only a unitary architectural work consisting of  
an office building that included the Courtyard.

Judge Tashima wrote a concurrence because he disagreed with the majority  
(and dissent) on this point. His view was that Section 120(a)’s permission to

1 photograph a building trumped and altered the copyright protections of PGS works  
2 embodied in buildings. In other words, he found that protection for architectural  
3 works in 17 U.S.C. § 102(a)(8) is now the exclusive remedy for PGS works  
4 embodied in an architectural work. *Id.* at 1222. Thus, he would have found for the  
5 defendant whether or not a separate PGS work existed. Judge Tashima is the only  
6 judge or academic to so reason.

7 Judge Fisher’s lengthy dissent offered a muscular argument for precisely the  
8 opposite conclusion (which is extremely close to Plaintiff’s position here): that  
9 Section 120(a) limited only the new species of copyrights enacted at the same time,  
10 rather than PGS copyrights as well.

11 As mentioned, Judge Rymer’s majority opinion obviously agreed with the  
12 concurrence in its ultimate result (no infringement because Section 120(a) applies).  
13 And while he need not have taken a position of the question that divided the other  
14 Judges, he did in fact break the tie in the dissent’s favor. He plainly expressed his  
15 view that a protected PGS work could exist on or attached to an architectural work  
16 by finding otherwise *only as a matter of fact*:

17 Leicester further maintains that the streetwall towers are a sculptural  
18 work which is ‘conceptually separate’ from the building and thus  
19 independently entitled to copyright protection. Again, the district court  
20 found otherwise, and we cannot say its finding lacks support.” *Id.*, at  
21 1219.

22 Even Justice Tashima stopped well short of the categorical proposition that  
23 GM somehow ascribes to the opinions as a whole. He did this by qualifying his  
24 argument as applying “at least” where the PGS work is a functionally part of the  
25 architectural work:

26 There is ample support in the legislative history of the Act that the  
27 protection for architectural works in 17 U.S.C. § 102(a)(8) is now the  
28 exclusive remedy for PGS works embodied in an architectural work—***at least for those PGS works that are so functionally a part*** of a building  
that § 120(a)’s exemption would be rendered meaningless for such  
buildings, if conceptual separability were applied to them. *Id.*, at 1222  
(emphasis added).

When the dissent mocked that under Tashima view, “If an artist created even

1 the smallest painting on the front of a building, she would lose PGS copyright  
2 protection in that work,” Justice Tashima responded by making clear that he was not  
3 announcing a doctrine of such broad and general application, but rather (echoing the  
4 majority) one limited to cases where the purported PGS is so integral to the  
5 architecture that there is just one unitary work. Justice Tashima explained:

6 I emphasize the narrow and unique circumstances of this case: Here, the  
7 disputed PGS work is the functional equivalent of a building wall,  
8 serving the architectural purpose of extending the building line itself, as  
9 architecturally-mandated by the CRA. This is a far cry from “the smallest  
10 painting on the front of a building,” or “painting even a small work on a  
11 building,” to which the dissent compares the streetwall. See *op. at* 1232–  
12 33, 1233–34. The case the dissent worries about is not before us.... *Id.*,  
13 at 1222, fn. 2.

14 Indeed, Justice Tashima goes on explicitly acknowledge that the artist could  
15 well have a PGS copyright in other aspects of the Courtyard project—just not in the  
16 streetwall that was used in Batman, which was unquestionably part of the  
17 architecture: “the free-standing elements of the [Courtyard] are not at issue in this  
18 case.” It strains logic to call Judge Tashima’s reasoning a bright-line rule—or even a  
19 rule at all. He merely found that an element of a unitary architectural work—as  
20 determined by a thorough factual investigation—is subject to Section 120.

21 Again, it is difficult to understand how GM could cite even the concurrence  
22 as supporting its categorical assertions, much less a majority. The instant case is  
23 actually far more similar to the hypothetical that Judge Tashima backed away from  
24 (a painting on a building that is small enough relative to the whole that it cannot be  
25 said to play a role in the architecture) than it is to the facts of *Leicester*.

#### 26 **4. Plaintiff’s mural had nothing to do with architecture.**

27 Under the legal principles laid out above, GM was not privileged to use  
28 photographs of Plaintiff’s work. The Mural is a straightforward pictorial work, of  
the sort that has always been protectable. And even if there were instances where a  
PGS work could lose its protection because it existed on, or was attached to an  
architectural work, this certainly would not be such a case. Here Plaintiff’s Mural

1 was not integrated into the architecture to any degree, he did not collaborate or even  
 2 communicate with the architect, and his mural played no functional or architectural  
 3 role. Furthermore, unlike the alleged infringement in *Leicester*—a wide-angle shot  
 4 of a city streetscape—GM’s photograph depicts no element of the parking structure.

5 **E. At very least, whether the Mural is part of the architecture is a fact issue.**

6 To withstand summary judgment, Plaintiff need not demonstrate that his PGS  
 7 work is protected by a copyright that has nothing to do with the architectural work  
 8 which houses it. Given that *Leicester* shows the relevant analysis to be fact-  
 9 intensive, it is enough that Plaintiff demonstrates that a fact issue exists as to  
 10 whether his mural is a separately existing PGS work, or (as in *Leicester*) a unitary  
 11 architectural work.

12 And indeed, courts hold that the “singleness” of a work—whether a work  
 13 should be analyzed “as a whole,” or as “separate works to be considered  
 14 individually”—is a “factual [finding]. See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d  
 15 77, 83 (2d Cir. 1995). Treating this issue as a question of fact is consistent with the  
 16 Ninth Circuit’s treatment of analogous questions: for example, the nature and  
 17 classification of a work is a question of fact (*Poe v. Missing Persons*, 745 F.2d  
 18 1238, 1242 (9th Cir. 1984)); whether copyrightable expression by two different  
 19 authors have merged into a unitary whole is a question of fact ( *S.O.S., Inc. v.*  
 20 *Payday, Inc.*, 886 F.2d 1081, 1086 (9th Cir. 1989)); and whether episodes of a  
 21 television series should be considered “separate works” or parts of “one work” for  
 22 purposes of statutory damages is factual (*Columbia Pictures Television v. Krypton*  
 23 *Broadcasting*, 106 F.3d 284, 295 (9th Cir. 1997), rev’d on other grounds, *Feltner v.*  
 24 *Columbia Pictures Television, Inc.*, 118 S. Ct. 1279 (1998)).

25 **III. DEFENDANT IS NOT ENTITLED TO SUMMARY JUDGMENT ON**  
 26 **PLAINTIFF’S SECTION 1202 CLAIM**

27 GM admits that it posted a photograph of Plaintiff’s Mural on multiple GM  
 28 social media sites and did so without Plaintiff’s permission. [GM Answer, Dkt 23,



1 ECF p. 2, ¶3.] GM also admits the posting was part of a GM advertising campaign.  
 2 *Id.*, p. 5, ¶17; see, also, ¶¶18-21.] In moving for summary judgment, GM further  
 3 acknowledges as uncontroverted facts that copyright management information  
 4 (“CMI”) in the form of Plaintiff’s signature and pseudonym exists on the Mural but  
 5 was not included in GM’s unauthorized posting of the Mural. [SUF 17, 21.]

6 Despite these admissions, GM argues that it cannot be liable for violation of  
 7 Section 1202 because it did not “intentionally” or “knowingly” remove Plaintiff’s  
 8 signature when it posted the Mural. But GM’s proffered evidence fails to  
 9 conclusively establish any such defense because the only support GM provides—  
 10 two vague and self-serving witness declarations denying any willful conduct—are  
 11 inconclusive and lack credibility. In other words, fact issues remain.

12 **A. GM fails to provide competent evidence of its asserted lack of intent.**

13 In seeking summary judgment based on its alleged lack of knowledge and  
 14 intent in removing Plaintiff’s CMI, one would expect GM to offer first-hand  
 15 declarations from its decision-makers stating that they had no knowledge that the  
 16 Mural included Plaintiff’s signature. And indeed, GM argues in its Motion that:

17 No one at General Motors who was responsible for the photo’s being  
 18 posted was aware that: i) the mural covered an additional wall not  
 19 pictured in the photograph; ii) the portion of the mural on the additional  
 20 wall contained the “Smash137” signature or Plaintiff’s name.... SUF 22,  
 23, 26 [Motion, ECF p. 12, ll. 16-23.]

21 If the uncontroverted facts were as GM stated, GM might be onto something.

22 **But GM’s declarations, inexplicably, do not support this assertion regarding**

23 **GM staff’s state of mind.** Rather, GM offers only the declaration of its employee  
 24 Donny Nordlicht, whose title is not provided but who explains he is “responsible for  
 25 Product and Technology *communications* for Cadillac.” In other words, he is a  
 26 spokesman, not a decision-maker. Mr. Nordlicht purports to declare as to the state of  
 27 mind of the relevant members of GM’s staff (who are not named but are said to be  
 28 responsible for the post in question), asserting: “at the time GM staff received the  
 photograph and at the time GM staff arranged for it to be posted on social media,

1 GM staff had no idea that the mural covered another wall.” [Nordlicht Decl., ¶7.]  
 2 Mr. Nordlicht makes no claim that he was among this group of decision-makers—  
 3 and he fails to explain how he knew their states of mind.

4 This evidence is of course objectionable as not first hand—and thus comes  
 5 nowhere near establishing GM’s ignorance of Plaintiff’s CMI or lack of intent  
 6 (especially given the high standard applicable to a party moving for summary  
 7 judgment). GM may be liable under Section 1202 if even only one member of the  
 8 group of unnamed GM decision-makers had reason to believe that the Mural was  
 9 signed. *Agence Fr. Presse v. Morel*, 934 F. Supp. 2d 547, 578 (S.D.N.Y. 2013)  
 10 (Section 1202 claim may be successful if at least one participant had knowledge of  
 11 missing CMI).

12 **B. GM’s summary judgment motion also fails because it turns on GM’s**  
 13 **witnesses’ credibility, a matter inappropriate for summary judgment.**

14 Even if GM’s key decision-makers had submitted declarations, it would not  
 15 conclusively establish lack of intent. A party is not entitled to summary adjudication  
 16 on a state of mind issue based only on self-serving declarations—especially before  
 17 discovery and especially where there are good reasons to question the declarations.

18 **1. Summary judgment is inappropriate where credibility is at issue,**  
 19 **especially with regard to reports of a declarant’s state of mind.**

20 “[S]ummary judgment is singularly inappropriate where credibility is at  
 21 issue.” *SEC v. M & A West, Inc.* (9th Cir. 2008) 538 F.3d 1043, 1054-1055 (internal  
 22 quotes omitted); *see also Deville v. Marcantel* (5th Cir. 2009) 567 F.3d 156, 165.  
 23 Thus, summary judgment is denied where an issue as to a material fact cannot be  
 24 resolved without observation of the demeanor of witnesses to evaluate their  
 25 credibility. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, (1986) (summary  
 26 judgment will be denied where a reasonable fact-finder could return a verdict for the  
 27 non-moving party).

28 This is all the more so when the issue in question is a party’s state of mind.



1 “[W]here motive and intent are important, proof is largely in the hands of the  
2 alleged conspirators, and relevant information is controlled by hostile witnesses,”  
3 summary judgment is disfavored. *International Healthcare Mgmt. v. Hawaii*  
4 *Coalition for Health*, 332 F.3d 600, 604 (9th Cir. 2003) (internal citations omitted).  
5 See also *Ferrell v. Harris Ventures, Inc.*, 812 F. Supp. 2d 741, 748 (E.D. Va. 2011)  
6 (“Questions of intent are hard to decide on summary judgment. They are almost  
7 always inferential, and best left to the trier of fact”); *Wallace v. DTG Operations,*  
8 *Inc.*, 442 F.3d 1112, 1117–118 (8th Cir. 2006) (“although Rule 56 contains only one  
9 standard, we must exercise *particular* caution when examining the factual question  
10 of intent to ensure that we dutifully extend all justifiable inferences in favor of the  
11 non-moving party”).

12 Courts have applied this doctrine Section 1202’s intent requirement. In  
13 *Friedman v Live Nation*, a Ninth Circuit panel denied summary judgment on a  
14 Section 1202 claim, based on these principles. *Friedman v. Live Nation Merch.,*  
15 *Inc.*, 833 F.3d 1180 (9th Cir. 2016) (“*Friedman*”). The *Friedman* court found that  
16 an “assessment of a party’s state of mind,” required for a Section 1202 analysis, is  
17 usually inappropriate for summary judgment. *Id.* at 1186. The court further held that  
18 defendant need not be the party that removed the CMI to be liable under Section  
19 1202, only that defendant knew CMI had been removed. *Id.*, at 1187. Unless a  
20 Section 1202 defendant presents conclusive and irrefutable proof that it had no  
21 knowledge CMI was removed or altered, it may not prevail on summary judgment.  
22 *Id.*, at 1187-1189.

23 Even GM’s marquee case illustrates this point. *Stevens v. Corelogic, Inc.*, 194  
24 F.Supp.3d 1046, 1052-1053 (S.D. Cal. 2016), *aff’d* \_\_\_ F.3d. \_\_\_ (9th Cir. June 20,  
25 2018) (“*Corelogic*”) supports the proposition that when a plaintiff has shown that  
26 CMI exists, as GM admits here, a defendant may not obtain summary judgment  
27 based on self-serving declarations claiming it lacked intent in removing CMI. This  
28 is so because “[c]redibility determinations, the weighing of the evidence, and the

1 drawing of legitimate inferences from the facts are jury functions, not those of a  
2 judge, when he or she is ruling on a motion for summary judgment.” *Corelogic*, 194  
3 F.Supp.3d at 1047. See, also, *Agence Fr. Presse v. Morel*, 934 F. Supp. 2d at 577-78  
4 (when determining summary judgment on a Section 1202 claim, a court may not  
5 consider any evidence a jury is not *required to believe* and may not make credibility  
6 judgments).

7 **2. GM’s declarations are flimsy and self-serving—and there is good**  
8 **reason to doubt them.**

9 Here, Bernstein’s and Nordlicht’s unsupported assertions that unnamed  
10 decision-makers were “unaware” of Plaintiff’s signature on his Mural—a signature  
11 that is, by GM’s own admission, bold and easily identifiable (Declaration of Paul  
12 Margolis, ¶5 and Exhibit D)—are less than credible on their face and may not form  
13 the basis of summary judgment. Further, there are good affirmative reasons to doubt  
14 these assertions. Indeed, the flimsy declarations GM offers are called into question  
15 by GM’s wide-ranging working relationship with photographer Bernstein (which  
16 Bernstein and Nordlicht fail to mention), and GM’s use of other graffiti themed  
17 advertisements for the very same car, the Cadillac XT5.

18 With regard to Bernstein’s relationship with GM, there is reason to believe it  
19 was much more extensive than GM’s declarants let on. As GM tells it, Bernstein just  
20 happened to be coming to Detroit, where he happened to borrow a GM car (which  
21 GM allowed as a courtesy), and then happened to take the photograph in question in  
22 front of Plaintiff’s Mural which he sent to GM. [Bernstein Decl., ¶¶ 4-10] GM  
23 further offers no explanation of why Bernstein sought a car from GM or why GM  
24 was inclined to provide the newly debuting 2017 Cadillac XT5 to Bernstein for his  
25 use free of charge during his Detroit trip. Bernstein states that he “knew about” auto  
26 companies maintaining “press fleets” of vehicles for “publicity purposes,” but he  
27 provides no explanation of why GM would be inclined to loan Bernstein such a  
28 vehicle—especially a newly debuting model. [Bernstein Decl., ¶5.]

1 A simple internet search reveals that Bernstein has done a good deal of work  
2 for GM. For instance, in early 2016, there are several posts on Mr. Bernstein's  
3 Instagram account featuring images from a photoshoot promoting GM's Chevrolet  
4 Camaro, and another featuring a photo of a Cadillac CTS-V. [Patterson Decl. ¶ 13,  
5 Exh. L.] And again, in October 2016, Mr. Bernstein directed a short promotional  
6 film for the Cadillac CTS-V. [Patterson Decl. ¶ 14, Exh. M.] Most recently, Mr.  
7 Bernstein was chosen to photograph GM's 2019 Corvette ZR1 for its global launch.  
8 [Patterson Decl. ¶ 15, Exh. N.]

9 Evidence also reveals that GM's assertion that Bernstein alone chose to use  
10 the mural in his photograph is not credible. GM regularly used graffiti in  
11 advertisements for the XT5 and similar SUVs—beginning at least as early as August  
12 2016. [See Patterson Decl. ¶¶ 4, 5 Exhs. C, D.] Additionally, the timing of GM's use  
13 of Plaintiff's mural coincided with other graffiti-themed Cadillac promotions.  
14 Specifically, GM posted the photo of Plaintiff's mural on November 29, 2016 [CITE  
15 GM's motion/decl.]. Three days later, GM posted photos and videos from an event it  
16 hosted at the December 2016 Art Basel fair in Miami Beach, showing an artist  
17 creating a graffiti-style painting on a Cadillac SUV. [Patterson Decl., ¶¶ 6-8, Exhs.  
18 E-G.] These images—including that of Plaintiff's mural—were re-posted to other  
19 GM social media accounts. [Id., at ¶¶ 9, 10; Exhs. H, I.]

20 In addition, and fatal to GM's summary judgment motion, Plaintiff has  
21 uncovered evidence that GM *through the present*, continues to distribute the  
22 infringing photograph without the copyright management information on GM's  
23 social media platforms. [Patterson Decl., ¶ 9, Exh. H.] This precludes summary  
24 judgment for GM as a matter of law. *Goldstein v. Metro. Reg'l Info. Sys., Inc.*, No.  
25 15-CV-2400, 2016 U.S. Dist. LEXIS 106735, 2016 WL 4257457, at \*8 (D. Md.  
26 Aug. 11, 2016) (finding that defendant's continued promotion of infringing content  
27 with altered CMI despite receiving cease and desist notice sufficed to sustain a  
28 Section 1202 claim); *see also Aaberg v. Francesca's Collections, Inc.*, No. 17-CV-

1 115 (AJN), 2018 U.S. Dist. LEXIS 50778, at \*25 (S.D.N.Y. Mar. 27, 2018).

2 **3. GM fails to establish Bernstein was not acting as GM’s agent when**  
 3 **he took the infringing photograph.**

4 GM posits as an uncontroverted fact that Bernstein, was not “an employee or  
 5 agent” of GM. [SUF No. 6.] The only basis for this key assertion (which GM hopes  
 6 will negate the possibility of vicarious liability) is again Bernstein’s declaration.  
 7 [*Id.*] The relationship between GM and Bernstein however, as suggested above, is  
 8 far from established. The photographer simply declares, without any background  
 9 information or explanation, that “at no time in 2016 was I ever an employee or agent  
 10 of Cadillac or GM.” [Bernstein Decl., ¶ 3.] These are improper conclusions, not  
 11 material statements of fact. Bernstein admits that he is a “professional automotive  
 12 photographer,” who works on a “freelance basis.” [*Id.* at ¶ 1.] Left unstated is what  
 13 Bernstein’s “freelance basis” of work entails. GM and Bernstein also fail to state  
 14 whether Bernstein ever worked on a “freelance basis” for GM.

15 But as mentioned above, there is much more to the GM-Bernstein relationship  
 16 than GM has disclosed. Whether full information would create be a basis for  
 17 vicarious liability (based on an agency or employment relationship) cannot be ruled  
 18 out, especially prior to discovery. The missing information is essential to understand  
 19 the relationship between GM and Bernstein. Whether Bernstein was acting as an  
 20 agent for GM when Bernstein took the infringing photograph and GM’s resulting  
 21 liability for Bernstein’s actions and imputation of Bernstein’s knowledge remain  
 22 disputed issues that preclude GM’s summary judgment.

23 **C. Plaintiff is entitled to discovery on GM’s knowledge and intent.**

24 Federal Rule of Civil Procedure 56(d) provides:

25 If a nonmovant shows by affidavit or declaration that, for specified  
 26 reasons, it cannot present facts essential to justify its opposition the court  
 27 may: (1) defer considering the motion or deny it; (2) allow time to obtain  
 28 affidavits or declarations or to take discovery; or (3) issue any other  
 appropriate order. [Fed. R. Civ. Pro. 56(d).]

Plaintiff has been afforded no opportunity to conduct discovery. [Patterson

1 Decl., ¶16.] As discussed in Section IV(C) above, Plaintiff challenges the vague and  
2 conclusory statements in the Bernstein and Nordlicht declarations and has presented  
3 evidence calling into question that testimony. Plaintiff is entitled to discover the  
4 facts and circumstances surrounding GM’s infringement of Plaintiff’s Mural,  
5 including the relationship between Bernstein and GM, and the infringing  
6 photograph’s creation and use by GM to promote the XT5.

7 In his concurrently-filed declaration, Plaintiff’s counsel Ryan Patterson  
8 further explains the need for discovery, and proposes specific discovery. For  
9 example, Plaintiff seeks (1) to depose Mr. Nordlicht and Mr. Bernstein on the issues  
10 described above, (2) information on the identity of the GM decisionmakers  
11 described in the Nordlicht declaration, (3) and seeks discovery of relevant  
12 communications between GM and Bernstein, including emails described but not  
13 attached to the Bernstein declaration

14 In contrast to GM’s self-serving and limited-information declarations, the  
15 requested discovery will reveal GM’s actual statements and activity at the time the  
16 infringing photograph was created and posted. Plaintiff is entitled to this discovery  
17 to explore GM’s true intent and knowledge surrounding Plaintiff’s copyright  
18 management information. The discovery is necessary to prevent Plaintiff from being  
19 “railroaded” by a premature motion for summary judgment. *Celotex Corp. v. Catrett*  
20 (1986) 477 US 317, 106 S.Ct. 2548, 2554; *Rivera-Torres v. Rey-Hernandez*, 502  
21 F.3d 7, 10 (1st Cir. 2007) (Rule allowing discovery by non-movant to marshal the  
22 facts safeguards against “judges swinging the summary judgment axe too hastily.”).

23 Accordingly, if the Court is not inclined to deny GM’s summary judgment on  
24 the current record, Plaintiff requests the opportunity to take the requested discovery  
25 before a final ruling is made.

#### 26 **IV. PUNITIVE DAMAGES COULD BE AVIALABLE**

27 Plaintiff moves for “for partial summary judgment on Plaintiff’s claim for  
28 punitive damages, on the grounds that punitive damages are never available with

