

09o2agaA

1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 AGENCE FRANCE PRESSE,

3  
4 Plaintiff,

New York, N.Y.

4  
5 v.

10 Civ. 2730 (WHP)

5  
6 DANIEL MOREL, et al.,

6  
7 Defendants.

7  
8 -----x

8  
9 September 24, 2010

9 10:45 a.m.

10  
10 Before:

11  
11 HON. WILLIAM H. PAULEY III,

12  
12 District Judge

13  
14 APPEARANCES

14  
15 VENABLE, LLP

15 Attorneys for Agence France Presse and Turner  
16 Broadcasting/CNN

16 BY: JOSHUA J. KAUFMAN

17  
18 THE HOFFMAN LAW FIRM

18 Attorneys for Daniel Morel

19 BY: BARBARA HOFFMAN

19  
20 LEVINE, SULLIVAN, KOCH & SCHULZ, LLP

21 Attorneys for ABC, Inc.

21 BY: ROBERT PENCHINA

22  
23 DAVIS WRIGHT TREMAINE, LLP

23 Attorneys for Getty Images and CBS

24 BY: JAMES ROSENFELD

24 DEBORAH ADLER

25  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

09o2agaA

1 THE DEPUTY CLERK: Matter on for argument, AFP v.  
2 Morel.  
3 Will counsel please give their appearances for the  
4 record.  
5 MR. KAUFMAN: Joshua Kaufman for Agence France Presse  
6 and Turner Broadcasting/CNN.  
7 THE COURT: Good morning, Mr. Kaufman.  
8 MR. PENCHINA: Good morning, your Honor. Robert  
9 Penchina for ABC, Inc.  
10 THE COURT: Good morning, Mr. Penchina.  
11 MR. ROSENFELD: Good morning. James Rosenfeld and  
12 Deborah Adler for CBS and Getty Images.  
13 THE COURT: Good morning.  
14 MS. HOFFMAN: I am Barbara Hoffman for Daniel Morel.  
15 Good morning, your Honor.  
16 THE COURT: Good morning, Ms. Hoffman.  
17 This is the plaintiff's motion. Mr. Kaufman, do you  
18 want to be heard?  
19 MS. HOFFMAN: Yes, your Honor.  
20 THE COURT: Very well.  
21 MR. KAUFMAN: As a preliminary matter, your Honor, we  
22 are going to be referring to a number of the exhibits and  
23 images, so to save the court the trouble of having to --  
24 THE COURT: Fine.  
25 MR. KAUFMAN: We made copies of them.  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

09o2agaA

1 THE COURT: Hand them up.

2 MR. KAUFMAN: Your Honor, thank you for hearing us  
3 this morning.

4 Daniel Morel is a documentary photographer who  
5 originally was from Haiti, who has an undisputed great passion  
6 and love for Haiti and the Haitian people. He was, for better  
7 or worse, in Port-au-Prince when the earthquake struck and had  
8 his camera with him. As a photographer, his instinct was to  
9 begin taking pictures, and he did.

10 As one dedicated to the people in the country of  
11 Haiti, he wanted the world to immediately see the destruction  
12 and devastation caused to his beloved country and people. In  
13 order to facilitate that, he posted his pictures on Twitter  
14 Twitpics, knowing that this would be the way to expose the  
15 horrors of the earthquake to the greatest number of people  
16 around the world in the quickest amount of time.

17 THE COURT: He posted the pictures on Twitpics, right,  
18 not Twitter?

19 MR. KAUFMAN: Right, that's correct.

20 THE COURT: Okay.

21 MR. KAUFMAN: We will get into that part shortly, your  
22 Honor.

23 THE COURT: Why don't you turn to that, because that's  
24 an important question.

25 MR. KAUFMAN: Okay.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

09o2agaA

1           THE COURT: When you say Twitter/Twitpics, that's  
2 really not true. It is just Twitpics.

3           MR. KAUFMAN: No, your Honor. The terms and  
4 conditions under which Twitpics operates are linked completely  
5 and tied into the Twitter terms and conditions. Yes, they are  
6 separate entities, but you cannot operate on Twitpics without  
7 operating -- without agreeing and abiding by the terms and  
8 conditions of Twitter. If you go to sign up for Twitpics, it  
9 immediately sends you to Twitter. You cannot sign up to  
10 Twitpics independently. It is just not possible. You go and  
11 you then have to agree to the terms and conditions set out on  
12 Twitter.

13           When you go back to Twitpics, you use your Twitter ID.  
14 You use your Twitter password. There is no independent access  
15 to Twitpics without Twitter. When you leave Twitter, it is one  
16 of the things we have in the materials for you, Exhibit B, it  
17 specifically states as you are leaving Twitter, it is Exhibit  
18 C, it specifically states when you are leaving Twitter, going  
19 to Twitpics, it says, by clicking "allow," you continue to  
20 operate under Twitter's terms of service. So you are going  
21 from Twitter to Twitpics, and it says you are operating under  
22 Twitter's terms of service. So it is -- while they are two  
23 separate entities, the license is granted, the terms of service  
24 are like a braid, they are interwoven.

25           And as we cite in our --

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

09o2agaA

1 THE COURT: How can this court consider the terms of  
2 service on Twitter on this motion?

3 MR. KAUFMAN: I am --

4 THE COURT: How can I consider the Twitter terms of  
5 service on this motion?

6 MR. KAUFMAN: Well, your Honor, I will just find the  
7 cites in our brief where we talk about how -- bear with me --  
8 as we cite that a court may consider documents attached to the  
9 complaint as exhibits, any documents incorporated by reference  
10 into a complaint. You can -- are entitled to consider  
11 documents that are not incorporated by reference when the --  
12 the court may nevertheless consider it where the complaint  
13 relies heavily upon its terms and effects which renders  
14 documents integral to the complaint. The court is also  
15 entitled to consider documents in plaintiff's possession of  
16 which plaintiff had knowledge and relied upon in bringing this  
17 suit. And the court may also consider publicly available  
18 documents on motion to dismiss. We cite the various cases on  
19 pages 6 and 7.

20 Q. But didn't Mr. Morel explicitly allege that the Twitter  
21 terms of service are not applicable?

22 MR. KAUFMAN: Well, they first alleged that they were  
23 in the first complaint. They attached --

24 THE COURT: The first complaint is history, isn't it?

25 MR. KAUFMAN: Yes, but in terms of --

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 THE COURT: Okay. So let's address the complaint  
2 that's before the court.

3 In paragraph 72, doesn't Mr. Morel explicitly allege  
4 that the Twitter terms of service are not applicable? Do you  
5 see that?

6 MR. KAUFMAN: What number?

7 THE COURT: Paragraph 72, with double asterisks,  
8 "Twitter TOS, Mr. Morel contends, are not applicable."

9 MR. KAUFMAN: Well, simply because they make that  
10 assertion, your Honor, the court is entitled to look beyond  
11 their bare assertions if there is no factual basis for them.  
12 There is no factual basis to state that the Twitter terms of  
13 service are not relevant. The court does not have to take  
14 every single statement made in a complaint at face value. It  
15 needs to be supported by facts.

16 THE COURT: But under the Chambers standard, isn't  
17 this court required to note whether the pleadings rely on the  
18 document?

19 MR. KAUFMAN: Right, but under Twombly it says that  
20 you can go -- I believe Twombly allows you to look at the  
21 Twitter terms of service because there it says it just can't be  
22 bare assertions, and that's all this is.

23 I know the first complaint isn't before the court, but  
24 clearly they were talking about it there. It is a factual --  
25 it is public documents, it is publicly available, and the court

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 isn't -- the court can consider it if it chooses to, I believe,  
2 under the cases that we cited in our brief that I just  
3 referenced, and --

4 THE COURT: Let's assume for a moment that I can  
5 consider the Twitter terms of use. If I read your brief  
6 correctly, you claim that those terms grant users a "worldwide  
7 nonexclusive, royalty-free license." Right?

8 MR. KAUFMAN: Yes, your Honor, that is correct. The  
9 terms of service --

10 THE COURT: How do you reach that conclusion, given  
11 the plain language of the Twitter terms of service?

12 MR. KAUFMAN: The Twitter terms of service says by  
13 submitting -- and we have it here, your Honor. You have to  
14 read several paragraphs together, which it says you should, but  
15 it says, By submitting, posting or displaying content on or  
16 through the service, you grant us, then it list the rights  
17 that --

18 THE COURT: Who is the "us."

19 MR. KAUFMAN: No, that's Twitter. But we are not done  
20 yet. That's why I said you have to read the whole thing. It  
21 says it is granting Twitter.

22 THE COURT: "Us" is Twitter.

23 MR. KAUFMAN: "Us" is Twitter there. That's correct.  
24 I'm not arguing that we are not granting Twitter these rights  
25 initially, the rights to nonexclusive royalty-free license to

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 reproduce, process, adapt, modify, publish, etc.

2 The license then goes on and says, in the next  
3 paragraph, The license -- this license is authorizing us --  
4 again, Twitter -- to make their tweets available to the rest of  
5 the world. And now here is the important part: And to let  
6 others do the same. "And others do the same" means on its  
7 plain face that we are letting others do the same thing you are  
8 letting Twitter do. Otherwise it has no meaning. "Others do  
9 the same" would be third parties who would be using Twitters.  
10 Without that, "and let others do the same" has no meaning. It  
11 is we have Twitter as being granted the rights --

12 THE COURT: Look at the very next sentence. "What's  
13 yours is yours."

14 MR. KAUFMAN: Absolutely.

15 THE COURT: "You own your content."

16 MR. KAUFMAN: Absolutely. Mr. Morel never gave up his  
17 copyright, never gave up ownership of his copyrights. We never  
18 claimed that in any way, shape or form. He is granting a  
19 license. Of course what's his is his. His copyrights are his.  
20 We never anywhere allege, imply, in any way saying that he gave  
21 up his copyrights.

22 THE COURT: And you are not disputing Mr. Morel's  
23 ownership of his copyright.

24 MR. KAUFMAN: No, we are not. What we are saying is  
25 simply that he is granted a license. When anybody is granted a

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300



09o2agaA

1 license, you don't give up your underlying copyrights. I don't  
2 care -- you know, he doesn't have to go through Mr. Morel.  
3 Generally you grant the license. I grant your Honor a license  
4 to reproduce X, Y, and Z. I still own my license.

5 THE COURT: Is the content in the tweets?

6 MR. KAUFMAN: The content is the tweets and in the  
7 Twitpics. You have to read these together is what -- you  
8 can't -- what we are saying is, you can't separate, because  
9 this license, when you go to Twitpics, you affirmatively  
10 understand that these terms and conditions apply to Twitpics.  
11 It is the quote that I just gave you. They are not separate.

12 THE COURT: But don't the Twitter terms of service  
13 grant the license to Twitter and its partners?

14 MR. KAUFMAN: Its partners and others.

15 THE COURT: No. It grants a license to Twitter and  
16 its partners --

17 MR. KAUFMAN: But --

18 THE COURT: -- not other users.

19 MR. KAUFMAN: No. It does, your Honor. Because where  
20 it says "and its partners," it then goes on -- here, two  
21 paragraphs down, "where you are responsible." Do you see that  
22 paragraph? Three paragraphs.

23 THE COURT: I don't have to go two paragraphs down.  
24 How about just going on to the second paragraph: "Such  
25 additional uses by Twitter or other companies, organizations or

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 individuals who partner with Twitter may be made," etc.

2 Your client is not a partner with Twitter, is it?

3 MR. KAUFMAN: No, but we are an "other." We are  
4 "other users."

5 Later in the paragraph, where it goes, You are  
6 responsible for your use of services for any content you  
7 provide and for any consequences there are, including the use  
8 of your content by others and our third-party partners. Again,  
9 it is defining "others" separately from the third-party  
10 partners.

11 That's what I am saying. You read this all together,  
12 you have Twitter is one entity, its partners are another  
13 entity, and others, which are the users, are a third entity.  
14 And it is granting this license, letting others do the same,  
15 and then it says, The use of your content by others and our  
16 third parties. So if there was no "others," then what is this  
17 "and third parties," "others and"? There are three people who  
18 benefit from this license -- Twitter, its partners and the  
19 users, and others. It says "and others" several points  
20 throughout here, and if you ignore that -- you can't ignore  
21 that. I mean, it has to apply to somebody, the "and others."

22 THE COURT: So let's see. You claim that the two  
23 different terms of service have to be read together.

24 MR. KAUFMAN: Correct.

25 THE COURT: But isn't that contradictory to how you  
SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

09o2agaA

1 interpret the Twitter terms of service?

2 MR. KAUFMAN: I don't see how.

3 THE COURT: Isn't your best argument that it is  
4 ambiguous? What do the Twitpics terms say?

5 MR. KAUFMAN: They don't discuss this at all. They  
6 are not contradictory. They have -- they talk about language,  
7 but they don't talk about third-party uses. It is silent as to  
8 that. They just don't refer to it. There is no contradictory  
9 language. They talk about you own your copyrights and other  
10 kinds of things like that, but they don't discuss the reuse  
11 aspect of it.

12 And, again, as we pointed out in our footnotes, your  
13 Honor, this is not a unique interpretation of AFP for the  
14 purposes of this motion. Again, the court is allowed to take  
15 judicial notice of what's out there. People are re-tweeting  
16 and re-Twitpic'ing pictures by the hundreds of thousands a day.  
17 This isn't just something that, all of a sudden, out of the  
18 blue, we are coming up with. This is a regular, constant  
19 occurrence that tens of thousands of people, hundreds of  
20 thousands of times a day are also interpreting it the same way,  
21 for better or for worse, but they are.

22 THE COURT: Is that somebody else on Twitter like  
23 Suero?

24 MR. KAUFMAN: Suero, yeah.

25 THE COURT: Right? Suero, a thief, right?

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 MR. KAUFMAN: Suero took --

2 THE COURT: That's your argument?

3 MR. KAUFMAN: No, other people are allowed to --

4 THE COURT: So the multitude is doing it; therefore,  
5 it is okay.

6 MR. KAUFMAN: No, no.

7 THE COURT: It was Bertrand Russell who said you  
8 shouldn't follow the multitude into evil. Remember that?

9 MR. KAUFMAN: Unfortunately, I don't read enough of  
10 Bertrand Russell.

11 THE COURT: He was one of the greatest philosophers of  
12 the 20th century.

13 MR. KAUFMAN: I know who was, but -- I certainly know  
14 who Bertrand Russell was.

15 THE COURT: It is worth the read.

16 MR. KAUFMAN: Yes, your Honor.

17 But my point here is, if you read the language in  
18 Twitter, it talks about three classes of people -- Twitter, its  
19 partners and others. "And others" has to have a meaning. It  
20 is not without meaning. It is there several times. When you  
21 leave Twitter and you go to Twitpics, it specifically says, The  
22 Twitter terms of service continue to apply. Well, you have to  
23 read them together. That's what it says on its face. And,  
24 again, we cite in our brief numerous case law in New York which  
25 says when you have to look at a whole transaction, you can't

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 look --

2 THE COURT: Mr. Kaufman, were there a number of news  
3 sources who asked Mr. Morel to pay for his pictures?

4 MR. KAUFMAN: Um-hmm.

5 THE COURT: Is that a yes?

6 MR. KAUFMAN: Yes, that is a yes.

7 THE COURT: Oh, good. All right.

8 So if you want to apply your argument about what  
9 everybody else is doing, there were numerous news sources who  
10 were paying, right?

11 MR. KAUFMAN: We don't -- they offered to pay. Maybe  
12 for an exclusive? Maybe for other pictures? AFP was asking --  
13 was talking to -- trying to reach, they didn't. None of the  
14 record that's here says that they were trying to buy these  
15 specific pictures. They were trying to reach him. They may  
16 have been like Corbis. They wanted to get an exclusive. These  
17 pictures were up. He is there with the camera. He may have  
18 had 100 more pictures that were not on Twitter, that were not  
19 free, that they wanted to purchase.

20 Just because somebody approached him doesn't mean that  
21 they -- that the Twitter terms and conditions aren't true.  
22 They may not even have understood the terms and conditions from  
23 Twitter. Who knows if they had ever bothered? They saw  
24 pictures up, and they say, Hey, we want more pictures. We have  
25 seen these you have posted to Twitter. Let's get -- do you

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 have any more? Can we get an exclusive from you? That's what  
2 the communication is. It wasn't necessary -- there is nothing  
3 in the record that contradicts that and says that -- that  
4 contradicts that position.

5 You have to -- you cannot read the two agreements  
6 separately. They refer to each other, they cross reference  
7 each other. You use the same user ID. They say you use that.  
8 The law, as we cited in our brief, says you have to look at the  
9 whole transaction to make it make sense. Otherwise, it just  
10 doesn't make sense. So we think you need to read both Twitter  
11 and Twitpics together. The only contradictory things have to  
12 do with choice of law and a venue, if you have a dispute with  
13 Twitter or Twitpics, but not as to usage.

14 THE COURT: What should I do about the language that  
15 says, All images uploaded are copyright their respective  
16 owners?

17 MR. KAUFMAN: That's true. There is a difference  
18 between owning a copyright and having a license granted. No  
19 one says that Mr. Morel lost his copyright by posting his  
20 images to Twitter/Twitpics. We have never argued that. We are  
21 saying that by accepting the terms and conditions, he  
22 accepted -- he granted a license, and the terms of the license  
23 are what is set out in Twitter as to the use of third parties.  
24 Twitpics doesn't talk about third parties. It is silent as to  
25 that. So you look to the other part of the equation, the

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 Twitter, which does specifically talk to Twitter's use, its  
2 partners' use, and the user's use.

3 And it says when you put -- other social networks and  
4 other sites don't have this language. You can -- if you look  
5 at one or the other, this language happens to be very broad.  
6 It is what Twitter and Twitpics are all about. It is the  
7 broadcast -- re-tweeting has become part of the lexicon,  
8 because these when you post these things up here, it happens  
9 again and again, it's what people do at these sites. It is not  
10 matter of stealing. It's not a matter --

11 THE COURT: Wasn't that what Mr. Suero was doing?

12 MR. KAUFMAN: Suero took them and said they were his  
13 own. That was Mr. Suero's problem. He basically took them off  
14 his site and said, These are my pictures. That's where  
15 Mr. Suero went wrong.

16 THE COURT: Was your client retweeting the  
17 photographs?

18 MR. KAUFMAN: In the sense that he was re-- he was  
19 falling within the license of -- where it says --

20 THE COURT: No, you were selling -- you were selling  
21 those photos for profit and putting your tag line on them,  
22 weren't you?

23 MR. KAUFMAN: Our credit line saying that they were  
24 coming from us, yes, saying -- that just identified us as  
25 distributor, where it said the ADAFP. It's a distribution tag

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 line.

2 THE COURT: And you were selling them, right?

3 MR. KAUFMAN: Yes, we were, your Honor. And the  
4 license says, Nonexclusive royalty-free license to reproduce,  
5 process, adapt, modify, publish, transmit, display, distribute  
6 in any and all media or distribution methods.

7 And later it says here -- there is a line in here  
8 where there is no compensation, as well in Twitter. I don't  
9 have my finger on it. It says all media, your Honor. When you  
10 were making the distinction between Twitter and Twitpics,  
11 Twitter is text. All media would include something beyond  
12 text. That's photographs as part of all media. And that's why  
13 this applies. It allows other people who are subscribers to  
14 Twitter, who pick these things up off of Twitter, the content,  
15 to do these things.

16 THE COURT: And you were claiming rights and  
17 exercising those rights for profit, right?

18 MR. KAUFMAN: Yes, your Honor.

19 THE COURT: And just give me in one nutshell how you  
20 claim you had a license?

21 MR. KAUFMAN: The language here doesn't limit your --  
22 when you have the right to adapt, modify, distribute in any  
23 manner in media or distribution method, there is nothing there  
24 that says but can only be not-for-profit. Your Honor, there is  
25 a whole body of licenses called The Commons, and they have

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300



09o2agaA

1 terms in there saying, if you use under these things, you can't  
2 do it for profit.

3 THE COURT: What you just read grants it to "us,"  
4 that's Twitter and its partners.

5 MR. KAUFMAN: Right, but the next line says, And the  
6 license is authorizing us to make the tweets available to the  
7 rest of the world and let us do the same. Let others do the  
8 same. Do the same as what? What is the same? The same is  
9 what -- the same thing you granted us the rights to do. What  
10 does the word "same" mean if it is not you could do the same as  
11 we can do?

12 THE COURT: But that's in the Twitter agreement --

13 MR. KAUFMAN: Correct.

14 THE COURT: -- about tweets. That's not content, is  
15 it?

16 MR. KAUFMAN: Yeah, I think it applies to --

17 THE COURT: You do? What's the basis of that?

18 MR. KAUFMAN: By submitting posting or displaying  
19 content --

20 THE COURT: But a tweet is not the content.

21 MR. KAUFMAN: Right.

22 THE COURT: The content here is Mr. Morel's photos.

23 MR. KAUFMAN: Right. And it says services, plural,  
24 your Honor, by the way. When you read this, where it says,  
25 under your rights, By submitting, posting or displaying content

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 on or through the services, plural. If it was just Twitter, it  
2 would just say the service. Services, we are talking plural,  
3 so we are talk Twitter/Twitpics. You have two services.  
4 Otherwise it wouldn't be a plural here if it was a singular  
5 service.

6 THE COURT: Really? You sure about that?

7 MR. KAUFMAN: I believe that's correct. You are the  
8 only one who can be sure, your Honor. You are the judge. I  
9 think it is --

10 THE COURT: I am always in doubt.

11 Why don't you turn to the DMCA.

12 MR. KAUFMAN: Okay.

13 THE COURT: Does your argument rest on the narrow  
14 definition of CMI?

15 MR. KAUFMAN: No, your Honor. That's only one, and  
16 that's our -- probably the -- that I would put at the bottom of  
17 my set of arguments. At the top of the set of arguments, there  
18 is no CMI here, that Mr. Morel never put any CMI on his  
19 pictures, AFP never removed any CMI. There was no  
20 intentional --

21 THE COURT: That's where you lose me. Isn't one of  
22 the definitions of CMI set forth in the statute, and I will  
23 quote, "The name of and other identifying information about the  
24 copyright owner of the work."

25 MR. KAUFMAN: Right? Right, but it doesn't mean

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 just -- you have to look at who put it on, where they put it  
2 on, and how they put it on.

3 THE COURT: But --

4 MR. KAUFMAN: It says -- it specifically excludes  
5 users in the statute. Twitter/Twitpics would be users, not the  
6 owners. The CMI, when you look at Exhibit P, which is in the  
7 packet I gave you, your Honor, which is what Mr. Morel's site  
8 has on there, if you look at his photograph, there is no CMI on  
9 his photograph. If you look in his pleadings where he shows  
10 pictures of the iconic images, there is no -- his name or any  
11 other identifier is not on any of the pictures. The CMI, he  
12 never put any CMI on his imagery that was put up there.

13 THE COURT: What about Photo Morel?

14 MR. KAUFMAN: Photo Morel is --

15 THE COURT: Isn't that his name?

16 MR. KAUFMAN: Photo Morel is his name, but it's not on  
17 the images. It is something that is generated by tweeter and  
18 Twitpics, by users. It is not generated by Mr. Morel. CMI has  
19 to be he generated by Mr. Morel. It has to be Mr. Morel's CMI  
20 not Twitter and Twitpic's CMI. He did not generate that. It  
21 is not on -- it is not on the pictures.

22 THE COURT: Does it have to be on the picture?

23 MR. KAUFMAN: That's what the case law says, your  
24 Honor. Under Arriba and a number of the other cases talk about  
25 it that it needs to be on the picture. Also, AFP never took it

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 off of his picture.

2 THE COURT: Doesn't the statute say, "in connection  
3 with the work"?

4 MR. KAUFMAN: But that has been interpreted to mean  
5 not on some other part put on by somebody else. It means  
6 something that you put on your image.

7 Mr. Morel did not put any CMI on his images. What you  
8 see on those pages was generated by Twitter and Twitpics.  
9 That's not Mr. Morel's CMI. The statute requires it to be his  
10 CMI, not a user's CMI. It specifically says that it is not the  
11 user's CMI. And also you have the whole aspect of intent and  
12 knowledge. This is a scienter thing. There is nothing pled in  
13 this -- in the second amended complaint factually based that  
14 says AFP, CNN or the other defendants knowingly and  
15 intentionally removed his material.

16 THE COURT: How do you distinguish Judge Karas' recent  
17 decision in BanxCorps?

18 MR. KAUFMAN: I am blanking on it, your Honor. I'm  
19 sorry. I am blanking on the case -- on the decision. I  
20 apologize.

21 The case says it has to be with knowledge and it has  
22 to be intentional. AFP pulled the material off of the Suero  
23 site originally. Everybody agrees to that. If you look at the  
24 Suero site, which is in the packet I showed you, there is no  
25 Morel -- there is no CMI there.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

09o2agaA

1 THE COURT: What about in the --

2 MR. KAUFMAN: So it did not remove any CMI from --  
3 when it uploaded the pictures from the Suero site. Suero  
4 perhaps did, obviously, if you --

5 THE COURT: It sounds like an argument for summary  
6 judgment, but your client knew.

7 MR. KAUFMAN: Knew what, your Honor?

8 THE COURT: Your client was contacting Morel, wasn't  
9 it?

10 MR. KAUFMAN: He was contacting Morel and he was  
11 contacting Suero at the same time.

12 THE COURT: And your client went ahead --

13 MR. KAUFMAN: And he hadn't reached either of them.

14 THE COURT: Excuse me.

15 MR. KAUFMAN: Sorry.

16 THE COURT: And your client went ahead and downloaded  
17 from Suero.

18 MR. KAUFMAN: Because Suero was the only one who had  
19 an affirmative statement saying it was his. The timeline on  
20 that, your Honor, is we tried reach Morel at 6:26 p.m. We  
21 couldn't reach him. He didn't respond. At 7:12, we tried to  
22 reach Morel again.

23 THE COURT: He was in Haiti.

24 MR. KAUFMAN: I understand that. But Suero --

25 THE COURT: No wonder he couldn't respond.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 MR. KAUFMAN: He was responding.

2 THE COURT: He was in Haiti in the middle of an  
3 earthquake.

4 MR. KAUFMAN: He had responded to other people in this  
5 time frame, your Honor. But the picture --

6 THE COURT: But I'm sure the thief, Mr. Suero, was  
7 sitting in his apartment someplace and just waiting to sell the  
8 pictures.

9 MR. KAUFMAN: He hadn't responded either, your Honor.  
10 What had happened, if you look at the initial e-mails that are  
11 cited, you have people saying, Are these your pictures? There  
12 is a whole question as to whose pictures these were. Suero put  
13 out a statement saying that they were his pictures. AFP could  
14 not reach Mr. Morel.

15 THE COURT: But your client had a good idea that they  
16 were Morel's.

17 MR. KAUFMAN: No, they didn't. At that point they  
18 didn't. They knew it was one of the two, and they didn't know  
19 which one. Suero put out an affirmative statement saying they  
20 were his. They uploaded from him. As soon as they found out,  
21 about six hours later, they were Morel's, they sent out a  
22 change -- a caption correction to let everybody know, and  
23 that's in the materials that we have provided to you, your  
24 Honor, which is referenced in the counterclaim. As soon as  
25 they found out that they were Morel's, they sent out a

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 correction to all their subscribers saying, Please correct the  
2 caption. These are by Daniel Morel. We have to look at the  
3 intent and the knowledge here. They had no knowledge.

4 THE COURT: That didn't work out very well either,  
5 right, according to the counterclaim?

6 MR. KAUFMAN: Well, no. People, after that, started  
7 using -- who got it from AFP started doing it. Whether people  
8 later on downstream changed it afterwards? That obviously a  
9 lot of them did not do. But we are talking about what AFP did,  
10 not what its subscribers did downstream.

11 You have an intent and knowing, and you don't have any  
12 factual basis here saying that AFP intentionally or knowingly  
13 removed Mr. Morel's -- and that is the key here -- Morel's CMI.  
14 They didn't remove any Morel CMI. They got it from Suero's Web  
15 site. There was no Morel CMI there to remove. You can't  
16 ignore the language that says that they have to knowingly and  
17 intentionally remove it. It took Suero's, but they didn't  
18 remove any Morel CMI at all. They just took it as it was, and  
19 there was none on his thing on Twitter, which we didn't remove  
20 it anyway from his -- put on there by Twitter, is user-based,  
21 is not -- which specifically is exclude in the language of the  
22 act. It says that it is not considered something done by a  
23 user, which is what Twitter/Twitpics would be in this context.  
24 So you have no --

25 THE COURT: What about the false CMI claim?

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 MR. KAUFMAN: They -- it still was knowing. There is  
2 nothing alleged here factually that when AFP and the other  
3 defendants put up the initial Suero material that they knew  
4 that it was false or misleading; and as soon as they found out,  
5 they corrected it. They had these two people had the same  
6 pictures up there, one claiming affirmatively that they were  
7 his; the other just having posted them, which is Mr. Morel.  
8 The affirmative statement is by Suero. So they don't know  
9 whose pictures they are. It is important to get the pictures  
10 out, that was key to everybody, including Mr. Morel, to get the  
11 pictures out and widespread.

12 THE COURT: What about the allegations that AFP  
13 contacted Morel first?

14 MR. KAUFMAN: We tried to reach Morel and Suero both  
15 at approximately the same time.

16 THE COURT: Isn't the allegation that AFP attempted to  
17 contact Morel first?

18 MR. KAUFMAN: Let's see. They tried to reach Morel at  
19 6:01. Suero tweets he has the photos.

20 THE COURT: I will tell you what. Rather than just  
21 reading from whatever documents you have, could you just answer  
22 that question? Didn't -- isn't it alleged that AFP contacted  
23 Morel first?

24 MR. KAUFMAN: They sent him a tweet --

25 THE COURT: That's a yes or a no.

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300



09o2agaA

1 MR. KAUFMAN: Well, when you say contact, they never  
2 contact -- Mr. Morel never responded.

3 THE COURT: Listen to my question. Isn't it alleged  
4 that AFP attempted to contact Morel first?

5 MR. KAUFMAN: Yes, that's correct, your Honor.

6 THE COURT: Isn't that enough to survive a 12(b)(6)  
7 motion?

8 MR. KAUFMAN: No, because it is not a matter of trying  
9 to contact him simply. They have to show that they removed his  
10 CMI with the intent to defraud, everything else the statute  
11 says. It's not simply you sent an unanswered e-mail.

12 THE COURT: Didn't they also link to his page? Didn't  
13 an AFP representative, Mr. Amaldy, didn't he link to  
14 Mr. Morel's page?

15 MR. KAUFMAN: I am not following what you are saying,  
16 link to a page.

17 THE COURT: Okay. Anything further?

18 MR. KAUFMAN: On that, no, your Honor, I guess not.  
19 There is the Lanham Act matter?

20 THE COURT: Let me hear from your adversary.

21 MS. HOFFMAN: Good morning again, your Honor.

22 I believe that the arguments made by Mr. Kaufman  
23 certainly are arguments that are created by him, and I would  
24 like to -- by him without -- and really go way beyond the  
25 standard that should be applied here on a 12(b)(6) motion,

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 where the allegations of the complaint are to be deemed true  
2 and where under Isquobal the court is to apply to determining  
3 whether a complaint states a plausible claim for relief --

4 THE COURT: Why are you pursuing relief under the  
5 trademark laws?

6 MS. HOFFMAN: I believe that under the trademark laws,  
7 I believe that we have a valid claim under the trademark laws.  
8 The case is distinguished from the Dastar case. Dastar  
9 basically dealt with the situation where the works were not in  
10 copyright and the issue was attribution, and the Supreme Court  
11 clearly said that nobody really cares about who did this and  
12 that Dastar could not be used as an artist's moral rights claim  
13 for attribution. This case --

14 THE COURT: Didn't Dastar hold that the Lanham Act  
15 protection does not extend to the author of a, quote,  
16 "communicative product"? Isn't that what the Supreme Court  
17 said?

18 MS. HOFFMAN: The Supreme Court in Dastar used the  
19 statement that you just quoted to refer to the right of  
20 somebody to claim attribution as the sole wrong that was  
21 attacked under the Lanham Act.

22 Mr. Morel's claim is quite different from the claim in  
23 Dastar which, as I am sure the court knows, dealt with a  
24 documentary that was repackaged by this company when the  
25 Dastar -- when the Eisenhower original film on which the

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 documentary was based was out of copyright.

2 In our case, we have several different claims. The  
3 first one under the Lanham Act deals with the fact that we  
4 claim that there was a false attribution, not of origin, which  
5 was at issue in Dastar. In Dastar, the Supreme Court defined  
6 what "origin" meant for the purposes of the Lanham Act.

7 In our case, the claim is a false sponsorship, so that  
8 when AFP and Getty sent out their notices with the  
9 AFP/Getty/Daniel Morel, that that created intentionally a false  
10 claim of sponsorship to the detriment of Mr. Morel. And our  
11 complaint specifically alleges that customers and consumers in  
12 the photography world and market in which Mr. Morel dealt were  
13 confused as to his affiliation. And we quote in different  
14 paragraphs of the complaint people who said, oh, Daniel Morel  
15 is now working for AFP; and in other articles in which the  
16 iconic images of Mr. Morel were discussed, there is still a  
17 question and a credit given to AFP, Daniel

18 Morel. This is a classic --

19 THE COURT: But isn't a misrepresentation of origin  
20 claim for a protected work like these photographs something  
21 that's cognizable under the copyright law not the trademark?

22 MR. KAUFMAN: No, because this -- even if -- it is a  
23 different claim. This one focuses on a different issue, which  
24 is, under trademark law, we are focusing on customer confusion  
25 and the harm that results from customer confusion. In this

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 case, even -- there is a suggestion that Daniel Morel had an  
2 affiliation or relationship to AFP and Getty when, in fact,  
3 subsequently he had a relationship with their competitor,  
4 Corbis. So that AFP -- it is not a question of reproducing.  
5 It is a question of affiliation that's attached to the breaking  
6 earthquake images. And if somebody were to seek other  
7 earthquake images, they would then go to AFP for those images,  
8 because they saw Mr. Morel affiliated with AFP.

9 So I agree that there is a slight -- it is a subtle  
10 distinction -- it doesn't hit you in the face -- but it is a  
11 distinction that I am trying to make, and it deals primarily  
12 not with origin, but with a prong of affiliation which becomes  
13 particularly poignant in this case because Getty and AFP were  
14 competitors of Corbis who ultimately ended up as the licensor  
15 of these images.

16 THE COURT: Didn't Judge Rakoff reject such an  
17 argument?

18 MR. KAUFMAN: He did. But there are courts that have  
19 accepted the argument; and the case that we cited to more  
20 recently, the Wayne Cable case, which of course is not in this  
21 circuit, but involved AFP and involves quite similar issues,  
22 where AFP made the same arguments, found that what was alleged  
23 in this case was the actual repackaging of the physical  
24 product, which is exactly what Dastar left open as a hole in  
25 the case. So that what was involved in this particular

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 situation is the fact that Dastar, in Dastar, the company had  
2 actually packaged the goods.

3 THE COURT: Was there any repackaging here?

4 MS. HOFFMAN: Yes, because we are talking about the  
5 digital files, the actual physical digital files, and the  
6 digital files that were used by Getty and AFP were the actual  
7 files that were stolen from the Web site. So that they then  
8 took these digital files, which are in fact the product, and  
9 repackaged them as theirs. So it is quite different than a  
10 case -- than the Dastar case.

11 THE COURT: All right. Anything further?

12 MS. HOFFMAN: On that issue or on anything?

13 THE COURT: On that issue or any other.

14 MS. HOFFMAN: Yeah, I would just like to say, and I  
15 apologize to the court, that the Kelly v. Arriba distinction, I  
16 didn't adequately brief it in my case, and in the BanxCorps  
17 case, Judge Karas said that Kelly v. Arriba wasn't helpful or  
18 these other cases on the issue that he was deciding because it  
19 dealt with images in a fairly offhanded manner, but it wasn't  
20 involved in the case. And I, in a similarly offhanded manner,  
21 dismissed the case, and I would like the opportunity to clarify  
22 our position on that issue.

23 First, to the extent that there is an allegation that  
24 the copyright management information was on the images, that's  
25 not correct. The second point is that it is not necessary that

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 the copyright management information be located physically as!  
2 metadata or as a watermark on the images, as I have read the  
3 cases and as the cases in this circuit have stated. We briefed  
4 those issues.

5 THE COURT: Are there any photos in the counterclaims  
6 that contain CMI on the images?

7 MS. HOFFMAN: On the images themselves? No, and I  
8 don't believe that that's necessary. The copyright management  
9 information was Daniel Morel, his name, and Photo Morel. And  
10 the point is that they were meant to link to Daniel Morel.

11 And as I was just finishing with the Kelly v. Arriba  
12 case, in Kelly v. Arriba, there was an automated crawler that  
13 went around taking images; and, ultimately, it is an important  
14 case for the idea of fair use and the use of thumbnail images.  
15 But what was important in the Kelly v. Arriba case, which dealt  
16 with copyright management information and found that there was  
17 not a violation of the DMCA, the case was 1999, just a short  
18 time after the DMCA was enacted, what was really important in  
19 that case was that it was an automated crawler, as distinct  
20 from BanxCorps, where there are actual people who are taking  
21 off this information or distributing it without information.  
22 And in the Kelly v. Arriba case, the actual crawler when you  
23 pulled up the thumbnail image, the actual thumbnail image led  
24 you to the site of the photographer, so that there was a link  
25 to the actual site and all the copyright information that was

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 not embedded on the photograph but was in fact on the site, so  
2 that somebody who clicked on it would then be directed to the  
3 site.

4 In this case, our case, the copyright management  
5 information, Daniel Morel, Photo Morel, copyright Twitpic was,  
6 in our view, totally removed, and there was no way that one  
7 could identify Mr. Morel, and we have alleged that this was  
8 deliberate. What the motion of all of the counterclaim  
9 defendants ignores almost to the point of trying to deceive the  
10 court is that our complaint basically alleges that all ABC, all  
11 the other companies, didn't -- either recklessly acted or they  
12 actually knew the images were Daniel Morel's and then they  
13 distributed them. And I think what's really important is that  
14 in my declaration, which provides to the court for ease certain  
15 documents, those documents were all referred to and relied on  
16 by us in our counterclaim, unlike the Twitter documents, and it  
17 is clear that in Soles4Souls, the license for Getty Images not  
18 only represents AFP as the photographer, but claims that Getty  
19 Images has the rights to license this, and that is after they  
20 all receive this kill notice.

21 So I believe that our allegations really set forth at  
22 this point, which is whether or not we are entitled to  
23 introduce evidence on each of these claims, I believe that our  
24 allegations, plus the accompanying images which support them,  
25 are not simply conclusory mantras, as the court would say.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1           And the only other issue that I want to address is  
2   that this court actually considered a case dealing with  
3   vicarious and contribute tarry infringement, and I think  
4   Mr. Penchina actually was one of the lawyers in the case. But  
5   in that case the court describes, and quite clearly set forth  
6   the issues of contributory and vicarious infringement, and I  
7   believe that CBS and ABC have made a motion to dismiss those  
8   claims against them on the basis of the fact that we have not  
9   alleged that they received a direct profit or benefit and  
10   didn't have any control. I disagree. I think that both -- all  
11   the counterclaim defendants, in attacking for deficiencies in  
12   our pleadings, because there is some factual discrepancies and  
13   then we have differences of law on the DMCA and on the license,  
14   which of course we don't believe exists, I mean it is clear  
15   that they were not intended beneficiaries, but the -- the front  
16   part of our complaint clearly alleges that they are, in fact,  
17   deriving a profit or gain. The definition of "affiliate" or  
18   "subsidiary" implicates by inference the idea of control. In  
19   fact --

20           THE COURT: How did you allege control?

21           MS. HOFFMAN: Excuse me?

22           THE COURT: How did you allege control?

23           MS. HOFFMAN: Well, there are several different  
24   things. As opposed to Getty Images, the control for vicarious  
25   and contributory infringement is in licensing the images; and

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300



09o2agaA

1 then, pursuant to their contract, they have the ability, if  
2 there is an issue with respect to copyright infringement, that  
3 is brought to their attention to terminate the license. They  
4 never did that. So that's basically control through the  
5 licensing agreement that Getty Images used.

6 With respect to --

7 THE COURT: Is that in the counterclaim?

8 MS. HOFFMAN: Yes.

9 THE COURT: Where? I don't recall seeing that.

10 MS. HOFFMAN: I provided in my declaration.

11 THE COURT: No, I asked you where it is in the  
12 pleading because that's what is before me.

13 MS. HOFFMAN: Well, your Honor, under the standard for  
14 considering documents that are not specifically attach to the  
15 pleading on which the -- and on which we rely, we specifically  
16 mention Getty's licensing agreement in the Soles4Souls, and  
17 that is attached as one of our exhibits. So because we had so  
18 many documents in the exhibit, in order to facilitate the  
19 court's review, I included as part of my declaration the  
20 exhibit from Soles4Souls which specifically referred to in the  
21 papers and the licensing agreement, the Getty licensing  
22 agreement, which was available by clicking on the papers that  
23 we provided as part of our complaint. Therefore, the license  
24 agreement between Getty and its users meets the standards for  
25 this court to consider a document which is not in the complaint

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 but referred to, as the Twitter terms and agreement are not  
2 properly considered, but it is not fatal to our argument on  
3 third-party beneficiary. As I said, it is sort of a  
4 red-herring issue because they are not beneficiaries, as the  
5 court has questioned Mr. Kaufman. We don't believe that they  
6 are beneficiaries or could be considered so. So we think that  
7 that shows the degree of control through the contract as for  
8 Getty.

9 With respect to the ABC and CBS affiliate, "affiliate"  
10 in the dictionary refers to control; and, therefore, an  
11 inference is that they controlled the one and the other. This  
12 is different than the case that was upheld by the Second  
13 Circuit on the basis of a very scholarly opinion written by you  
14 where there was a loan, lenders. This is not that case. And  
15 in fact, my further research on the Internet shows that in fact  
16 the CBS and ABC, quote, affiliates, are in fact owned by, so  
17 they may in fact be departments of, in which case our claim for  
18 direct infringement would simply be increased by the number of  
19 images that were displayed by the affiliate, because they would  
20 be one and the same.

21 THE COURT: All right.

22 MS. HOFFMAN: They wouldn't even be a separate entity.  
23 We haven't been able to find out any more than that.

24 And I would just conclude by saying -- and this is not  
25 part of our response to the motion -- I believe that we meet

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 the standard at this stage of the proceedings, that we have  
2 alleged all of the facts that one needs to allege on the  
3 issues, and that with respect to the law, we have set out our  
4 position and believe that both under the -- that there is no  
5 license and, under the DMCA, the better view is that of Judge  
6 Karas and Judge Castel in this circuit; that the copyright  
7 management information does not have to be on the image, as  
8 also Judge Castel said when AFP and AP had lines below it as  
9 their copyright information; and that certainly with respect to  
10 Twitpic, Twitpic guaranteed to Mr. Morel his copyright; and I  
11 guess we believe Dastar is distinguishable; and the rest of the  
12 information is set out in our papers.

13 THE COURT: Thank you, Ms. Hoffman.

14 MS. HOFFMAN: Thank you, your Honor.

15 THE COURT: Anything further, Mr. Kaufman?

16 MR. KAUFMAN: No, but I believe my colleagues may want  
17 to address certain issues.

18 THE COURT: Mr. Penchina.

19 MR. PENCHINA: Yes, your Honor.

20 Your Honor, on behalf of ABC, there are only two  
21 claims against ABC in this case, so not all of the issues that  
22 are before your Honor necessarily relate to ABC. One claim  
23 against ABC is for copyright infringement, and that claim  
24 includes both direct liability and what the plaintiff or the  
25 counterclaim plaintiff has termed secondary liability, so I am

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 presuming that she is attempting to sweep in both contributory  
2 and vicarious.

3 Just based on what's pled in this counterclaim, it is  
4 in paragraph 215, and all that it says is that Mr. Morel  
5 discovered six of the iconic images posted in an online photo  
6 gallery of KFSN, the ABC affiliate in Fresno. Mr. Morel did  
7 not authorize the display, reproduction, transmission of the  
8 infringing iconic images, and ABC is secondarily liable for the  
9 act of its affiliates. It's a conclusory statement with  
10 absolutely no facts pled whatsoever addressing any of the  
11 elements of either contributory or vicarious liability. There  
12 is nothing about control. There is nothing about profit of any  
13 kind, let alone direct profit. There is no allegation that the  
14 photos were provided by ABC. ABC, unlike some of the other  
15 folks involved in the case, are not accused of having  
16 distributed the photos to third parties, but simply having used  
17 them themselves, and that doesn't state a claim for  
18 contributory infringement or vicarious.

19 THE COURT: ABC's argument is that it wasn't Fresno,  
20 it should have been Oakland, right? "There is no there there."

21 MR. PENCHINA: "There is no there there."

22 THE COURT: I got it.

23 MR. PENCHINA: In terms of the second claim against  
24 ABC, it is for removal of the copyright management information,  
25 just the removal aspect. And in terms of that, the allegations

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 in the complaint are that ABC downloaded the image from the  
2 Twitter page or the Twitpic page. Essentially all it did, as  
3 alleged in the complaint, is it clicked on the image and it  
4 saved it.

5 There is the conclusory assertion that ABC removed  
6 copyright management information, but all of the exhibits in  
7 the complaint itself or in the counterclaims themselves show  
8 that there was no copyright management information on the  
9 photo, there was no copyright management information that would  
10 have come along with it when you download it, and therefore  
11 nothing was removed. There is no case that says that you have  
12 to reach out and add additional information that may have  
13 appeared elsewhere on the page, and that allegation of  
14 violating through the removal of copyright management  
15 information doesn't state a claim absent something there that  
16 was actually removed, which couldn't have happened. And if we  
17 downloaded and saved, we got what was there. Whether we should  
18 have taken it or shouldn't have taken it is a different issue  
19 and will come up later in the case. But for the purposes of  
20 copyright management information, if you look at all of the  
21 exhibits depicting the image, there is no copyright management  
22 information on it and no case says we need to also pull  
23 information from elsewhere on the page.

24 Thank you, your Honor.

25 THE COURT: Thank you, Mr. Penchina.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 Anything further?

2 MS. HOFFMAN: Your Honor, if I could just respond to  
3 that?

4 THE COURT: Well, let's hear from Mr. Rosenfeld.

5 You want to be heard also?

6 MR. ROSENFELD: Very briefly, your Honor.

7 THE COURT: Very briefly.

8 MR. ROSENFELD: Your Honor, I won't speak to the  
9 copyright issues, I think those have been covered.

10 The issue as to whether this information was copyright  
11 management information, there is a split in courts and there is  
12 a split within this circuit as to whether information that's  
13 not automated systems, watermark or something of that nature,  
14 is CMI at all. And as we have briefed we think the Silver and  
15 the IQ cases, and the other cases that held that it is  
16 automated, that it must be the automated systems rather than  
17 simply the identity of the copyright owner or something of that  
18 nature, dig much deeper into the structure of the statute and  
19 the legislative intent of the statute and get it right.

20 THE COURT: But what about Judge Castel's point that  
21 where the statute is clear, there is no need to resort to  
22 legislative history?

23 MR. ROSENFELD: That's right. I mean, certainly we  
24 understand when the plain meaning of the statute is clear, you  
25 don't have to go to the legislative history. In this case, we

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 don't think it is, because you don't look at just those few  
2 words in isolation. You have to look at the entire statute,  
3 the entire structure of the DMCA; and when you look at all of  
4 the categories of information that are classified as CMI, there  
5 are things that, you know, like terms of use, things that are  
6 of an electronic nature, and you can't just read it in  
7 isolation.

8 THE COURT: Just so I'm clear, when you talk about the  
9 split in this circuit, you are referring to Judge Castel and  
10 Judge Karas on one side and Magistrate Judge Freeman on the  
11 other?

12 MS. HOFFMAN: So I believe so. That was the Silver  
13 case.

14 THE COURT: That's the split?

15 MR. ROSENFELD: Again, within the Southern District,  
16 judges disagree.

17 THE COURT: Well, you said in the circuit.

18 MR. ROSENFELD: And I meant the Southern District.

19 THE COURT: Fine.

20 Anything further?

21 MR. ROSENFELD: No. Thank you, your Honor.

22 THE COURT: Thank you, Mr. Rosenfeld.

23 I will give you one minute, Ms. Hoffman.

24 MS. HOFFMAN: That's all I want.

25 THE COURT: You are using it right now, so let's go.

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 Speak.

2 MS. HOFFMAN: The only thing I wanted to say is that  
3 all of the defendants here aggressively defend their own  
4 copyright and that the -- that the claim that I just said, that  
5 Mr. Morel -- and it probably is not worth repeating -- but when  
6 Mr. Morel put up those images, it is not really any different  
7 than ABC, CBS, CNN wanting everybody to come to their sites to  
8 watch the Olympics or the tennis championships, and they  
9 aggressively defend copyright in those programs, even though  
10 they want all the world to see it, for the purpose of selling  
11 sponsorships.

12 I think everything else is in our papers.

13 Oh, and I would like to say that in the event that --  
14 we don't believe that the complaint warrants dismissal, but in  
15 the event that you would deem that a claim would be dismissed,  
16 we would request the right to amend our pleadings to correct  
17 any deficiency.

18 Thank you, your Honor.

19 THE COURT: All right.

20 Counsel, thank you for your arguments. Decision  
21 reserved.

22 Have a good weekend.

23 MS. HOFFMAN: Thank you, your Honor.

24 MR. PENCHINA: Your Honor, can I raise one point off  
25 of the motion? We think, speaking on behalf of ABC, that this

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300



09o2agaA

1 case might be something that would be appropriate for mediation  
2 and would wonder if the court would entertain ordering that we  
3 participate in mediation through the magistrate?

4 THE COURT: Ms. Hoffman, are you -- do you share that  
5 view?

6 MS. HOFFMAN: No, I don't share that view.

7 And since extraneous matters have been brought up, I  
8 would just like to point out that, despite your Honor's order  
9 that requested that discovery proceed pending this motion, we  
10 have fully complied to the best of our ability with the  
11 discovery requests of all of the counterclaim defendant, and we  
12 have received not one document from any of the --

13 THE COURT: Then follow my rules of individual  
14 practice, try to resolve it; and if you can't resolve it, send  
15 me a joint letter, and I will rule on it.

16 MS. HOFFMAN: Thank you, your Honor.

17 THE COURT: So you want to just keep litigating the  
18 case? You don't want to see if you could settle it? Is that  
19 it?

20 MS. HOFFMAN: I believe that, based on --

21 THE COURT: I will tell you what, maybe, because I  
22 think you are about to say something that is irrational, you  
23 ought to take a few minutes and confer with your client and let  
24 me know whether you want to have a discussion with the  
25 magistrate to see if you can resolve the case. You can send me

SOUTHERN DISTRICT REPORTERS, P.C.

(212) 805-0300

09o2agaA

1 such a letter next week, just two sentences, one sentence: I  
2 have consulted with my client, and we agree with Mr. PENCHINA  
3 that it would be helpful, it might be helpful; or, I have  
4 consulted with my client and, in the words of Patrick Henry,  
5 it's give me liberty or give me death. Okay?

6 MS. HOFFMAN: Thank you, your Honor.

7 MR. PENCHINA: Thank you, your Honor.

8 THE COURT: Have a good weekend.

9 MR. PENCHINA: You, too.

10 - - -  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300

