

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:18-cv-2023-MSK

BLAINE HARRINGTON III,

Plaintiff,

v.

AEROGELIC BALLOONING, L.L.C., and  
SHANE CORY,

Defendants.

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**DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT**

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Pursuant to Fed.R.Civ. P.56 and Local Rule 56.1, Defendants, Aerogelic Ballooning, L.L.C. and Shane Cory ("Aero") by and through undersigned counsel, hereby submits this Motion for Summary Judgement.

**Certificate of Compliance with D.C.COLO.LCivR 7.1**

Defense counsel discussed the grounds for this motion and the relief requested with counsel for the Plaintiff the week of October 22, 2018. Plaintiff's counsel opposes the relief requested herein.

**I. INTRODUCTION**

Defendants are a one man small business balloon ride service firm residing in Arizona and offering balloon rides in Arizona and New Mexico, aerogelicballooning.com. Shane Cory is a

certified balloon pilot and even weaves his own baskets. He founded his firm twenty years ago. Shane Cory maintains his own website. On or about January 2016, Shane Cory downloaded an unlabeled photograph shown as Exhibit 4 in the Complaint. Shane Cory believes he found it at “[picturelights.club/galleries/sandia-mountains-wallpaper.html](http://picturelights.club/galleries/sandia-mountains-wallpaper.html)”. See Exhibit A herein, to the best of his knowledge. Shane Cory hired YEXT to promote his website, wherein YEXT posted the photograph as noted in the Complaint paragraph 12. See Exhibit B herein.

Shane Cory may have downloaded the photograph from other free, unlabeled copies thereof including those listed in Exhibit C as found by Mr. Joshua Martin on behalf of Shane Cory.

Upon notice of copyright infringement from Plaintiff’s counsel, David C. Deal, Shane Cory removed all posts. Since YEXT had done the postings, it took Shane Cory several tries to find and take down all the postings.

Over the years Shane Cory has received hundreds of like photos taken from his balloon over the same city of Albuquerque, New Mexico, see Exhibit D for a few samples.

**STATEMENT OF NON-DISPUTED FACTS PER ACCEPTED SCHEDULING ORDER**

The following facts are undisputed:

1. Plaintiff is the author and copyright holder of Copyrighted Photograph.
2. Defendants copied and posted or caused to be posted Copyright Photograph to the following advertising websites: [www.yellowpages.com](http://www.yellowpages.com), [www.superpages.com](http://www.superpages.com), [www.whitepages.com](http://www.whitepages.com).

3. Aerogelic Ballooning LLC is a commercial entity.
4. Shane Cory is the owner and manager of Aerogelic Ballooning LLC.
5. Defendants found a free, unlabeled copy of Copyrighted Photograph online and posted it.
6. Defendants removed the post upon notice.

### **SUMMARY OF RELIEF REQUESTED**

Defendants rely on case law that defines the minimum statutory damages of \$750. is due per work, not per posting done by YEXT. See *UMG Recordings, Inc. v. MP3.com Inc.*, 109 F. SUPP.2d 223, 225 (S.D.N.Y.2000).

Defendants argue that no reasonable jury could find a willful infringement by Shane Cory, a high school graduate and balloon entrepreneur of twenty years, who is deluged with free photos from his own balloon. A reasonable juror would decide that Shane Cory cannot possibly determine that one particular balloon photo is registered as a copyright. And that although available for free to anybody else, Shane Cory should have known he should pay a fee for a download.

<b>THE LAW</b>
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### ***Legal Standards Governing Summary Judgement***

Summary judgement is appropriate where there is no genuine issue of material fact, and the moving party is entitled to judgement as a matter of law. Fed.R.Civ.P.56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). While the burden of demonstrating the absence of any material factual dispute rests with the moving party, to defeat a summary judgement motion the nonmoving party must do “more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the nonmoving party must set forth “specific facts showing that there is a genuine issue for trial.” *Id.* at 587.

## DISCUSSION

The statute 17 U.S.C. §504 (c)(1) specifically allows this Court to hold that a \$750. Damage award is applicable for this innocent infringement of ONE WORK. This Court can consider evidence of actual damages such as the Gettyimages collection of balloon photos attached as Exhibit E. Very similar photos are available for \$499. Thus, an award of \$750. exceeds a commercial value of the accused photo.

Another factor for this Court to consider is that Plaintiff’s attorney first contacted Aero over one year ago. But reference to Exhibit A herein shows this Court that the accused photo is still available FOR FREE on 10/25/2018! Why is Plaintiff permitting this and the sites in Exhibit C and others to continue and offer for free downloads of his “work of art”?

Federal Courts are awash with copyright setup cases such as the pornography Plaintiffs Strike 3 and Malibu. The game is simple. Plant unlabeled “registered copyright works of art” all over the internet. When somebody downloads a “work of art”, bingo! A trace is made to the user.

A lawyer contacts the user warning of up to even a \$30,000 award for an “innocent” download. So in our case a demand of \$7500. sounds like a bargain. In our case a reverse image search spider was used to locate Defendants, and then demand \$7500.

This Court does not have to decide if the ongoing free availability of the accused photo is part of a sophisticated copyright scam.

Aero respectfully requests a holding that the Statute’s minimum damage of \$750. is applicable here. A good discussion of this minimum award can be found at *Super Express USA Publishing Corp et al. v. Spring Publishing Corp.*, No.13-cv-2814 (DLI) (JO) (U.S. Dist.Ct., E.D.N.Y., Feb.23, 2018).

Dated this 29<sup>th</sup> day of October, 2018.

RESPECTFULLY SUBMITTED,

PATENT LAW OFFICES OF RICK  
MARTIN, P.C.

*Original Signature on File at the Offices of  
Patent Law Offices of Rick Martin, P.C.*

*/s/ Ralph (Rick)Martin*

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*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on the 29<sup>th</sup> day of October, 2018, I electronically filed the foregoing paper with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following email address:

David C. Deal

david@daviddeal.com

s/ *Ralph (Rick) Martin*  
Ralph (Rick) Martin