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14 **UNITED STATES DISTRICT COURT**
CENTRAL DISTRICT OF CALIFORNIA
15 **(Western Division)**

16 BRIAN J. KRUEGER,
17 Plaintiff,

18 v.

19 ADLIFE MARKETING AND
COMMUNICATIONS CO., INC.,
20 Defendant.

)
) **Civil Action No. 2:20-cv-7083**

)
) **COMPLAINT FOR**
DECLARATORY RELIEF

21 **NATURE OF THE ACTION**

22 1. This action for declaratory relief is brought against AdLife Marketing and
23 Communications Co., Inc. In approximately 2001, defendant caused the creation of a
24 photograph of fresh produce (the “Produce Photograph”). It placed the photograph in a
25 database made available to grocers and other businesses that use photographs of food to sell
26 their wares.

27 2. Plaintiff Brian J. Krueger created and maintains an Internet platform called
28

1 LabSpaces.net, as a forum to host and enable scientific discussion. In 2013, a blogger
2 posted on LabSpaces.net a deeplink to defendant's Produce Photograph to discuss the ways
3 in which grocers present their wares to induce shoppers to buy more of their fruits and
4 vegetables.

5 3. Beginning in June 2020, defendant's agent sent plaintiff a demand letter and then
6 a series of emails accusing plaintiff of copyright infringement based on the blogger's post,
7 threatening to sue plaintiff for such infringement, and demanding that plaintiff pay
8 thousands of dollars to avoid having such a lawsuit filed.

9 4. Plaintiff was not aware of the posting until he received the letter from defendant's
10 agent in June 2020. After the initial demand letter alerted plaintiff to the posting, plaintiff
11 removed the link to the Produce Photograph from LabSpaces.net, and also explained to
12 defendant's agent that a third-party forum user had posted the link, without the plaintiff's
13 knowledge or involvement, and hence that plaintiff was not liable for copyright
14 infringement.

15 5. Despite these facts and plaintiff's explanation, defendant has persisted in its claim
16 that plaintiff has infringed defendant's copyright and has continued to demand payment,
17 repeatedly threatening to file suit if payments are not made promptly. Defendant is claiming
18 actual damages based on its standard licensing formula, under which subscribers get
19 permission to use any and all of defendant's photographs for \$999 per month. On
20 information and belief, the market value of the single photo that plaintiff is claimed to have
21 infringed is under \$100.

22 6. Accordingly, plaintiff now asks the Court for a judgment declaring that he is not
23 liable for thousands of dollars in damages for copyright infringement.

24 **PARTIES**

25 7. Plaintiff Brian J. Krueger is an individual who lives in Chapel Hill, North
26 Carolina.

27 8. Defendant AdLife Marketing and Communications Co., Inc., is a Rhode Island
28 corporation whose headquarters is in Pawtucket, Rhode Island. As relevant here, defendant

1 has acted through an agent located in Santa Ana, California.

2 **JURISDICTION AND VENUE**

3 9. A definite, substantial and concrete controversy exists within this Court's
4 jurisdiction between the parties concerning plaintiff's and defendant's rights under the
5 United States Copyright Act of 1976, 17 U.S.C. § 101 et seq. (the "Copyright Act").
6 Defendant, through its agent and counsel based in Santa Ana, California, has expressed an
7 intention to commence litigation against plaintiff over plaintiff's alleged infringement of the
8 copyright in one of defendant's photographs.

9 10. This action for a declaratory judgment arises under the Copyright Act and the
10 Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. Thus, this Court has original
11 jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338.

12 11. This Court has personal jurisdiction over the defendant because it employed a
13 California law firm, Higbee and Associates, as its agent to search the Internet for
14 unauthorized uses of its photographs and to send demand letters and threats seeking to
15 collect money from alleged infringers. On information and belief, defendant sells licenses
16 for the use of its photographs to firms all over the United States, including in California.

17 12. Venue is proper in this Court under 28 U.S.C. § 1400(a) because defendant and
18 its agent, Higbee and Associates, may be found in this district.

19 **FACTUAL BACKGROUND**

20 13. Plaintiff Brian J. Krueger is a molecular biologist who is currently employed as
21 an associate director for research and development by a medical testing company. In 2005,
22 while he was in graduate school, he founded a web site at LabSpaces.net, to serve as a social
23 network for the scientific community. The web site contains discussion threads addressed
24 to several different scientific disciplines, each of which featured further discussion threads
25 on many different topics within that discipline. In 2011, LabSpaces.net created a blogging
26 platform that enabled scientists to host their own blogs.

27 14. Hosting was available to anyone who wanted to create a blog. At its height, there
28 were 36 active bloggers on LabSpaces; they posted on different topics, from reviewing and

1 dissecting scientific literature to writing about their experiences as graduate students or
2 scientists. In addition to the blogs, universities and other institutions could log in to post
3 press releases. However, after Krueger began running a genome-sequencing program for
4 Duke University in November, 2012, he had less time to maintain the site actively, although
5 he did not take down the content that had been posted.

6 15. In 2013, a blogger on the site posted a five-part series of blog articles entitled
7 “How stores trick our senses to make us buy more.” Part 2 of the series was entitled
8 “Sight,” and gave several practical examples in explicating an article in the Journal of
9 Neuroscience. The author discussed several images in the article. One of her examples
10 noted that in grocery stores “we’re bombarded with beautiful, fresh produce, setting the tone
11 for the rest of our beautiful, fresh shopping trip.” Next to these words, users were directed
12 to defendant’s Produce Photograph via a deeplink to the photograph as it appeared on
13 blogspot.com, a location over which plaintiff had no control.

14 16. A deeplink is a hyperlink to another web site that allows viewers of the forum to
15 see the photograph within the forum by “pulling” the image directly from the
16 non-LabSpaces server where it is hosted, so that it is displayed to the viewers’ personal
17 devices.

18 17. Here, the other site is blogspot.com, which is unrelated to LabSpaces.net and not
19 subject to its control. The embedded hyperlink, posted in 2013, allowed viewers of the
20 article to see the Produce Photograph on their own personal devices; no copy of the
21 defendant’s Produce Photograph was ever posted, hosted, or maintained on the server for
22 LabSpaces.net.

23 18. Plaintiff did not post this link, and he was unaware of the link until defendant’s
24 Santa Ana counsel wrote to him in June 2020 about the photograph.

25 19. Plaintiff did not encourage or participate in any way in the placement of the
26 hyperlink to the Produce Photograph on the LabSpaces.net blog, and has derived no
27 financial benefit from the posting.

28 20. On information and belief, the photograph was taken in 2001. Copyright in the

1 photograph was not registered until September, 2016.

2 21. The LabSpaces.net web site required users to register as a condition of posting.
3 Users had to agree to LabSpaces.net's terms of service, which included that the registrant
4 "represent, warrant and covenant that: (a) you shall not upload, post or transmit to or
5 distribute or otherwise publish through LabSpaces.net any materials which . . . (iii)
6 constitute or encourage conduct that would constitute a criminal offense, give rise to civil
7 liability or otherwise violate law, [or] (iv) violate, plagiarize or infringe the rights of third
8 parties including, without limitation, copyright, trademark, patent, rights of privacy or
9 publicity or any other proprietary right."

10 **DEFENDANT'S ACTS COMPRISING ACTUAL CONTROVERSY**

11 22. By a letter dated June 18, 2020, and emails dated June 18, June 19, June 24, July
12 1, and July 6, defendant's agent, the Higbee law firm, repeatedly claimed that plaintiff was
13 infringing defendant's copyright because the Produce Photograph had been linked from the
14 LabSpaces.net web site. Defendant's agent demanded payment of \$2,525, and threatened
15 to bring him "before a judge" to answer for his alleged wrongdoing. In one of the
16 threatening communications, a "Compliance Resolution Specialist" from the Higbee firm
17 told Krueger that defendant licenses access to its photographs for "\$999 per month, with a
18 minimum contracted rate of 12 months," implicitly making the \$2,525 demand seem to be
19 a bargain. Defendant's agents invited plaintiff to contact them to negotiate a settlement.
20 The letter and the emails are attached as Exhibit A.

21 23. Plaintiff quickly explained to defendant's agents at the Higbee firm that he did
22 not place the deeplink on the blog, that he never hosted the photograph on his own server
23 and has no control of what materials are hosted on the server where the Produce Photograph
24 was maintained, that the blogger's link to the photograph was fair use, and that, in any event
25 the fair market value of the allegedly infringing use of this one photograph is far less than
26 \$999 per month. Defendant has stated through its Santa Ana agent that it disputes each of
27 these objections to its copyright claim.

28 24. Defendant has not withdrawn its threat to sue for copyright infringement. To the

1 contrary, defendant has persisted in threatening copyright litigation.

2 25. Plaintiff believes that the deeplink to the Produce Photograph that a
3 LabSpaces.net blogger included in her blog article does not violate defendant's copyright,
4 and in any case does not constitute infringement for which plaintiff would be responsible,
5 and plaintiff desires to continue to allow forum users to use deeplinks to images related to
6 their posts. However, given defendant's ongoing and serious threats of litigation seeking
7 damages, even after plaintiff removed the deeplink to defendant's photograph from the blog
8 post, plaintiff feels compelled to bring this action to obtain a judicial declaration of non-
9 infringement.

10 **CAUSE OF ACTION**

11 26. A justiciable and actual controversy exists by way of defendant's credible threat
12 of immediate litigation seeking damages from the plaintiff.

13 27. Plaintiff is entitled to a declaratory judgment that he is not infringing, has not
14 infringed, and is not liable for infringing any valid copyright owned by defendant based on
15 the posting of a deeplink to the Produce Photograph by a blogger using LabSpaces.net as
16 a blogging platform.

17 **PRAYER FOR RELIEF**

18 **WHEREFORE**, plaintiff prays for relief against defendant as follows:

19 A. Declare that the posting (or restoration thereof) to plaintiff's blogging platform
20 of a deeplink to a server where defendant's photograph was displayed, where that deeplink
21 enabled readers of the blog to view the photograph, was not copyright infringement;

22 B. Declare that the blogger's posting was not infringement for which plaintiff is
23 legally liable in the absence of plaintiff's volitional acts or direct financial benefit from the
24 alleged infringement;

25 C. Declare that the blogger's posting of a link to defendant's photograph was fair
26 use;

27 D. In the alternative, declare that defendant's actual damages from the alleged
28 infringement must be calculated based on the fair market value of the allegedly infringing

1 use, not on the cost of a monthly license for defendant's database;

2 E. Award plaintiff's costs and attorney's fees against defendant as allowed by law;
3 and

4 F. Grant such other or further relief as allowed by law and the Court deems
5 appropriate.

6 DATED: August 6, 2020

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