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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

INCREDIBLE FEATURES, INC., et al.,	} Case No. CV 20-943-DMG (RAOx) <b>ORDER RE PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT [63]</b>
Plaintiffs,	
v.	
BACKCHINA, LLC,	
Defendant.	}

This matter is before the Court on Plaintiffs Incredible Features, Inc., Jeffrey R. Werner, and Brian R. Wolff’s Motion for Summary Judgment (“MSJ”). [Doc. # 63.] The motion is fully briefed. [Doc. # 70 (“Opp.”), 71 (“Reply”).] For the reasons set forth below, the Court **GRANTS** in part and **DENIES** in part the MSJ.

**I.  
PROCEDURAL BACKGROUND**

Plaintiffs filed their Complaint against Defendant BackChina, LLC on January 29, 2020, alleging copyright infringement. [Doc. # 1.] Defendant filed its operative Amended Answer on December 28, 2020, asserting a number of affirmative defenses. [Doc. # 58.] On October 29, 2021, Plaintiffs filed their MSJ, seeking partial summary judgment as to liability, as well as the availability of enhanced statutory damages based

1 on Defendant's alleged willfulness. They do not move for summary judgment on the  
2 amount of damages. *See* MSJ.

3 Rather than providing individual responses to each of Plaintiffs' Statements of  
4 Undisputed Facts ("SUF") [Doc. # 63-4], as required by the Court's Initial Standing  
5 Order, Defendant's Statement of Genuine Disputes in support of its Opposition responds  
6 in part to Plaintiffs' SUFs simply by stating: "Proposed Undisputed Facts 1-15, 54-58,  
7 62, 66, 70, 74, 78-79, 83, 87, 92 are hearsay, irrelevant, unsupported by documents  
8 requested during discovery, and should not be taken as true without testing by cross-  
9 examination." [Doc. # 70-1.] *See also* Initial Standing Order at 6-9<sup>1</sup> [Doc. # 9].  
10 Defendant does not dispute or object to the rest of the SUFs, except SUF 93, which it  
11 states is "irrelevant and unfairly prejudicial." Defendant provides no extrinsic evidence  
12 in support of its Opposition whatsoever.

13 The Court need not address vague, boilerplate evidentiary objections lodged  
14 indiscriminately at over two dozen SUFs without any explanation and not attached to any  
15 specific evidence. *See Stonefire Grill, Inc. v. FGF Brands, Inc.*, 987 F. Supp. 2d 1023,  
16 1033 (C.D. Cal. 2013) ("All of the parties' objections are boilerplate recitations of  
17 evidentiary principles or blanket objections without analysis applied to specific items of  
18 evidence. . . . On this basis alone, the Court will not scrutinize each objection and give a  
19 full analysis of identical objections raised as to each fact."). Moreover, the notion that  
20 evidence "should not be taken as true without testing by cross-examination" does not  
21 create a genuine dispute of material fact at summary judgment. *See* Fed. R. Civ. P. 56(c).  
22 The Court therefore deems all of Plaintiffs' SUFs to be uncontroverted, except SUF 93.<sup>2</sup>  
23 *See Pleasant v. AutoZone, Inc.*, No. 12-7293, 2013 WL 3121360, at \*3 (C.D. Cal. June  
24 19, 2013) ("Where, as here, a party fails to file opposing . . . evidence, the Court 'may  
25 assume that the material facts as claimed and adequately supported by the moving party  
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27 <sup>1</sup> All page references herein are to the page numbers inserted by the CM/ECF system.

28 <sup>2</sup> The Court will address the objection to SUF 93 as it becomes pertinent to the analysis below.

1 are admitted to exist without controversy.”) (citing L.R. 56-3); *see also* Fed. R. Civ. P.  
2 56(e)(2)-(3).

3  
4 **II.**  
**FACTUAL BACKGROUND**

5 Plaintiffs Werner and Wolff are professional photographers, and Werner is the  
6 president of Incredible Features, which distributes and syndicates his work. SUF 1, 6, 10.  
7 Incredible Features generates income by licensing the photographs in its portfolio. SUF  
8 11, 13. Werner captured the following photographs that are the subject of this lawsuit  
9 (together, “Subject Images”):

- 10 • Four photographs of “a 70-year old retired real estate agent . . . wearing a custom  
11 rubber bodysuit manufactured by FemSkin” (“FemSkin Images”). SUF 16; *see*  
12 Pls.’ Ex. 1 [Doc. # 63-5 at 6-8].
- 13 • Two photographs of “R.C. Bridges, nicknamed the ‘Buffalo Whisperer,’ and his  
14 wife Sherron, who share their Texas home [with] a 2,400lbs buffalo named  
15 ‘Wildthing’ and a 900lbs buffalo named ‘Bullet’” (“Buffalo Whisperer Images”).  
16 SUF 21; *see* Pls.’s Ex. 2 [Doc. # 63-5 at 9-11].
- 17 • Eight photographs of “a professional cuddler who operates a business called ‘The  
18 Snuggery’” (“Snuggery Images”). SUF 25; *see* Pls.’ Ex. 3 [Doc. # 63-5 at 12-14].
- 19 • Six photographs of “Erika ‘Amazon Eve’ Ervin, a 6’8 professional model known  
20 as the world’s tallest model” (“Amazon Eve Images”). SUF 29; *see* Pls.’ Ex. 4  
21 [Doc. # 63-5 at 15-17].
- 22 • Eleven photographs of “former beauty queens turned big game hunters who have  
23 hunted over 70 different species” (“Huntress Images”). SUF 33; *see* Pls.’ Ex. 5  
24 [Doc. # 63-5 at 18-20].
- 25 • Five photographs of a woman “who wears a set of brass rings around her neck in  
26 order to deliberately stretch it to look like a giraffe” (“Giraffe Woman Images”).  
27 SUF 37; *see* Pls.’ Ex. 6-9 [Doc. # 63-5 at 21-32]. One of the Giraffe Woman  
28 Images was captured by Wolff, and the other four were captured by Werner. *Id.*

1 All of the Subject Images are registered with the United States Copyright Office. SUF  
2 18, 22, 26, 30, 34, 38. Incredible Features is the exclusive licensor of each of them. SUF  
3 19, 23, 27, 31, 35, 39.

4 Defendant operates a Chinese-language website that publishes news,  
5 entertainment, blogs, and videos, including through its own in-house editors. SUF 41,  
6 43, 48. The website is monetized through paid advertising. SUF 45.

7 On June 21, 2018, a member of Incredible Features' staff visited Defendant's  
8 website. SUF 56. The staff-member discovered the following:

- 9 • An article in the website's "news" section that contained the FemSkin Images, with  
10 a headline translating roughly to "U.S. companies use rubber clothes to turn men  
11 into 'women.'" SUF 57, 59.
- 12 • An article in the "forum" section—uploaded by an employee of Defendant who  
13 was the forum moderator—that contained the Buffalo Whisperer Images, with the  
14 headline: "U.S. couples keep two bison as pets, confident that there is no danger."  
15 SUF 62-63.
- 16 • An article in the forum section uploaded by the forum moderator that contained the  
17 Snuggery Images, with the headline: "In New York: You can go to sleep with this  
18 girl." SUF 66-67.
- 19 • An article in the news section that also contained the Snuggery Images, with the  
20 headline: "American female master's master shop to sleep, not to sell for the  
21 person holding the decompression." SUF 70-71.
- 22 • Another news section article containing the Snuggery Images, with the headline:  
23 "Those happy and interesting careers: Their different life." SUF 74-75.
- 24 • A news section article containing the Amazon Eve Images with the headline: "The  
25 worlds tallest female model is over two meters tall and sexy." SUF 78, 80.
- 26 • A news section article containing the Huntress Images with the headline: "Beauty  
27 hunter shoots 70 kinds of rare wild animals called animal protection." SUF 83-84.

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- 1 • A news section article containing the Giraffe Woman Images with the headline:  
2 “American woman gives up her name for health and removes a long collar with 5  
3 years of wear.” SUF 87-88.

4 Plaintiffs did not license any of the Subject Images to Defendant. SUF 61, 65, 69,  
5 73, 77, 82, 86, 90. The Images were published on the website using “picture links,”  
6 meaning that they did not reside on Defendant’s servers but instead were displayed on the  
7 page via an embedded link. SUF 51. Some of the images on Defendant’s website  
8 included a watermark that said “© Incredible Features / Barcroft Media.” SUF 58, 79.  
9 Barcroft Media is a European sublicensing agent of Incredible Features. *Id.*

### 10 III.

### 11 LEGAL STANDARD

12 Summary judgment should be granted “if the movant shows that there is no  
13 genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
14 of law.” Fed. R. Civ. P. 56(a); *accord Wash. Mut. Inc. v. United States*, 636 F.3d 1207,  
15 1216 (9th Cir. 2011). Material facts are those that may affect the outcome of the case.  
16 *Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1147 (9th Cir. 2012)  
17 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A dispute is genuine  
18 “if the evidence is such that a reasonable jury could return a verdict for the nonmoving  
19 party.” *Liberty Lobby*, 477 U.S. at 248.

20 The moving party bears the initial burden of establishing the absence of a genuine  
21 dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the  
22 moving party has met its initial burden, Rule 56(c) requires the nonmoving party to “go  
23 beyond the pleadings and by [his or] her own affidavits, or by the ‘depositions, answers  
24 to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is  
25 a genuine issue for trial.’” *Id.* at 324 (quoting Fed. R. Civ. P. 56(c), (e)); *see also Norse*  
26 *v. City of Santa Cruz*, 629 F.3d 966, 973 (9th Cir. 2010) (*en banc*) (“Rule 56 requires the  
27 parties to set out facts they will be able to prove at trial.”). “In judging evidence at the  
28 summary judgment stage, the court does not make credibility determinations or weigh

1 conflicting evidence.” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir.  
2 2007). “Rather, it draws all inferences in the light most favorable to the nonmoving  
3 party.” *Id.*

4 **IV.**  
5 **DISCUSSION**

6 Plaintiffs move for summary judgment on their copyright infringement claim with  
7 respect to each of the Subject Images and all of Defendant’s affirmative defenses.  
8 Defendant’s Opposition does not address Plaintiffs’ *prima facie* infringement claim at all  
9 or any of its affirmative defenses except for fair use, *scènes a faire*, *de minimis* use, safe  
10 harbor under 17 U.S.C. § 512(d), and the statute of limitations. Defendant therefore  
11 concedes that Plaintiffs have established the *prima facie* elements of copyright  
12 infringement and waives its other defenses. *See Stichting Pensioenfonds ABP v.*  
13 *Countrywide Fin. Corp.*, 802 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011) (“[I]n most  
14 circumstances, failure to respond in an opposition brief to an argument put forward in an  
15 opening brief constitutes waiver or abandonment in regard to the uncontested issue.”). At  
16 issue only are the aforementioned affirmative defenses.

17 **A. Fair Use**

18 The “fair use” of a copyrighted work is not an infringement of copyright. 17  
19 U.S.C. § 107. “[I]t is well established that a court can resolve the issue of fair use on a  
20 motion for summary judgment.” *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522,  
21 530 (9th Cir. 2008); *see also Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d  
22 605, 608 (2d Cir. 2006) (although the issue of fair use is a mixed question of law and  
23 fact, the court may resolve issues of fair use at the summary judgment stage where there  
24 are no genuine issues of material fact as to such issues). Because fair use is an  
25 affirmative defense to infringement, the defendant bears the burden of proving fair  
26 use. *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1151 (C.D. Cal. 2010).

27 The Court considers the following factors in determining whether a use of a  
28 copyrighted work is fair:

- 1 (1) the purpose and character of the use, including whether such use is of
- 2 a commercial nature or is for nonprofit educational purposes;
- 3 (2) the nature of the copyrighted work;
- 4 (3) the amount and substantiality of the portion used in relation to the
- 5 copyrighted work as a whole; and
- 6 (4) the effect of the use upon the potential market for or value of the
- 7 copyrighted work.

8 17 U.S.C. § 107.

9 **1. Purpose and Character of the Use**

10 Defendant argues that its use of the Subject Images was fair because it amounted to  
11 news reporting and was “for teaching purposes, *i.e.* presenting information translated into  
12 Chinese for reading by a Chinese audience.” Opp. at 4. Notwithstanding that fair use is  
13 an affirmative defense, Defendant provides no evidence of its own to demonstrate how  
14 the website used the Subject Images for news reporting. The Court only has evidence  
15 provided by Plaintiffs, including the translated headlines of the articles in which the  
16 Images appeared (but not the translated text of the articles themselves) and the fact that  
17 some of them were in the “news” section. In any event, the fact that copyrighted material  
18 is used in news reporting does not necessarily make it fair use. *See Harper & Row*  
19 *Publishers, Inc v. Nation Enterprises*, 471 U.S. 539, 561 (1985). It is well established  
20 that “the use of an image solely to illustrate the content of that image” is not fair use.  
21 *Otto v. Hearst Commc'ns, Inc.*, 345 F. Supp. 3d 412, 428 (S.D.N.Y. 2018). As far as the  
22 Court can discern from the limited information available in Plaintiffs’ evidence,  
23 Defendant’s articles “did not comment on, criticize, or report news about the Images  
24 themselves; instead, they used the Images as illustrative aids because they depicted the  
25 subjects described in its articles.” *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297 F.  
26 Supp. 3d 339, 352 (S.D.N.Y. 2017); *see also Monge v. Maya Mags., Inc.*, 688 F.3d 1164,  
27 1176 (9th Cir. 2012) (“wholesale copying sprinkled with written commentary—was at

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1 best minimally transformative”).<sup>3</sup> Moreover, the website is a commercial publication.  
2 This factor thus does not favor fair use.

3 **2. Nature of the Copyrighted Work**

4 This factor addresses the extent to which the work is creative and whether it is  
5 unpublished. *Monge*, 688 F.3d at 1177. “Photos are generally viewed as creative,  
6 aesthetic expressions of a scene or image and have long been the subject of copyright.”  
7 *Id.* (citing 17 U.S.C. § 102(a)(5)). Defendant argues that the content of the Subject  
8 Images is factual rather than a work of fiction, but “[s]imply because a photo documents  
9 an event does not turn a pictorial representation into a factual recitation.” *Id.* Although  
10 the Subject Images were published, this factor does not favor fair use.

11 **3. Amount and Substantiality of the Portion Used**

12 Defendant used the entirety of the Subject Images in its articles. Defendant notes  
13 that this factor “weighs less when considering a photograph—where all or most of the  
14 work often must be used in order to preserve any meaning at all—than a work such as a  
15 text or musical composition, where bits and pieces can be excerpted without losing all  
16 value.” *Katz v. Google Inc.*, 802 F.3d 1178, 1183-84 (11th Cir. 2015) (internal quotation  
17 marks and citation omitted). Still, “[w]hile wholesale copying does not preclude fair use  
18 per se, copying an entire work militates against a finding of fair use.” *Worldwide Church*  
19 *of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000)  
20 (internal quotation marks and citation omitted). This factor weighs against fair use,  
21 though is not dispositive.

22 **4. Effect on the Potential Market**

23 It is undisputed that Plaintiffs are in the business of licensing the Subject Images  
24 for commercial gain. *See* SUF 13. Defendant argues that Plaintiffs have failed to allege  
25 a lost sale or licensing opportunity as a result of the use. But Plaintiffs lost the  
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27 <sup>3</sup> It is also unclear how the Images were used for “teaching purposes” via translation for a  
28 Chinese-language audience. The Images are pictures—there is nothing to translate.



1 opportunity to license the works *to Defendant*. If Defendant and others like it are allowed  
2 to use the Subject Images in the manner that it has—by publishing them in full with a  
3 description of their contents—Plaintiffs would lose most of their ability to market the  
4 works for their own commercial gain. As Defendant itself has argued, the value in the  
5 photographs is in the subject matters they depict. Displaying the photographs for the  
6 purpose of demonstrating their contents is where their value lies. The fourth factor does  
7 not evaluate only what losses Plaintiffs have already incurred; it assesses the losses they  
8 *would* suffer if Defendant’s use was sanctioned and repeated on a larger scale. The factor  
9 thus weighs heavily against fair use.

10 In sum, Defendant has not demonstrated that its use of the Subject Images was fair.

#### 11 **B. *Scènes a faire***

12 Under the doctrine of *scènes a faire*—which usually pertains to literature—  
13 “situations and incidents that flow necessarily or naturally from a basic plot premise” are  
14 not protected by copyright. *Corbello v. Valli*, 974 F.3d 965, 975 (9th Cir. 2020) (“Non-  
15 protectable elements include ideas; historical facts; common phrases; *scenes-a-faire* . . .  
16 and “[f]amiliar stock scenes and themes that are staples of literature.”) (citation omitted).  
17 Simply put, “a 70-year old retired real estate agent . . . wearing a custom rubber bodysuit”  
18 and “former beauty queens turned big game hunters,” for example, are not stock  
19 situations that flow from a basic premise.

#### 20 **C. *De Minimis* Use**

21 The use of a copyrighted work “is considered *de minimis* only if it is so meager  
22 and fragmentary that the average audience would not recognize the appropriation.”  
23 *Fisher v. Dees*, 794 F.2d 432, 434 (9th Cir. 1986). Here, Defendant used the entire  
24 photograph for each Subject Image. Its use was not *de minimis*.

#### 25 **D. Safe Harbor**

26 Defendant argues that it is shielded from liability by 17 U.S.C. section 512(d),  
27 which limits liability for “referring or linking users to an online location containing  
28 infringing material or infringing activity, by using information location tools, including a

1 directory, index, reference, pointer, or hypertext link,” provided that the defendant does  
2 not have actual or constructive knowledge of the infringing activity and responds  
3 expeditiously to remove access to the infringing material upon its discovery. Defendant  
4 points out that it used “picture links” to third-party websites. But Defendant did not  
5 merely direct users to a third-party site that contained the Subject Images, it caused the  
6 Images to display on its own site. It also clearly had the right and ability to control the  
7 display of the Subject Images—its own employees published the infringing articles—and  
8 it received a financial benefit from them in the form of paid advertising. *See* 17 U.S.C. §  
9 512(d)(2) (safe harbor not available where defendant has right and ability to control the  
10 infringing activity and receives a direct financial benefit from it). Defendant is therefore  
11 not entitled to the safe harbor.

#### 12 **E. Statute of Limitations**

13 Copyright infringement claims have a three-year statute of limitations. *See* 17  
14 U.S.C. § 507(b). According to the testimony of Werner and Wolff, Plaintiffs discovered  
15 the Subject Images displayed on Defendant’s website on June 21, 2018 and filed suit on  
16 January 29, 2020, within three years. Defendant states in its brief that “in some cases” it  
17 removed the accused posts more than three years before Plaintiffs filed suit. *Opp.* at 6-7.  
18 But it provides no *evidence* to support this naked assertion. Attorney statements in briefs  
19 do not create a dispute of material fact. The statute of limitations defense is therefore  
20 unavailing.

#### 21 **F. Willfulness**

22 Although Plaintiffs do not move for summary judgment on damages, they do seek  
23 a finding of Defendant’s willfulness, such that enhanced statutory damages may be  
24 available. *See* 17 U.S.C. § 504(c)(2) (increasing availability of statutory damages to up  
25 to \$150,000 per infringement upon proof of willfulness). Willfulness can be shown  
26 through actual knowledge of the copyright holder’s rights and the infringing activity, or  
27 “recklessness shown by reckless disregard or turning a blind eye to infringement.” *VHT,*  
28 *Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 748 (9th Cir. 2019). Plaintiffs point out that some

1 of the Subject Images had a copyright symbol watermark and that Defendant has been  
2 sued for infringement at least 16 times before. *See* SUF 93.<sup>4</sup>

3 On the other hand, a reasonable and good-faith belief that use of the work is fair  
4 negates willfulness. *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1165 (C.D. Cal. 2010)  
5 (“[T]he willfulness issue turns on whether the Defendants had a good faith belief that  
6 their use constituted fair use and whether that belief was reasonable.”). Although  
7 Defendant’s use of the Subject Images fell comfortably outside of fair use, “[g]iven the  
8 uncertainty of the fair use doctrine in general,” and specifically with regard to news  
9 reporting, the Court declines to say that Defendant’s belief was so unreasonable that it  
10 rises to the level of willfulness as a matter of law. *Id.* Moreover, it appears that  
11 Defendant took down the infringing posts after it was alerted to them by Plaintiffs. *See*  
12 SUF 91. Accordingly, Plaintiffs’ MSJ with respect to willfulness is **DENIED**.

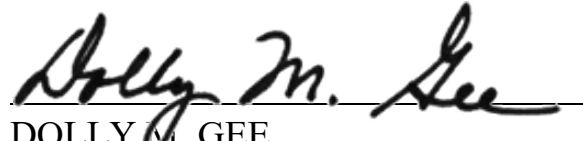
13 **V.**

14 **CONCLUSION**

15 In light of the foregoing, the Court **GRANTS** Plaintiffs’ MSJ with respect to  
16 Defendant’s liability for copyright infringement of all of the Subject Images, and  
17 **DENIES** the MSJ as to Defendant’s willfulness.

18 IT IS SO ORDERED.

19 DATED: December 16, 2021

20   
21 DOLLY M. GEE  
22 UNITED STATES DISTRICT JUDGE  
23  
24  
25

26 <sup>4</sup> Defendant objects to evidence of prior lawsuits against it as irrelevant and unfairly prejudicial.  
27 A repeated pattern of infringing activity is relevant to willfulness, and unfair prejudice is not an  
28 appropriate objection at summary judgment, where all the evidence is viewed in the light most favorable  
to the non-moving party. The objection is **OVERRULED**.