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

11 BARRY ROSEN, ) Case No. CV 12-658 CAS (FFMx)  
12 Plaintiff, )  
13 vs. ) FINDINGS OF FACT AND  
14 NETFRONTS, INC., ET AL., ) CONCLUSIONS OF LAW  
15 )  
16 Defendants. )  
17 \_\_\_\_\_ )

18  
19 **I. INTRODUCTION**

20 Plaintiff Barry Rosen (“Rosen”) filed the instant action in this Court on January  
21 25, 2012. Plaintiff’s complaint alleges two claims for copyright infringement. The  
22 gravamen of plaintiff’s complaint is that defendant Stephen Pierson (“Pierson”) has,  
23 through his website, attempted to sell four unauthorized prints of photographs taken by  
24 plaintiff (“the Photographs”).<sup>1</sup> The Photographs portray actress Gena Lee Nolan, and at  
25 the time defendant was offering them for sale, they were purportedly autographed. The  
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27 <sup>1</sup> Rosen’s complaint named Pierson and Netfronts, Inc. as defendants. Dkt. #1. On  
28 February 27, 2012, the claims against Netfronts, Inc. were dismissed with prejudice  
pursuant to a stipulation. Dkt. #14. Pierson is the sole remaining defendant.

1 Photographs were never sold, and the asking price for the Photographs never exceeded  
2 fifty dollars. Rosen is seeking attorney's fees, statutory damages, and an injunction.

3 On June 13, 2013 the Court held a bench trial. After considering the evidence and  
4 arguments presented at trial, the Court finds and concludes as follows.

5 **II. FINDINGS OF FACT**

6 1. Plaintiff Rosen is a photographer, and has worked in this profession for  
7 several years. Rosen took the Photographs at issue in this case, and registered them with  
8 the Copyright Office in 2004.

9 2. Defendant Pierson is in the business of selling entertainment memorabilia,  
10 including autographed pictures. For several years, Pierson operated a retail store in Los  
11 Angeles, California. Additionally, Pierson sold memorabilia by mail and through the  
12 Internet.

13 3. At some point during the late 1990s, two men appeared in Pierson's store,  
14 and sold Pierson several prints, including the Photographs.

15 4. After purchasing the Photographs, Pierson displayed them and offered them  
16 for sale through his store, through mail-order catalogs, and through the Internet. The  
17 dispute underlying this case arises out of Pierson's efforts to sell the Photographs,  
18 Rosen's efforts to stop Pierson from selling the Photographs, Pierson's eventual  
19 acquiescence to Rosen's demands, and Pierson's avowed efforts to remove his offers to  
20 sell the Photographs from the Internet. The facts revolve around several encounters  
21 during which Rosen demanded that Pierson cease his activities.

22 5. The first such encounter occurred at some point in either the late 1990s or  
23 early 2000s, when Rosen appeared in Pierson's store. Upon seeing the Photographs,  
24 Rosen informed Pierson that he owned a copyright to the Photographs, and demanded  
25 that Pierson cease displaying the Photographs and offering them for sale. Pierson asked  
26 Rosen for proof establishing his ownership of a copyright in the Photographs. Rosen did  
27 not offer any proof, and left the store.

1           6.       A second set of encounters occurred between 2001 – 2004, and involved  
2 Pierson’s attempts to sell the Photographs through the Internet. On several occasions,  
3 Rosen issued notices, pursuant to the Digital Millennium Copyright Act, 17 U.S.C. §  
4 512 (“DMCA”), demanding that the Photographs be removed from ebay.com and  
5 dejavugalleries.com (“Pierson’s website”), the latter of which was operated by Pierson.  
6 In 2004, Pierson learned of one of the DMCA notices from Tony Romero (“Romero”),  
7 who was providing technical support to Pierson’s business. In response to the DMCA  
8 notice, Pierson ceased displaying and offering the Photographs for sale through the  
9 Internet. Pierson was unsure whether or not he had a right to sell and display the  
10 Photographs, but decided to cease his activity because the Photographs were inexpensive  
11 items.

12           7.       At some point in 2005, Pierson encountered technical problems with his  
13 website, and removed his business from the Internet. At this time, Rosen believed  
14 Pierson had ceased doing business.

15           8.       Although Pierson ceased his efforts to sell the Photographs online in 2004,  
16 he had also displayed one of the Photographs in a mail-order catalog. Pierson did not  
17 remove the offers to sell this Photograph from the mail order catalogs at that time.  
18 Accordingly, one of the four Photographs was displayed and offered for sale through the  
19 catalog. The catalog continued to be published, even after Pierson discontinued his  
20 online business.<sup>2</sup>

21           9.       Subsequently, in or around 2010, Pierson revived his online business, and  
22 hired Lin Daniel (“Daniel”) to rebuild his website. When Daniel rebuilt the website, she  
23 used a “global replace” technique, which drew upon a database Pierson had created that  
24 included information regarding all or almost all of the merchandise he had for sale.  
25 Although Romero had removed the Photographs from Pierson’s website, they had never  
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27           <sup>2</sup> It is unclear why Pierson did not remove the Photograph from the catalog, or  
28 whether he even knew that the Photograph was included in the catalog.

1 been removed from this database. Therefore, when the website was rebuilt, a  
2 consequence of the “global replace” was that the Photographs and offers to sell were  
3 again displayed on Pierson’s website. Additionally, Pierson’s new website included a  
4 digital version of the print catalog, which still contained a copy of one of the  
5 Photographs and a related offer to sell.

6 10. With the Photographs back online, the final set of encounters occurred. At  
7 some point in 2010, Rosen viewed the Photographs while conducting an Internet search.  
8 In response, Rosen issued new DMCA notices demanding that the Photographs be taken  
9 down, and demanding that the electronic version of the catalog also be taken down.  
10 Pierson learned of the DMCA notices, and directed Daniel to remove the Photographs  
11 from the website. Additionally, Pierson removed the copy of the Photograph from the  
12 electronic version of the catalog, and directed Daniel to replace the allegedly infringing  
13 catalog with the modified catalog.

14 11. In response to Pierson’s request, Daniel stated that she would resolve the  
15 problem, and attempted to reprogram the website to ensure that the Photographs would  
16 not reappear. She did not, however, remove the Photographs from Pierson’s database.  
17 Instead, she attempted to make the Photographs inaccessible by removing any links to  
18 the Photographs. She believed that actually removing the images from the database  
19 would have been excessively difficult and not necessary to remove the Photographs from  
20 the website.

21 12. Rosen was able to view the Photographs online despite Daniel’s  
22 modification to the website, and on September 3, 2011, Rosen sent another DMCA  
23 notice demanding that the images be taken down.

24 13. Rosen filed the instant lawsuit on January 25, 2012, alleging that Pierson  
25 engaged in copyright infringement through the website. Subsequently, in response to the  
26 complaint and DMCA notice, Daniel took additional steps to ensure that the Photographs

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1 would not reappear, and also removed them from the website’s database. Since this  
2 lawsuit was filed, the Photographs have not reappeared on Pierson’s website.

3 14. To the extent necessary, each of these findings of fact may be deemed to be  
4 a conclusion of law.

### 5 **III. CONCLUSIONS OF LAW**

6 1. Rosen has asserted claims for copyright infringement arising out of  
7 Pierson’s post-2010 display of the Photographs and attendant offers of sale.

8 2. A copyright infringement claim has two elements: (1) ownership of a valid  
9 copyright, and (2) violation of any of the exclusive rights of copyright owners. 17  
10 U.S.C. § 501; Ellison v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004). Rosen owns a  
11 copyright in the Photographs, and by displaying the Photographs on the Internet along  
12 with offers to sell, Pierson violated Rosen’s exclusive rights to reproduce and distribute  
13 the Photographs. 17 U.S.C. § 106. While, under some circumstances, the “first sale”  
14 doctrine allows purchasers of authorized individual copies of an image to sell any copies  
15 lawfully purchased, the doctrine is inapplicable here because Pierson presented no  
16 evidence that the prints he sold were authorized copies. 17 U.S.C. § 109(a); Apple, Inc.  
17 v. Psystar Corp., 658 F.3d 1150, 1155 (9th Cir. 2011). Moreover, while the defense of  
18 laches can, under some circumstances, provide a defense to copyright infringement, it is  
19 inapplicable here because the evidence shows that Rosen did not unreasonably delay in  
20 asserting his rights, but instead refrained from bringing a suit earlier because he believed  
21 Pierson had gone out of business. Danjaq LLC v. Sony Corp., 263 F.3d 942, 950 – 951  
22 (9th Cir. 2001) (“To demonstrate laches, the defendant must prove both an unreasonable  
23 delay by the plaintiff and prejudice to itself.”).

24 3. Therefore, the Court finds that Pierson infringed Rosen’s copyright in all  
25 four Photographs by posting the Photographs online along with offers to sell. The Court  
26 next considers what remedies are available to Rosen.

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1           4.     Rosen seeks statutory damages, attorney’s fees, and injunctive relief. 17  
2 U.S.C. §§ 502, 504(c), 505. In response, Pierson argues that statutory damages are  
3 unavailable under the doctrine of continuing infringement, which bars a copyright  
4 plaintiff from seeking attorney’s fees or statutory damages where the alleged acts of  
5 infringement commenced prior to the registration of the work. 17 U.S.C. § 412(2).  
6 Additionally, Pierson argues that even if the doctrine of continuing infringement does  
7 not apply, only minimal statutory damages should be awarded because he never intended  
8 to display or offer to sell the Photographs when he resume his online business in 2010.

9           5.     Under the doctrine of continuing infringement, “the first act of infringement  
10 in a series of ongoing infringements of the same kind marks the commencement of one  
11 continuing infringement under § 412.” Derek Andrew, Inc. v. Poof Apparel Corp., 528  
12 F.3d 696, 699 (9th Cir. 2008). Here, Pierson’s infringement through the catalog  
13 commenced at least in 2001, and hence commenced prior to registration. Rosen  
14 therefore cannot pursue statutory damages arising out of the copying and offers of sale  
15 that occurred in connection with Pierson’s catalog. Rosen can, however, pursue  
16 statutory damages arising out of the copying and offers of sale that occurred through  
17 Pierson’s website. The doctrine of continuing infringement does not apply to these acts  
18 because Pierson ceased displaying the Photographs through his website between 2005 –  
19 2010, and this cessation of infringing activity renders the defense of continuing  
20 infringement inapplicable to the claims arising out of the website. Troll Co. v. Uneeda  
21 Doll Co., 483 F.3d 150, 158 – 159 (2d. Cir. 2007); Mason v. Montgomery Data, Inc.,  
22 741 F. Supp. 1282, 1286 (S.D. Tex. 1990); Singh v. Famous Overseas, Inc., 680 F.  
23 Supp. 533, 535 (E.D. N.Y. 1988).<sup>3</sup>

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26           <sup>3</sup> The infringement through the catalog is irrelevant to the analysis of whether  
27 continuous infringement occurred through Pierson’s website, because those acts of  
28 infringement are not “of the same kind.” Derek Andrew, Inc., 528 F.3d at 699.

1           6.       Rosen may therefore be awarded statutory damages for infringement of  
2 each of the four Photographs. Statutory damages are awarded based on the number of  
3 works infringed, not the number of infringements that took place. Walt Disney Co. v.  
4 Powell, 897 F.2d 565, 569 (D.C. Cir. 1990). The standard amount of statutory damages  
5 is \$750 – \$30,000 per work, but if the infringement was “innocent,” a court may award  
6 damages as low as \$200. Id. §§ 504(c)(1) – (2). Infringement is innocent if the  
7 “infringer was not aware and had no reason to believe that his or her acts constituted an  
8 infringement of copyright.” Id. § 504(c)(2).

9           7.       A defendant has the burden of proving innocent infringement, and to carry  
10 this burden, the defendant must show a good faith belief that no infringement occurred,  
11 and must also show that this belief was objectively reasonable. Childress v. Taylor, 798  
12 F. Supp. 981, 994 (S.D. N.Y. 1992). In a typical innocent infringement defense, a party  
13 asserts its belief that no infringing act took place because either the infringed works were  
14 not copyrighted, or the acts did not constitute infringement. See, e.g., id.; D.C. Comics  
15 Inc. v. Mini Gift Shop, 912 F.2d 29, 32, 26 (2d Cir. 1990); Allen-Myland, Inc. v.  
16 International Business Machines Corp., 770 F. Supp. 1014, 1027 (E.D. Pa. 1991). Here,  
17 Pierson offers a slightly different version of the defense. Rather than attempting to argue  
18 that he was unaware that the Photographs were copyrighted, he argues that he was  
19 unaware that he had actually posted the Photographs online with offers to sell. Pierson’s  
20 defense therefore does not contest his knowledge of whether the acts constituted  
21 infringement, but instead rests on his assertion that—at the time the infringement  
22 commenced—he had a reasonable belief that he was not engaging in the acts constituting  
23 infringement.

24           8.       The Court finds that Pierson’s infringement was innocent. The evidence at  
25 trial showed that Pierson did not personally handle technical duties regarding his  
26 website, but instead retained Romero and Daniel for this purpose. Moreover, Pierson  
27 consistently directed both Romero and Daniel to remove the Photographs from the  
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1 website upon learning of Rosen’s complaints. Therefore, Pierson never personally  
2 displayed the Photographs or offers to sell the Photographs on his website, nor did he  
3 direct Romero or Daniel to do so, which supports his contention that he never  
4 subjectively intended to engage in the infringing acts that took place.

5 9. Moreover, it was reasonable for Pierson to believe that by bringing his  
6 business back online in 2010, he would not engage in infringement of Rosen’s  
7 copyrights. Pierson had instructed Romero to remove the Photographs from the website  
8 in or around 2004, and thereby ceased infringing Rosen’s copyrights through his  
9 website. Accordingly, when he reestablished his online business in 2010, Pierson had no  
10 reason to believe that he would engage in infringing acts by reviving the website.  
11 Nothing that occurred between 2005 – 2010 raised the possibility that Daniel’s global  
12 replace would reintroduce the Photographs to the website. Moreover, after learning that  
13 his website had, in fact, displayed the Photographs, Pierson immediately directed Daniel  
14 to modify the website. While Daniel’s modifications to the website did not successfully  
15 prevent the images from reappearing, the Court has no reason to doubt the  
16 reasonableness of Daniel’s belief that her modifications to the website should have been  
17 sufficient to prevent further infringing acts, nor the reasonableness of Pierson’s belief  
18 that Daniel could successfully prevent the Photographs from reappearing. The Court  
19 therefore concludes that there are no additional steps a reasonable person in Pierson’s  
20 position would have taken to insure that the Photographs would not reappear online.  
21 Consequently, Pierson’s infringement was the result of a reasonable mistake, and  
22 therefore Pierson’s infringement was innocent. Accordingly, given the innocent nature  
23 of the infringement, statutory damages in the amount of \$800 are appropriate.

24 10. Additionally, because Pierson’s infringement was innocent, Pierson has  
25 ceased any infringing conduct, and Pierson has made good faith attempts to avoid  
26 infringement, the Court finds that Rosen is not entitled to attorney’s fees. McCulloch v.  
27 Albert E. Price, Inc., 823 F.2d 316, 323 (9th Cir. 1987) (“Considerations which justify  
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1 the denial of fees may include . . . the defendant’s status as innocent, rather than willful  
2 or knowing, infringer . . . the defendant’s good faith attempt to avoid infringement.”);  
3 Warner Bros., Inc. v. Dae Rim Trading, Inc., 677 F. Supp. 740 (S.D. N.Y. 1988).<sup>4</sup>

4 11. Finally, an injunction preventing Pierson from displaying the Photographs  
5 or offering to sell the Photographs should issue. A permanent injunction is an  
6 appropriate remedy for copyright infringement if there is a threat of continuing  
7 violations and an injunction is a reasonable means of preventing future infringement.  
8 MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 520 (9th Cir. 1993); 17  
9 U.S.C. § 502. Because inadvertent computer errors caused infringement to occur on at  
10 least two occasions since 2010, and there is a threat that similar errors could cause  
11 further infringement, the Court concludes that an injunction should issue to ensure that  
12 Pierson takes steps to prevent the kind of inadvertent computer errors discussed above  
13 from causing future infringement.

14 12. To the extent necessary, each of these conclusions of law may be deemed to  
15 be a finding of fact.

16 **III. CONCLUSION**

17 Based on the above Findings of Fact and Conclusions of Law, the Court finds that  
18 Pierson is liable to Rosen for copyright infringement, and awards Rosen \$800 statutory  
19 damages. Additionally, Pierson, along with any of his agents, servants, employees,  
20 affiliates, successors, or assigns, and any person or entity acting on their behalf or in  
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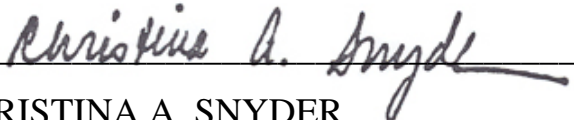
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22 <sup>4</sup> An award of attorney’s fees to Pierson is not warranted either—despite the fact that  
23 Pierson prevailed on the issue of innocent infringement—because Pierson did not prevail  
24 on the issue of liability, and Rosen’s position regarding innocent infringement was not  
25 objectively unreasonable, particularly in light of the fact that multiple acts of infringement  
26 occurred. Love v. Associated Newspapers, Ltd., 611 F.3d 601, 614 (9th Cir. 2010) (“In  
27 considering whether [to award fees pursuant to section 505], the court might consider (1)  
28 the degree of success obtained; (2) frivolousness; (3) motivation; (4) the objective  
unreasonableness of the losing party’s factual and legal arguments; and (5) the need, in  
particular circumstances, to advance considerations of compensation and deterrence.”).

1 concert or participation with them, is hereby PERMANENTLY ENJOINED from  
2 copying, displaying, distributing, marketing, licensing, offering to license, selling, or  
3 offering to sell the Photographs or any prints of the Photographs. Each side is to bear its  
4 own costs and attorney's fees.

5 IT IS SO ORDERED.

6  
7 Dated: July 9, 2013

8   
9 CHRISTINA A. SNYDER  
10 United States District Judge