

No. 20-55441

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL GRECCO PRODUCTIONS, INC.,
Plaintiff-Appellant,

v.

BDG MEDIA, INC., et al,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
Hon. André Birotte Jr.
No. 2:19-cv-04716

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellant Michael Grecco Productions, Inc., hereby files its corporate disclosure statement as follows: Michael Grecco Productions, Inc. is a privately held corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Dated: August 3, 2020

Respectfully submitted,

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STATEMENT OF JURISDICTION

This action arises under 28 U.S.C. § 1331 and the Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* (“Copyright Act”). Excerpt of Record (“ER”) 33, 59.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this appeal is taken from an order and judgment of the district court granting a motion to dismiss for failure to state a claim. The order of dismissal was entered on February 26, 2020 (ER 16-29) and judgment was entered on March 16, 2020 (ER 32). Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), a Notice of Appeal was timely filed on March 18, 2020. ER 1-5.

ISSUES PRESENTED

1. Whether a copyright holder has plausibly alleged that it is entitled to invoke the “discovery rule” to toll the three year statute of limitations for copyright infringement where it has alleged in its complaint that it discovered infringing use of its copyrighted photographs on an Internet website using a reverse image search more than three years after the infringement occurred where no evidence in the record suggests that the copyright holder was on inquiry notice of the infringements prior to the dates of discovery.

2. Whether a copyright holder can plausible allege a timely claim for copyright infringement of its rights to distribute and publically display its copyright photographs where both photographs were still accessible on the infringer’s website at the time the claim was filed.

3. Whether a copyright holder that amends its complaint to add in more specific facts related to its original claim of infringement of one of its copyrighted photographs and facts related to an additional instance of infringement of one of its copyright photographs on an infringer’s website can relate those claims back to the date of the original complaint pursuant to Federal Rules of Civil Procedure 15(c).

PERTINENT RULES AND STATUTES

Pertinent rules and statutes are reproduced in the addendum attached hereto.

STATEMENT OF THE CASE

I. INTRODUCTION

A. Michael Grecco Is A Renowned Celebrity Photographer.

Appellant Michael Grecco Productions, Inc. (“MGP”) is a professional media and photography company run by renowned celebrity photographer Michael Grecco (“Grecco”). ER 34, 70. Grecco is an award-winning commercial photographer and film director noted for his iconic celebrity portraits, innovative magazine covers, editorial images and advertising spreads for such companies such as NBC/Universal, GE, Pfizer, HBO, Kodak, ABC, IBM, Yahoo!, ESPN, Wired, Time, Entertainment Weekly, Esquire, Premier, and MAXIM. ER 34-35, 71-72.

Grecco has developed a specialty reputation as a celebrity photographer and has been retained to photograph subjects including Martin Scorsese, Hugh Hefner, Robert Duvall, Lucy Liu, Will Ferrell, Mel Brooks, Christina Applegate, Ben Stiller, Owen Wilson, Penelope Cruz, Jet Li, Bill Murray, Joaquin Phoenix and Rene Russo. ER 35.

In 2012 Grecco was a recipient of the Professional Photographer Leadership Award from the United Nations International Photographic Council in recognition of his work with the American Photographic Artists organization. His reputation for professional service turns, in part, on his efforts to educate photographers concerning the benefits of copyright registration as a way to combat the pandemic of image piracy of that accompanied the rise of the Internet. *Ibid.*

Grecco teaches that the economic viability of photography as an art and profession is endangered because “[p]eople are systematically stealing, and we need to systematically defend ourselves.” By complying with copyright registration requirements, and then asserting their rights to statutory damages under the Copyright Act, Grecco contends that photographers can turn the table on commercial content pirates. *Ibid.*

In keeping with his advice to the profession, Grecco spends time and money to actively search for hard-to-detect infringements, and he enforces his rights under the Copyright Act against serial commercial infringers. ER 35-36. As part of its efforts to detect infringements on the Internet, Grecco and MGP have, in the past, utilized a third-party reverse image search software platform operated by ImageRights International, Inc. (“ImageRights”). ER 36. ImageRights provides “AI-driven intelligent Internet search and copyright enforcement services to photo agencies, image archives, professional photographers, and media companies worldwide.” *Ibid.* Grecco and MGP also monitor infringements in house through publically available Internet tools such as Google Image Search. ER 36.

Despite using sophisticated search techniques and advanced software, detecting infringements can be like finding a needle in the proverbial haystack with many infringements going undetected for years at a time due to the vastness and breadth of the modern Internet. *Ibid.* The Google Search Index alone contains hundreds of billions¹ of webpages and is well over 100,000,000 gigabytes in size. *Ibid.*

In addition, once a list of potential infringement is generated by software, a human must manually review each search result to verify that the result is not a false positive, and must further verify that the use in question is not licensed. *Ibid.* The entire process is costly and labor intensive, even more so to individuals and entities such as Grecco and MGP who, as the result of a successful decades long

¹ To put in perspective its sheer enormity, it would take over three years of continuously searching 91 million webpages per day in order to search the first hundred billion pages of the Google Search Index. This becomes even more pronounced when searching for photographs because many individual web pages contain multiple photographs per page, not to mention the addition newly created pages that have yet to be added to the Index and older pages already contained in the Index that have subsequently been altered or updated.

career, have amassed thousands of valuable photographs depicting prominent individuals and subject matter which is all the more tempting to prospective infringers. *Ibid.*

B. MGP Is The Rights Holder To The X-Files Photos.

Because of his reputation as a skilled celebrity photographer, Grecco has, on multiple occasions, photographed actors David Duchovny and Gillian Anderson who portrayed FBI agents Fox Mulder and Dana Scully respectively, on the hit television show *The X-Files*. ER 37, 71.

On one such shoot occurring in 1993, Grecco photographed Duchovny and Anderson standing in a dark hallway floodlit by a partially open door in the background (“Hallway Photo”). ER 37, 44. On another shoot occurring in 1995, Grecco photographed Duchovny and Anderson holding illuminated flashlights (“Flashlight Photo”)². ER 37, 45, 77.

MGP is the exclusive rights holder to these X-Files Photos and has registered them with the United States Copyright Office. ER 37, 71.

C. BDG Media, Inc. Is A Global Digital Media Company.

Appellee BDG Media, Inc. (“BDG Media”) is “the largest premium publisher reaching millennial women” with a claimed monthly readership of nearly 80 million. ER 37, 71. BDG Media does business with over 300 global brands, and ranks among the most popular media companies with its demographic on social media. *Ibid.*

BDG Media is the owner and operator of the website www.bustle.com (“Bustle”). *Ibid.* BDG Media operates in an industry where copyright is prevalent and is fully knowledgeable about and experienced with copyright ownership and

² The Hallway Photo and Flashlight Photo will be collectively referred to as the “X-Files Photos.”

law. ER 38. It aggressively asserts exclusive legal rights to its “own” content on Bustle. *Ibid.*

D. BDG Media Infringed MGP’s X-Files Photos On Bustle.

Through an ImageRights search in October 2016, MGP discovered the Hallway Photo being used without authorization on Bustle in an article titled “The 11 Most Stylish Fictional Couples Of The 90s, From Ross & Rachel To Carrie & Big – PHOTOS” (“90’s Article”). ER 38, 47-48.

MGP’s counsel corresponded extensively with BDG Media about the Hallway Photo, however the copy of the Hallway Photo was still on the Bustle server at the time MGP filed its First Amended Complaint in December of 2019. ER 38, ER 50.

In January 2019, MGP conducted an in-house Google Image search and discovered the Flashlight Photo being used on Bustle in an article titled “The X-Files’ Is Coming Back & Here Are 7 Ways To Prepare For The Triumphant Return” (“Return Article”). ER 38-39, 52-53, 71, 80. The Return Article was published on Bustle on May 11, 2015. ER 53, 80.

On January 25, 2019, Grecco reached out to BDG Media on behalf of MGP alerting them to the use of the Flashlight Photo on the Return Article but the parties were unable to come to a resolution. ER 72.

In February of 2019, MGP discovered the Flashlight Photo being used a second article on Bustle titled “The ‘X-Files’ Reboot Teaser Is Only 18 Seconds And Now All I've Got Is About A Millions Questions” (“Reboot Article”). ER 38-39, 52, 54, 72, 79, 82. The Reboot Article was published on Bustle on July 24, 2015. ER 52, 54, 79, 82.

None of BDG Media’s uses of the X-Files Photos on Bustle was authorized by MGP. ER 39, 72.

Despite both the Return Article and Reboot Articles being published in 2015, upon closer inspection of the URL where the Flashlight Photo was being hosted on the server for Bustle, it appears that the copy of the Flashlight Photo discovered by MGP in 2019 was either uploaded or re uploaded to Bustle on September 13, 2016. ER 39, 57-58, 83.

E. Adjudication Of The Motion To Dismiss Is Repeatedly Delayed.

On May 30, 2019, MGP filed a complaint against BDG Media (“Complaint”), alleging one cause of action for copyright infringement of the two uses of the Flashlight Photo on Bustle. ER 69-83. In its Complaint MGP alleged that it had discovered the BDG Media’s two infringing uses of the Flashlight Photo in January and February of 2019, respectively. ER 71-72. MGP also alleged that as of the date of the Complaint, the Flashlight Photo was still being publically displayed with the Reboot Article on Bustle. ER 82-83.

After being served with the Complaint on June 24, 2019, MGP and BDG Media stipulated to allow BDG an extension of time to respond. ER 66-68. Subsequently, BDG Media filed a 12(b)(6) Motion to Dismiss MGP’s Complaint on the basis that the infringements alleged occurred outside the statute of limitations,³ which was noticed for hearing on August 30, 2019. ER 63-65.

On August 15, 2019 the parties stipulated to continue the hearing date to September 13, 2019 in order to accommodate counsel for BDG Media who would be on vacation. *Ibid.* On August 16, 2020 the District Court granted the stipulation, however the District Court set the hearing date for September 27, 2019, instead of September 13, 2019. ER 61-62.

³ BDG Media also filed an unsuccessful Motion to Transfer the case to New York. While the District Court addressed the propriety of transfer in the November 21, 2019 Order (ER 7-14) that portion of the Order is not part of the instant appeal.

On September 26, 2020, the District Court issued an order in chambers continuing the hearing date to November 1, 2019 on its own motion. ER 60. On October 30, 2019, the District Court issued a second order in chambers taking the Motion to Dismiss under submission and vacating the November 1, 2019 hearing date. ER 59.

F. The District Court Erroneously Dismisses MGP’s Complaint.

On November 21, 2019, the District Court issued an Order (“November 21 Order”) dismissing MGP’s Complaint as time-barred, but with leave to amend. ER 12-14. In the November 21 Order, the District Court recognized that 9th Circuit precedent specified that “a copyright infringement claim accrues—and the statute of limitations begins to run—when a party discovers or, with the exercise of diligence, reasonably should have discovered the alleged infringement” and that a statute of limitations defense may only be raised on a motion to dismiss “if the running of the statute is apparent on the face of the complaint.” ER 13.

The District Court concluded that the Return and Reboot Articles featuring MGP’s Flashlight Photo were both originally published in 2015, which was more than three years prior to the filing of MGP’s Complaint on May 30, 2019. *Ibid.* The District Court further held that MGP’s Complaint did not allege facts to justify the application of the delayed discovery rule. ER 13-14. The November 21 Order granted MGP leave to file a First Amended Complaint within 21 days, but placed no other restrictions on the scope of the permitted amendment. ER 14.

On December 12, 2019 MGP filed a First Amended Complaint (“FAC”). ER 33-58. In addition to re-alleging BDG Media’s infringements of the Flashlight Photos, MGP also included BDG media’s infringement of the Hallway Photo, including evidence that the infringing copy of the Hallway Photo was still publically accessible on Bustle. ER 38, 47-48, 50. The FAC also included detailed allegations related to Grecco and MGP’s efforts to detect online copyright

infringement through use of various technologies including ImageRights and Google Image Search; (ER 35-36) allegations related to the limitations and difficulties of detecting photography infringement on the Internet, including the vast size of the Google Search Index, and the costly and labor intensive process manual review process required to verify that any return search results are not false positives or licensed uses; (ER 36) and allegations that because Grecco and MGP had amassed thousands of valuable photographs depicting prominent individuals and subject matter as a result of a successful, decades long career, that the costs and labor required for MGP to detect infringements was particularly pronounced (*Ibid.*).

In addition to specific allegations regarding the difficulties of detecting online copyright infringement, MGP also alleged that the URL where the Flashlight Photo was being hosted on the server for Bustle, indicated that the infringing copy of the Flashlight Photo at issue was uploaded or re uploaded to Bustle on September 13, 2016. ER 39, 57-58. In support of this allegation, MGP provided screenshots obtained from Bustle showing that the URL for the infringing copy of the Flashlight Photo contained the date 2016/9/13 followed by the file name. ER 57-58.

At no point in either the Complaint or FAC did MGP allege that the Flashlight Photo had been uploaded to Bustle and displayed with the Return and Reboot Articles in 2015 when those Articles were originally published.

BDG Media subsequently moved to dismiss the FAC on the grounds that the MGP's claims were time barred and that the new allegations in the FAC concerning the Flashlight and Hallway Photo were improper. On February 26, 2020 the District Court issued an order granting BDG's Motion to Dismiss ("February 26 Order"). ER 16-29.

In its February 26 Order, the District Court reasoned that MGP's claims were time barred because the facts pled in the FAC were insufficient to support invoking the delayed discovery rule. ER 22. The District Court opined that MGP's specific allegations related to the methods used by MGP and the difficulties of detecting online infringements were "boilerplate" and not sufficiently related to the infringements at issue. The District Court stated that it could not "reasonably conclude that using certain search methods, or even 'actively searching,' amounts to 'reasonable diligence.'" ER 23-24

As to the allegations that the Flashlight Photo was either uploaded or re uploaded to the Bustle server in September of 2016, the District Court also concluded that such a claim was "untimely" for three reasons. ER 24-25.

First, the District Court erroneously concluded that "Plaintiff himself raises doubts as to whether the 're-uploaded' photo is his Flashlight Photo. [citation]. This alone defeats Plaintiff's reliance on the re-uploaded photo for a copyright infringement claim." ER 24. This is not correct. MGP merely pointed out that its Flashlight Photo was displayed on Bustle when the infringements were originally discovered in 2019, and that because the URL on Bustle indicated that the Flashlight Photo had been uploaded or re uploaded to Bustle in September of 2016, MGP could not be sure whether a different photograph may have been used on Bustle *prior* to the September 2016 upload of the Flashlight Photo discovered by MGP.

Second, the District Court concluded that the claim could not relate back to the date of the filing of the original Complaint because the original Complaint was untimely and therefore there was nothing to relate back to. ER 24. The District Court also concluded that because the FAC was filed in December 2019, more than three years had passed since the September 2016 upload rendering the claim untimely. *Ibid.*

Finally, the District Court concluded that the September 2016 re-upload allegation could not relate back because it was a separate and distinct act of infringement despite the fact the allegations contained in MGP's original Complaint was premised on the September 2016 re upload of the Flashlight Photo. ER 24-25; *see* ER 83. In connection with this erroneous conclusion, the District Court also opined that the FAC supposedly went "beyond the scope of the amendment granted" despite the November 21 Order placing no restrictions on the scope of the permitted amendment. ER 14, 25.

As to the allegations of BDG Media's infringement of the Hallway Photo the District Court concluded that such a claim could not related back to the original Complaint because it was not related to the "core operative facts" original alleged. ER 25-27. The District Court also concluded that the allegation was "untimely" because the FAC was filed in December of 2019, which was more than three years after the date of discovery. ER 27-28.

The District Court did not consider that MGP could have timely asserted both Bustle's September 2016 re upload of the Flashlight Photo and Bustle's October 2016 use of the Hallway Photo had the District Court not repeatedly delayed the hearing on the Motion to Dismiss.

On March 16, 2020, the District Court entered Judgment against MGP and in favor of BDG Media. ER 31-32. On March 18, 2020, MGP timely filed a notice of appeal. ER 1-5.

STANDARD OF REVIEW

The appellate court reviews de novo the grant of a motion to dismiss under Rule 12(b)(6) accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party. *Fields v. Twitter, Inc.*, 881 F.3d 739, 743 (9th Cir. 2018). Review is limited to the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice. *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008).

The question of when a cause of action accrues and whether a claim is barred by the statute of limitations is also reviewed de novo. *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 779-80 (9th Cir. 2002). Likewise, in reviewing a district court's decision not to apply the relation back doctrine of Federal Rule of Civil Procedure 15(c) to save from dismissal an otherwise time barred claim, the standard of review is de novo. *Percy v. S.F. Gen. Hosp.*, 841 F.2d 975, 978 (9th Cir. 1988) (“we are in as good a position as the district court to decide whether the ‘conduct, transaction, or occurrence’ test of the Rule has been met. Consequently, we review this question de novo.”).

SUMMARY OF THE ARGUMENT

The District Court erred by applying an incorrect “heightened” standard of reasonable diligence with respect to whether MGP could invoke the “discovery rule” to state a timely claim for copyright infringement against BDG Media.

MGP alleged four key facts in its FAC sufficient to plausibly invoke the “discovery rule”: (1) that it first discovered the infringements at issue less than three years prior to initiating the lawsuit; (2) that it discovered the infringements only after conducting a reverse image search through Google and ImageRights; (3) that even when utilizing most sophisticated search technologies available the sheer volume of information on the Internet means that infringements can sometimes go years without detection; and (4) that due to the size and subject matter of MGP’s photographic library, the process required to detect infringements is extremely costly and labor intensive. ER 35-39.

Because copyright holders do not have a standing duty to police their works absent inquiry notice of a potential infringement, MGP has plausibly alleged that its claim accrued less than three years before the lawsuit was filed because it lacked both actual knowledge and constructive notice of BDG Media’s infringing acts prior to discovering them. These factual allegations are sufficient to satisfy the liberal pleading standards of Rule 8 and render MGP’s infringement claims timely.

Additionally, the X-Files Photos were still publically accessible on Bustle at the time the Complaint was filed constituting new and separate infringing acts such that MGP can allege a timely cause of action under the “separate-accrual rule.”

Finally, the District Court erred in applying the relation back doctrine because the allegations in the FAC arise out of the same conduct, transaction, and occurrence alleged in the Complaint.

The District Court should therefore be reversed, and this matter remanded for further proceedings.

ARGUMENT

I. MGP CAN INVOKE THE “DISCOVERY RULE” BECAUSE IT PLAUSIBLY ALLEGED THAT IT LACKED CONSTRUCTIVE KNOWLEDGE OF THE INFRINGEMENT PRIOR TO DISCOVERY

A. A Copyright Claim Accrues Only When A Plaintiff Is Chargeable With Knowledge Of The Infringement.

The Copyright Act provides that “[n]o civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.” 17 U.S.C. § 507(b). Under the “discovery rule,” a copyright infringement claim accrues—and the statute of limitations begins to run—when a party discovers, or reasonably should have discovered, the alleged infringement. *Media Rights Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1022, (9th Cir. 2019) citing *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004); *see also Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994) (“A cause of action for copyright infringement accrues when one has knowledge of a violation or is chargeable with such knowledge.”).

Reasonableness of discovering copyright infringement is a question of fact. *Id.* at 707; *Free Speech Sys., LLC v. Menzel*, 390 F. Supp. 3d 1162, 1170 (N.D. Cal. 2019). Because the applicability of doctrines related to when the statute of limitations begins to run often depends on matters outside the pleadings, it “is not generally amenable to resolution on a Rule 12(b)(6) motion.” *Cervantes v. City of San Diego*, 5 F.3d 1273, 1276 (9th Cir. 1993). A motion to dismiss based on the running of the statute of limitations period may be granted only “if the assertions of the complaint, read with the required liberality, would not permit the plaintiff to prove that the statute was tolled.” *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 682 (9th Cir. 1980). A complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove *no set of facts* that would establish the timeliness of the claim. *Ibid.* (emphasis added) (citing *Conley v. Gibson*, 355 U.S. 41

(1957)). For this reason, the Ninth Circuit has reversed dismissals where the applicability of the statute of limitations depended upon factual questions not clearly resolved in the pleadings. *See Cervantes*, 5 F.3d at 1277; *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1199 (9th Cir. 1988) (dismissal reversed where “plaintiffs’ complaint states that they ‘did not know’ and ‘did not learn’ of defendants’ alleged misconduct ‘until a time within one year of the date of the filing.’”); *see also Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir. 1995) (When the issue of tolling of statute of limitations arises, the court “must reverse if the factual and legal issues are not sufficiently clear to permit us to determine with certainty whether the doctrine could be successfully invoked.”).

The allegations of the Complaint and FAC, taken as true, clearly establish that MGP lacked actual knowledge of BDG Media’s infringement until the infringements were first discovered on Bustle in October 2016, January 2019, and February 2019, respectively. With actual knowledge lacking, the question of whether MGP’s infringement claims against BDG Media accrued outside the statute of limitations period turns on when MGP was “chargeable with such knowledge,” *Roley*, 19 F.3d at 481, or in other words, whether MGP’s “lack of knowledge was reasonable under the circumstances,” *Polar Bear Prods., Inc.*, 384 F.3d at 706.

“It is well-settled that statutes of limitations are affirmative defenses, not pleading requirements. . . . [A] plaintiff is not ordinarily required to plead around affirmative defenses.” *Ayala v. Frito Lay, Inc.*, 263 F. Supp. 3d 891, 913 (E.D. Cal. 2017) (internal citations and quotations omitted). Nonetheless, MGP alleged four key facts in its FAC sufficient to plausibly invoke the “discovery rule”: (1) that it first discovered the infringements at issue less than three years prior to initiating the lawsuit; (2) that it discovered the infringements only after conducting a reverse image search through Google and ImageRights; (3) that even when utilizing most

sophisticated search technologies available the sheer volume of information on the Internet means that infringements can sometimes go years without detection; and (4) that due to the size and subject matter of MGP's photographic library, the process required to detect infringements is extremely costly and labor intensive. ER 35-39.

MGP has plausibly alleged that its claim accrued less than three years before the lawsuit because it lacked actual knowledge of the infringements and because the limitations and difficulties of detecting Internet based infringements can plausibly show that MGP lacked constructive notice of BDG Media's infringing acts prior to discovering them. These factual allegations are sufficient to satisfy the liberal pleading standards of Rule 8 and render MGP's infringement claims timely.

With respect to determining when a copyright plaintiff is chargeable with knowledge of an infringement such that the claim accrues, this Court should apply the "inquiry notice" standard adopted by other circuits as it is in harmony with current Ninth Circuit precedent and has already been applied by multiple district courts in this Circuit.

The District Court should therefore be reversed, and this matter remanded for further proceedings.

B. An "Inquiry Notice" Standard Is Used To Determine When Infringement Should Reasonably Be Discovered.

If a copyright holder lacks actual knowledge of an infringement, the statute of limitations may, nonetheless, begin to run if the copyright holder "reasonably should have discovered[] the alleged infringement." *Polar Bear Prods., Inc.*, 384 F.3d at 706. Courts from other circuits have determined that a reasonably diligent plaintiff should discover the injury forming the basis of an action when the plaintiff is put on inquiry notice of the infringement of a right. *See, e.g., Warren Freedendfeld Assocs. v. McTigue*, 531 F.3d 38, 44 (1st Cir. 2008) ("[A] plaintiff can

be charged with inquiry notice, sufficient to start the limitations clock, once he possesses information fairly suggesting some reason to investigate whether he may have suffered an injury at the hands of a putative infringer.”); *William A. Graham Co. v. Haughey*, 568 F.3d 425, 438 (3d Cir. 2009) (holding that a claim accrues when the plaintiff “should have known of the basis for its claims, which depends on whether it had sufficient information of possible wrongdoing to place it on inquiry notice” (citations and quotation marks omitted)); *Netzer v. Continuity Graphic Assocs.*, 963 F. Supp. 1308, 1315 (S.D.N.Y. 1997) (“A cause of action accrues when a reasonably diligent plaintiff would have been put on inquiry as to the existence of a right.” (citation omitted)).

In particular, courts have held that a plaintiff is only put on inquiry notice once it possesses information regarding culpable conduct — “storm warnings” — suggesting some reason to investigate. The First Circuit in *Warren Freeddenfeld*, 531 F.3d at 45 observed:

But the duty to investigate is not always in the wind. Typically, inquiry notice must be triggered by some event or series of events that comes to the attention of the aggrieved party. *See McIntyre v. United States*, 367 F.3d 38, 52 (1st Cir. 2004). The familiar aphorism teaches that where there is smoke there is fire; but smoke, or something tantamount to it, is necessary to put a person on inquiry notice that a fire has started.

Similarly, in *Haughey*, the Third Circuit held that the appropriate test for when a copyright infringement claim accrues is whether the plaintiff “should have known of the basis for its claims, which depends on whether it had sufficient information of possible wrongdoing to place it on inquiry notice or to excite storm warnings of culpable activity.” *Haughey*, 568 F.3d at 438 (citations and quotation marks omitted). The *Haughey* court held that under the inquiry notice test, the defendants “bear the burden of demonstrating such storm warnings, and if they do so, the burden shifts to [the plaintiff] to show that it exercised reasonable due

diligence and yet was unable to discover its injuries.” *Ibid.* (citations and quotation marks omitted).

Regrettably, the “reasonable diligence” standard for Internet based copyright infringement claims has not been fully articulated by the Ninth Circuit. MGP would submit that this “inquiry notice” standard, in which a copyright holders duty to diligently investigate is not triggered until the copyright holder becomes aware of suspicious activity that may indicate infringement, strikes an appropriate balance between requiring diligent detection of infringing activity without unreasonably burdening copyright holders with a “never ending obligation” to police and discover whether anyone is infringing his copyrighted material or risk losing their right to pursue legitimate claims. *See MacLean Assoc., Inc. v. WM. M. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769, 780 (3d Cir. 1991).

An “inquiry notice” standard is in harmony with current Ninth Circuit precedent regarding the accrual of a claim for copyright infringement. *See Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1521 (9th Cir. 1983) (Duty to investigate triggered upon suspicion of infringing acts); *Roley*, 19 F.3d at 481 (9th Cir. 1994) (Either actual or constructive knowledge of facts giving rise to the alleged infringement is sufficient to trigger statute of limitations.); *Kling v. Hallmark Cards, Inc.*, 225 F.3d 1030, 1036 (9th Cir. 2000) (“The question then arises, if the Klings had no actual or constructive knowledge of any infringement, how could the district court subsequently reject the infringement claim?”); *Polar Bear Prods., Inc.* 384 F.3d at 706 (9th Cir. 2004) (Statue of limitations tolled “so long as the copyright owner did not discover -- *and reasonably could not have discovered* -- the infringement before the commencement of the three-year limitation period.” (emphasis added)); *Graham-Sult v. Clainos*, 756 F.3d 724, 745 (9th Cir. 2014) (Discussing when duty to investigate infringement claim is

triggered); *Media Rights Techs.*, 922 F.3d at 1022; *see also Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir. 2001).

Furthermore, district courts in this Circuit are already effectively applying this standard in copyright infringement cases. *See Free Speech Sys.*, 390 F. Supp. 3d at 1170 (“[T]hat Menzel polices his copyrights [using reverse image search] but does not frequent the InfoWars site and that the Post was up as of April 30, 2012 ... does not establish as a matter of law that his delay in filing suit was unreasonable.”); *Fahmy v. Jay-Z*, 835 F. Supp. 2d 783, 790 (C.D. Cal. 2011) (“The plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the [claim.]” (citation and quotation omitted)); *UMG Recordings, Inc. v. Glob. Eagle Entm't, Inc.*, 2016 U.S. Dist. LEXIS 77853, 2016 WL 3457179 (C.D. Cal. Apr. 20, 2016) (Despite “open and notorious” infringing use of sound recordings and music videos on defendant airline’s inflight entertainment system, the fact that “UMG’s executives occasionally traveled by plane and observed that in-flight entertainment existed” not enough to put plaintiff on notice of alleged infringement in order to trigger running of statute of limitations.).

MGP would therefore submit that the “inquiry notice” standard is the logical extension of current Ninth Circuit precedent, and should thus be adopted by this Court as the standard for imputing constructive knowledge of the accrual of a copyright infringement claim on the Internet. Under this standard, MGP has sufficiently alleged that it was not on inquiry notice of BDG Media’s infringements prior to discovering them. None of the conclusions reached by the District Court compel a different result.

The District Court should therefore be reversed, and this matter remanded for further proceedings.

1. MGP Plausibly Alleged That It Was Not On Inquiry Notice Of The Infringement Prior To Discovery.

Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief” and a complaint “does not need detailed factual allegations” provided that the allegations do not rely solely on formulaic recitations or conclusory statements. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and quotations omitted). To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.” *Id.*, at 570; *see also Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (a well-pleaded complaint may proceed even if it appears “that a recovery is very remote and unlikely”).

Here, MGP’s FAC contains the requisite short and plain statement sufficient to show that MGP is plausibly entitled to invoke the “discovery rule.” Both parties and the District Court seem to agree that MGP plausibly alleged that it actually discovered the infringements less than three years prior to filing the lawsuit and thus lacked actual knowledge prior to that time. ER 8, 19, 38, 71-72.

Similarly, MGP’s FAC contains allegations that plausibly allege that MGP did not have constructive knowledge of the infringements until the date of actual discovery. MGP alleged in the FAC that it discovered the infringements via a reverse image search; that even when utilizing most sophisticated search technologies available the sheer volume of information on the Internet means that infringements can sometimes go years without detection; and that due to the size and subject matter of MGP’s photographic library, the process required to detect infringements is extremely costly and labor intensive. ER 35-39. BDG Media provided no evidence in the record to establish that MGP either had actual knowledge or was on inquiry notice of the infringements prior the dates of discovery alleged by MGP.

Despite these specific allegations in the FAC, in its November 21 Order the District Court dismissed the allegations in the FAC as “boilerplate” and not related to the present case. ER 22-23. The District Court further concluded that,

Plaintiff alleges no facts that support it used reasonable diligence. Plaintiff states that it “actively searches for hard-to-detect infringements and devotes time and money to enforcing his rights under the Copyright Act.” FAC ¶ 15. However, there are no facts alleged by Plaintiff in its FAC or Opposition to support this conclusory statement.

ER 23.

On the contrary, MGP specifically alleged that it used both ImageRights and Google to detect the infringements at issue⁴ and even specifically alleged that ImageRights provides “AI-driven intelligent Internet search and copyright enforcement services to photo agencies, image archives, professional photographers, and media companies worldwide.” ER 36, 38-39.

The District Court would apparently hold MGP to a heightened pleading standard at odds with the “short and plain” statement required by the Federal Rules. The problem with the District Court’s line of reasoning is that it would essentially require MGP to provide a comprehensive list of all image search technologies it had used in the past and include a litany of specific facts as to the technical specifications and limitations of why each of those technologies could not detect the infringements sooner.

As one court noted, it is contrary to the “inquiry notice” doctrine to impute on a copyright holder a standing duty to police and investigate all potential

⁴ The District Court apparently assumed that MGP utilized additional reverse image search technologies during the relevant time period which, even if true, is irrelevant since it was only Google and ImageRights that discovered the infringements at issue. Furthermore, it should be noted that MGP’s current strategy for detecting infringements in 2020 is substantial different than its strategy, or lack thereof, in 2015 when the Bustle articles were originally published.

infringements. *Design Basics, LLC v. Chelsea Lumber Co.*, 977 F. Supp. 2d 714, 725 (E.D. Mich. 2013). Rather the duty to investigate “is not triggered until the plaintiff becomes aware of suspicious activity that may indicate infringement.” *Ibid.* (citation omitted). This makes sense as a rule. As the framers themselves recognized the underlying policy behind the copyright regime is “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8, cl. 8. In other words, copyright policy should be focused on encouraging creators to create. Imputing on copyright holders a standing duty to police and investigate all potential infringements would undermine that policy by forcing copyright holder to devote their limited time, efforts, and resources to detecting potential infringement instead of creating valuable and useful works, they lose the ability to enforce their copyrights.

In *Warren Freedensfeld*, 531 F.3d at 45-46, the First Circuit rejected the argument that the plaintiff was on inquiry notice on the day that a building based on the plaintiff’s architectural plans was opened to the public, when there was no evidence that the plaintiff toured or viewed the building that was allegedly infringing the plaintiff’s copyright. The court noted, “Architects have no general, free-standing duty to comb through public records or to visit project sites in order to police their copyrights.” *Id.* at 46.

The *Warren Freedensfeld* court recognized that the relevant question is whether the plaintiff had “some reason to investigate whether he may have suffered an injury *at the hands of a putative infringer.*” *Id.* at 44 (emphasis added); *see also Chicago Bldg. Design, P.C. v. Mongolian House, Inc.*, 770 F.3d 610, 615 (7th Cir. 2014) (inquiry notice is defendant-specific). Even if MGP were aware of infringement occurring on the Internet generally, without evidence that MGP became aware of storm warnings to suggest a reason to specifically investigate

BDG Media, MGP cannot be charged with knowledge of BDG Media' infringing acts.

Imposing such a heightened standard of diligence would unreasonably burdensome and create a never-ending obligation to seek and discover infringements. *See MacLean Assoc., Inc.*, 952 F.2d at 780. This is not the law. Rather, the specific facts pled by MGP in the FAC could plausibly be read to indicate that the costly, labor intensive, and technologically limited detection process renders it reasonable that MGP could not have discovered BDG Media's infringing acts earlier than the dates of discovery alleged. *See* ER 36

The District Court should therefore be reversed, and this matter remanded for further proceedings.

2. *Reversal Would Not Preclude Adjudication On The Merits Of The Statute Of Limitations Issue.*

Reasonableness of discovering copyright infringement is a question of fact. *Free Speech Sys.*, 390 F. Supp. 3d at 1170 (N.D. Cal. 2019).

If the Court were to reverse and remand for further proceedings, BDG Media would not be precluded from continuing to litigate, and potentially prevailing, on its statute of limitations defense. The sole issue in this appeal is whether MGP has alleged facts *sufficiently plausible* to invoke the "discovery rule" in its amended complaint. Just because MGP's theory is plausibly alleged in a complaint does not mean that it would be ultimately successful on the merits. Indeed, it is expected that a significant portion of discovery will center on MGP's infringement detection practices, its use of reverse image search, and the circumstances surrounding its discovery of the infringements at issue. Such factual inquiries will be critical to determining whether MGP's failure to discover the infringement earlier were reasonable under the circumstances.

Thus, a reversal of the District Court’s dismissal and a remand for further proceedings would not preclude BDG Media from fully asserting the statute of limitations as an affirmative defense and potentially prevailing on summary judgment or at trial. *See Michael Grecco Prods. v. Valuwalk LLC*, 345 F. Supp. 3d 482, 511 (S.D.N.Y. 2018) (“[T]here is a genuine issue of material fact as to whether Plaintiff’s claims under the Copyright Act are barred by the statute of limitations.”).

The District Court should therefore be reversed, and this matter remanded for further proceedings.

II. UNDER THE SEPARATE ACCRUAL RULE, MGP HAS PLAUBLY ALLEGED BDG MEDIA HAS COMMITTED INFRINGING ACTS WITHIN THE THREE YEAR STATUTORY WINDOW

In addition to the discovery rule, the “separate-accrual rule” in copyright law provides that “when a defendant commits successive violations [of the Copyright Act], the statute of limitations runs separately from each violation. Each time an infringing work is reproduced or distributed, the infringer commits a new wrong. Each wrong gives rise to a discrete ‘claim’ that ‘accrue[s]’ at the time the wrong occurs.” *Media Rights Techs., Inc.*, 922 F.3d at 1023 quoting *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014).

Here, the allegations in the FAC plausibly allege timely violations of MGP’s rights to reproduce, distribute, and display the X-Files Photos. Because these violations occurred within three years of MGP’s filing of this lawsuit, under the separate-accrual rule, MGP’s claims are timely.

A. MGP Has Plausibly Alleged A Timely Violation Of The Reproduction Right Of The Flashlight Photo.

The Copyright Act grants a copyright owner the exclusive right to “reproduce the copyrighted work in copies or phonorecords.” 17 U.S.C. § 106(1). The term “copies” is defined as “material objects, other than phonorecords, in

which a work is fixed and by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” 17 U.S.C. § 101. A work is “‘fixed’ in a tangible medium of expression when its embodiment in a copy or phonorecord . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration.” 17 U.S.C. § 101.

In the digital context, a photographic image is “‘fixed’ in a tangible medium of expression,’ . . . when embodied (i.e., stored) in a computer’s server (or hard disk, or other storage device). The image stored in the computer is the ‘copy’ of the work for purposes of copyright law.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1160 (9th Cir. 2007); *see Capitol Records, LLC v. ReDigi, Inc.*, 934 F. Supp. 2d 640, 649 (S.D.N.Y. 2013) (“the reproduction right is necessarily implicated when a copyrighted work is embodied in a new material object”).

Here, MGP alleged that the copy of the Flashlight Photo used in the Articles on Bustle discovered by MGP in 2019 was uploaded to the Bustle server in September of 2016⁵. ER 39. MGP reached this conclusion by observing the URL on the Bustle website which appeared to show the upload date in question, a copy of which was provided in screenshots attached as an exhibit to the FAC. ER 39, 57-58.

By uploading the photograph onto the Bustle server in 2016, BDG Media created a new “copy” of the Flashlight Photo, which was then “fixed” on the Bustle

⁵ As explained more fully in section III.A the allegation of the 2016 upload was not a “separate and different act of infringement” from that which was alleged in the original Complaint. Rather both complaints utilized the exact same screenshot, with the FAC containing additional specific allegations in an attempt to satisfy the District Court’s concerns about timeliness.

server and capable of being “perceived, reproduced, or otherwise communicated.” *See Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649, 657 (2d Cir. 2018) (“the fixing of the digital file in [defendant’s] server . . . creates a new phonorecord, which is a reproduction.”); *see also Flava Works Inc. v. Gunter*, 689 F.3d 754, 757 (7th Cir. 2012) (“The infringer is the customer . . . who copied [Plaintiff’s] copyrighted video by uploading it to the internet.”). Taking as true MGP’s allegation that BDG Media uploaded the copy of Flashlight Photo at issue to Bustle in September 2016, MGP’s allegations as to the Flashlight Photo are timely as they occurred less than three years from the date of filing. *See Valuwalk, LLC*, 345 F. Supp. 3d at 512 (suggesting plaintiff’s copyright claim would be within the statute of limitations if defendants had “republish[ed]” a copyrighted image online)

The District Court should therefore be reversed, and this matter remanded for further proceedings.

B. MGP Has Plausibly Alleged A Timely Violation Of The Distribution Right Of The Flashlight And Hallway Photo.

An infringement is defined as a violation of “*any* of the exclusive rights of the copyright owner.” 17 U.S.C. § 501(a). Under 17 U.S.C. § 106, a copyright holder owns a number of exclusive rights, and a violation of any one right gives rise to a separate claim for infringement. *See Petrella*, 572 U.S. at 671-72 (“Each time an infringing work is reproduced or distributed, the infringer commits a new wrong. Each wrong gives rise to a discrete ‘claim’ that ‘accrue[s]’ at the time the wrong occurs.”).

One such exclusive right is the right “to distribute copies . . . of the copyrighted work.” 17 U.S.C. § 106(3). However, the Copyright Act fails to define “distribution”. *See Elektra Entm’t Grp., Inc. v. Barker*, 551 F. Supp. 2d 234, 240 (S.D.N.Y. 2008) (“The word ‘distribute,’ . . . is not defined in the Copyright Act.”); *Atlantic Recording Corp. v. Howell*, 554 F. Supp. 2d 976, 981 (D. Ariz.

2008) (“The statute does not define the term distribute”). For that definition, courts have looked to “the statute's plain meaning and legislative history.” *Ibid.*

Copies can be distributed electronically. *See Perfect 10, Inc.*, 508 F.3d at 1162. In the electronic context, distribution has been held to include electronic distribution of individual copies of articles in online news databases. *See N.Y. Times Co. v. Tasini*, 533 U.S. 483, 498 (2001). Distribution has also been defined as the transmission of photographic images electronically to the user’s computer. *See Perfect 10*, 508 F.3d at 1162; *see also London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 173 (D. Mass. 2008) (“An electronic file transfer is plainly within the sort of transaction that § 106(3) was intended to reach.”).

To distribute online, first there must be “an identifiable copy of the work to change hands in one of the prescribed ways for there to be a distribution.” *Rosen v. eBay, Inc.*, 2018 U.S. Dist. LEXIS 222728, at *11 (C.D. Cal. Jan. 24, 2018) quoting *Atlantic Recording*, 554 F. Supp. 2d at 976. “The general rule, supported by the great weight of authority, is that ‘infringement ... requires an actual dissemination of either copies or phonorecords.’” *Atlantic Recording*, 554 F. Supp. 2d at 981, quoting *Nat’l Car Rental Sys. v. Computer Assocs. Int’l, Inc.*, 991 F.2d 426, 434 (8th Cir. 1993).

For photographs, there are several ways that a copy of an image can “change hands.” One way⁶ is for the infringer to save the copy of the image on its website server for the world to see, and for a computer user to visit the infringer’s web

⁶ Another way -- and the way often implicated in copyright display right violation cases -- is to display the image via a link to third party’s server. *See, e.g., Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 595 (S.D.N.Y. 2018) (defendants embedded a link to image in a tweet); *Leader’s Inst., LLC v. Jackson*, 2017 U.S. Dist. LEXIS 193555, at *31-32 (N.D. Tex. Nov. 22, 2017) (display by website framing); *Flava Works, Inc v. Gunter*, 2011 U.S. Dist. LEXIS 98451, at *9 (N.D. Ill. Sep. 1, 2011) (display by linking to third party server). That method of distribution is also not relevant here since the undisputed facts are that the BDG Media stored the copies of MGP’s X-Files Photos on Bustle’s servers.

page to view the image⁷. When the computer user visits the web page, a copy of the image is transferred from the infringer's website server to the computer user so that the image can be displayed on the user's computer screen. *See Perfect 10*, 508 F.3d at 1162 (“the website publisher's computer ... distributes copies of the images by transmitting the photographic image electronically to the user's computer.”). In the Internet context, this means a “transfer of a file from one computer to another.” *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828 (C.D. Cal. 2006). Distribution is complete when “the receiving computer assembles the transmitted information into a complete image that can be ‘perceived.’” *IMAPizza, LLC v. At Pizza Ltd.*, 334 F. Supp. 3d 95, 120 (D.D.C. 2018).

Transfer of an image file from one computer to another is distribution in violation of § 106(3). *See Warner Bros. Records, Inc. v. Walker*, 704 F. Supp. 2d 460, 467 (W.D. Pa. 2010) (downloading of copies of copyrighted work placed online by defendant “establish[ed] unauthorized distribution [of]... recordings.”); *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 651 (S.D.N.Y. 2013) (distribution occurs where consumers purchase copyrighted products online); *Miller v. Facebook, Inc.*, 2010 U.S. Dist. LEXIS 61715, at *15 (N.D. Cal. May 27, 2010) (distribution found where users downloaded the copyright works and it was saved to the user's cache); *see also* 2 Nimmer on Copyright § 8.20 (“the

⁷ The Ninth Circuit in *Perfect 10* explained this process in more detail:

Computer owners can provide information stored on their computers to other users connected to the Internet through a medium called a webpage. A webpage consists of text interspersed with instructions written in Hypertext Markup Language (“HTML”) that is stored in a computer. No images are stored on a webpage; rather, the HTML instructions on the webpage provide an address for where the images are stored, whether in the webpage publisher's computer or some other computer. In general, webpages are publicly available and can be accessed by computers connected to the Internet through the use of a web browser.

Perfect 10, 508 F.3d at 1155.

transmission of the . . . printed version of [literary, musical and dramatic works] so that they may be read by electronic means . . . does not implicate the reproduction right Such conduct would become infringing only by reason of the display right.”).

An image is distributed each time a user accesses a webpage that contains that image. *Miller v. Facebook, Inc.*, 2010 U.S. Dist. LEXIS 61715, at *15 (N.D. Cal. May 27, 2010). Once an image is placed on a website, the image is continuously distributed each time a user visits that website. *Ibid.* When a user visits a website, the images on that website are stored in the computer’s cache memory. *Ibid.* The internal cache then “saves copies of webpages and images that the user has recently viewed so that the user can more rapidly revisit these webpages and images.” *Ibid.* (citing *Perfect 10 v. Amazon.com*, 508 F.3d at 1156 n.3). In more practical terms, each time a user accesses a webpage, copies of the images contained on the webpage are distributed and locally saved to the user’s device. *Ibid.* This caching process results in the distribution of images. *Id.* at *15-16. *See also Live Face on Web, LLC v. Absonutrix, LLC*, 2018 U.S. Dist. LEXIS 80017, at *4 (M.D.N.C. May 8, 2018) (“As a result of the modifications to the Defendants’ Website . . . when a web browser retrieves a page from the Defendants’ Website, a copy of the infringing version of the LFOW Software is distributed by Defendants to the website visitor and stored on the visitor’s computer in cache, memory, and/or its hard drive. Accordingly, each visit to the Defendants’ Website is a new act of copyright infringement.” (*Id.*, ¶ 28.)) In sum, LFOW contends that, in modifying their website to link to the “ip_player.js” file stored on a third-party server, Defendants engaged in “direct, indirect and/or vicarious infringement of registered copyright(s).”); *Live Face On Web, LLC v. Biblio Holdings LLC*, 2016 U.S. Dist. LEXIS 124198, at *11 (S.D.N.Y. Sep. 12, 2016); *Live Face on Web, LLC v. Emerson Cleaners, Inc.*, 66 F. Supp. 3d 551,

555-56 (D.N.J. 2014); *Live Face on Web, LLC v. Unlimited Office Sols., LLC*, 2014 U.S. Dist. LEXIS 171401, at *8-9 (D.N.J. Dec. 11, 2014).

In 2010, the court in *Miller v. Facebook, Inc.* 2010 U.S. Dist. LEXIS 61715, (N.D. Cal. May 27, 2010) held that it is reasonable to infer that a video game had been distributed once saved to the cache memory of a user's computer. *Ibid.* At issue before the court in that case was whether the plaintiff's exclusive right to distribute was violated when the defendant allowed users to download a video game where it was being hosted to the local cache memory of any Facebook user who played the ChainRxn video game. *Id.* at *5. In determining that the defendant violated the plaintiff's exclusive right to distribute, the court stated that:

content accessed by a user over the Internet is routinely stored locally on the user's computer in what is called cache memory. *See* 508 F.3d at 1156 n.3 (defining "cache" memory as "computer memory with very short access time used for storage of frequently or recently used instructions or data" and explaining that a user's personal computer "has an internal cache that saves copies of webpages and images that the user has recently viewed so that the user can more rapidly revisit these webpages and images."). It is a reasonable inference that the ChainRxn video game was distributed by defendant Yeo to members of the public through this routine "caching" process.

Id. at *14-15.

As in *Miller*, MGP's exclusive right to distribute the X-Files Photos was violated, each and every time, a user accessed articles on Bustle. Upon visiting Bustle, the X-Files Photos on the website were distributed and stored into the user's cache memory. The transfer of a copy—and thus, distribution— occurred each time individuals access the articles on Bustle.

In both the Complaint MGP alleged that it was still able to access the Flashlight Photo on the Bustle server at the time of filing of the Complaint in May 2019, and in the FAC MGP added that additional allegation that it was able to access the Hallway Photo on the Bustle server at the time of the filing of the FAC in December 2019. ER 39, 50, 54-55, 72, 82-83. MGP further supported the

plausibility of these allegations by providing time stamped screenshots. ER 50, 54-55, 82-83. Because the court must accept these allegations as true, MGP has plausibly alleged a timely violation of MGP's right to distribute the X-Files Photos because they could be accessed, and actually were accessed, on Bustle at the time of the filing of the Complaint and SAC.

The District Court should therefore be reversed, and this matter remanded for further proceedings.

C. MGP Has Plausibly Alleged A Timely Violation Of The Display Right Of The Flashlight And Hallway Photo.

The Copyright Act grants the owner of a copyright exclusive rights to, *inter alia*, “display the copyrighted work publicly.” *See* 17 U.S.C. § 106(5). “To ‘display’ a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process” 17 U.S.C. § 101. With regard to the meaning of ‘publicly’, the Copyright Act provides, in relevant part, that:

[t]o perform or display a work ‘publicly’ means - -
. . . .

(2) to transmit or otherwise communicate a performance or display of the work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

17 U.S.C. § 101.

The Copyright Act unambiguously states that “[t]o ‘display’ a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process” 17 U.S.C. § 101. Cases interpreting this definition have held that display occurs by “the projection of an image on a screen . . . by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage retrieval system.” *Greenberg v.*

Nat'l Geographic Soc'y, 533 F.3d 1244, 1279 (11th Cir. 2008). The definition's usage of the phrase "any other device or process" clearly brings showing a copy of a work through a computer within the statutory definition of "display." Thus, each unauthorized showing of a work through a computer infringes on the owner's right of public display.

Unauthorized transmission of a copyrighted work onto a public website alone violates a copyright owner's display right irrespective of whether the infringer's server hosts the work. *Kelly v. Arriba Soft Corp.*, 280 F.3d 934, 946 (9th Cir. 2002) ("By allowing the public to view Kelly's copyrighted works while visiting Arriba's web site, Arriba created a public display of Kelly's works"). Violation of a copyright owner's display right occurs "even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission." *Kelly*, 280 F.3d at 945. The act of transmitting a work onto a website is enough; it is not necessary for anyone to actually view the infringing image for the display right to be violated. *Kelly*, 280 F. 3d at 946 ("Allowing this capability is enough to establish an infringement; the fact that no one saw the images goes to the issue of damages, not liability"); *Greenberg*, 533 F.3d at 1279-1280 ("The definition of 'transmit' is broad enough to include all conceivable forms and combinations of wired and wireless communications media..." citing H.R. Rep. No. 94-1476). Other courts that have considered this issue have reached similar conclusions.

In *Perfect 10, Inc. v. Amazon.com, Inc.*, the 9th Circuit considered whether an internet search provider infringed on the plaintiff's display rights by storing thumbnail versions of copyrighted images on its server and communicating those images to its users. *Perfect 10*, 508 F.3d at 1155-61. The Court determined that "based on the plain language of [17 U.S.C. § 101], a person displays a photographic image by using a computer to fill a computer screen with a copy of

the photographic image fixed in the computer's memory.” *Id.* at 1160. Based on that determination, the Court held that the plaintiff made a “prima facie case that [defendant’s] *communication* of its stored thumbnail images directly infringe[d] on [plaintiff’s] display right.” *Ibid.* (emphasis added).

Similarly, in *Playboy Enterprises, Inc. v. Webbworld, Inc.*, 991 F. Supp. 543, 548 (N.D. Tex. 1997) the defendants owned or operated a website that offered copyrighted photographs and images to subscribers for a monthly fee. The defendant “allowed its paying subscribers to view [plaintiff’s] copyrighted works on their computer monitors while online,” and the Court determined that “[s]uch action constitutes a display” *Id.* at 551-52.

Here, MGP alleged that BDG Media published the X-Files Photos on Bustle, where they remained at the time the Complaint and FAC were filed. ER 39, 50, 54-55, 72, 82-83. MGP further supported the plausibility of these allegations by providing time stamped screenshots. ER 50, 54-55, 82-83. Because the court must accept these allegations as true, MGP has plausibly alleged a timely violation of the X-Files Photos because they could be accessed, and actually were accessed, on Bustle at the time of the filing of the Complaint and SAC.

Because the court must accept these allegations as true, MGP has plausibly alleged a timely violation of MGP’s right to display the X-Files Photos because they could be accessed, and actually were accessed, on Bustle at the time of the filing of the Complaint and FAC and displayed on a user’s computer. Consequently, each of these displays constituted a separate infringement on MGP’s right of public display under § 106(5), with each infringement starting a new limitations period. *See APL Microscopic, LLC v. United States*, 144 Fed. Cl. 489, 499 (Fed. Cl. 2019) (holding that claim of infringing photograph originally published on NASA webpage in 2004 and continuously displayed through time of lawsuit was timely because “each time a user viewed NASA’s webpage, APL’s

copyrighted Work was displayed on the user’s computer[, and] each of these displays constituted a separate infringement ... with each infringement starting a new limitations period.”).

The District Court should therefore be reversed, and this matter remanded for further proceedings.

III. THE DISTRICT COURT FAILED TO PROPERLY APPLY THE RELATION BACK DOCTRINE

In accordance with the general theory of liberalized pleading in the federal system, the relation back doctrine of Rule 15(c) is “liberally applied.” *Asarco, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) citing *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1259 n.29 (9th Cir. 1982). Indeed, Rule 15’s purpose “is to provide maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities.” *Asarco, LLC*, 765 F.3d at 1005 (citation omitted).

Here, the District Court incorrectly applied the relation back doctrine under Rule 15(c) because it erroneously concluded that the September 2016 upload of the Flashlight Photo was a new claim, and it incorrectly determined that the Hallway Photo could not relate back to MGP’s original infringement claim. In any event, the statute of limitations should be equitably tolled because, but for the District Court’s repeated delays in adjudicating the motion to dismiss, MGP would have been able to file the FAC at or before the statute of limitations for the infringement of the X-Files Photos as alleged in the FAC.

A. The District Court Erroneously Concluded That The September 2016 Upload Of The Flashlight Photo Was A Separate Claim.

“Amendments that restate the original claim with greater particularity or amplify the factual circumstances surrounding the pertinent conduct, transaction or occurrence in the preceding pleading fall within Rule 15(c).” *Bensel v. Allied*

Pilots Ass'n, 387 F.3d 298, 310 (3d Cir. 2004) citing *Clipper Exxpress*, 690 F.2d at n.29.

In the original Complaint, MGP alleged that BDG Media uploaded and displayed the Flashlight Photo on Bustle and that it discovered those infringements in 2019. ER 71-72. MGP did not make any allegations as to when these acts originally occurred. *Ibid*. In support of its allegations, MGP included a screenshot of the Flashlight Photo as it resided on the Bustle server. ER 83. In response to the District Court's directive to add more detailed factual allegations related to the statute of limitations issue raised by BDG Media, in its FAC, MGP utilized the same screenshot of the Flashlight Photo on the Bustle server, and added specific allegations that the URL on the Bustle server indicated that the Flashlight Photo was uploaded on September 13, 2016. ER 39, 57-58.

Despite the fact that MGP used the exact same screenshots and alleged infringing use in the exact same articles on Bustle in the FAC, the District Court rejected the more specific allegations related to the September 13, 2016 upload erroneously stating that it constituted "a completely separate act from the publishing of the two Flashlight Photo Articles Plaintiff asserted in its original Complaint" and this could not relate back. ER 24. Capitalizing on this error, the District Court alternatively found that the allegedly "new" facts went beyond the scope of the amendment granted by the District Court. ER 25. Finally, the District Court concluded that even if the relation back doctrine were applicable, because the original complaint was untimely, the new allegations could not relate back. ER 24.

Contrary to the District Court's erroneous conclusions, the allegation in the FAC related to the Flashlight Photo were not different than those asserted in the original Complaint. Rather, they were more specific allegations arising out of the original conduct alleged.

Furthermore, a properly related claim under Rule 15 relates back to the date of filing even if the original complaint was, itself, originally dismissed as untimely. *See Seals v. Compendia Media Group*, 290 F. Supp. 2d 947, 952 (N.D. Ill. 2003) (“Contrary to defendants’ argument, the fact that this court subsequently dismissed plaintiff’s first, second, and third complaints does not render the fourth amended complaint, filed on May 5, 2003, untimely.”); *see also Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 541 (2010) (“Rule 15(c) of the Federal Rules of Civil Procedure governs when an amended pleading ‘relates back’ to the date of a timely filed original pleading and is thus itself timely even though it was filed outside an applicable statute of limitations.”). As explained above in sections I and II, the original Complaint was, in fact, timely, however even if it were not that would not preclude MGP from utilizing the relation back doctrine to cure the defect. *See Boyce v. Anderson*, 405 F.2d 605 (9th Cir. 1968) (allowing amendment to cure jurisdictional defect in complaint after statute of limitations had expired because the claims were not modified) *also see Carney v. Resolution Trust Corp.*, 19 F.3d 950 (5th Cir. 1994) (amended complaint relates back to date of original filing, even when the amendment states a new basis for subject-matter jurisdiction).

The District Court should therefore be reversed, and this matter remanded for further proceedings.

B. The Hallway Photo Is Properly Related To MGP’s Original Claim For Copyright Infringement And Is Thus Timely.

“Amendments seeking to add claims are to be granted more freely than amendments adding parties.” *Union Pacific R. Co. v. Nevada Power Co.*, 950 F.2d 1429, 1432 (9th Cir. 1991). “When a suit is filed in a federal court under the [Federal Rules of Civil Procedure], the defendant knows that the whole transaction described in it will be fully sifted, by amendment if need be, and that the form of the action or the relief prayed or the law relied on will not be confined to their first

statement.” *Ibid.* (citation and quotation omitted); *see also Ophthalmic Imaging Sys. v. Fukuhara*, 2006 U.S. Dist. LEXIS 5924, *10-11, 2006 WL 229793 (E.D. Cal. January 25, 2006) (“In the case at bar, the proposed amendment does relate directly to the conduct, transactions, and occurrences that are detailed in the initial complaint. Namely, the allegation of conversion is very much related to the broad set of facts that gave rise to the allegations copyright infringement, false advertising, violation of the Computer Fraud and Abuse Act, breach of contract, misappropriation of trade secrets, and interference with contracts. For this reason, the court finds that the relation-back doctrine would ensure that the amendment would not be barred by the statute of limitations.”)

Here, the District Court dismissed the claims related to BDG Media’s infringement of the Hallway Photo because it concluded that the allegations of an upload of the Hallway Photo to the Bustle did not arise out of the same conduct, transaction or occurrence as MGP’s claims of infringement of the Flashlight Photo. ER 25-28.

Both claims have a number of factual, legal, and evidentiary commonalities. First, both arise out of BDG Media’s photo use policies (or lack thereof) on the same website, Bustle. Any written or informal policies, training materials, or editorial guidance will common to both infringements. Second, MGP has not added any new claims per se, but merely more instances and violations of its singular legal claim for copyright infringement. Thus, there are no new causes of action or legal theories. Just more instances of the same exact infringement claims MGP raised in its original Complaint. Third, MGP has alleged three separate uses of its photographs on Bustle, and given past experience, MGP would not be surprised if discovery revealed yet more instances of MGP photographs on being used on Bustle, as serial infringers such as BDG Media often make widespread use of unauthorized materials.

Thus, give the liberal standards of Rule 15, BDG's infringing use of the Hallway Photo on Bustle can be said to have arisen out of the same conduct, transaction or occurrence as MGP's claims of infringement of the Flashlight Photo.

Additionally, the District Court concluded that the addition of the Hallway Photo infringement was outside the scope of the permitted amendment. ER 25-28. Despite this finding, the Court's original November 21, 2019 Order simply dismissed the Complaint and orders MGP to file a First Amended Complaint within 21 days, but placed no other restrictions on the scope of the permitted amendment. ER 14. Thus, the allegations related to the Hallway Photo were not outside the scope of the permitted amendment, because the District Court did not narrow the scope of the permitted amendment to begin with.

The District Court should therefore be reversed, and this matter remanded for further proceedings.

C. The District Court's Own Delay Precluded The Filing Of An Amended Complaint Within The Three Year Limitations Period.

Finally, the District Court concluded that both allegation that the Flashlight Photo was uploaded to Bustle on September 13, 2016 and the allegation that MGP discovered the Hallway Photo infringement in October 2016 were untimely because MGP filed its FAC in December 2019, more than three years after both occurrences. ER 24, 27.

While it is true that MGP filed the FAC in December 2019, this is because of the repeated delays in having BDG Media's Motion to Dismiss timely adjudicated. MGP filed its Complaint on May 30, 2019. ER 69-83. After being served with the Complaint on June 24, 2019, MGP and BDG Media stipulated to allow BDG an extension of time to respond. ER 66-68. Subsequently, BDG Media filed its Motion to Dismiss MGP's Complaint, which was noticed for hearing on August 30, 2019. ER 63-65.

On August 15, 2019 the parties stipulated to continue the hearing date to September 13, 2019 in order to accommodate counsel for BDG Media who would be on vacation. *Ibid.* Had the Motion to Dismiss been adjudicated on September 13, 2019 as planned, MGP would have been able to file a FAC alleging the September 13, 2016 upload of the Flashlight Photo and October 2016 discovery of the Hallway Photo without running afoul of the three year statute of limitations.

On August 16, 2020 the District Court granted the stipulation, but set the hearing date for September 27, 2019, instead of September 13, 2019. ER 61-62. On September 26, 2020, the District Court issued an order in chambers continuing the hearing date to November 1, 2019 on its own motion. ER 60. On October 30, 2019, the District Court issued a second order in chambers taking the Motion to Dismiss under submission and vacating the November 1, 2019 hearing date. ER 59. The Motion to Dismiss was not adjudicated until November 21, 2019, and MGP was ordered to file the FAC within 21 days. ER 7-14.

There was no way for MGP to know the out come of the Motion to Dismiss before the Court issued its November 21 Order. Thus, through no fault of its own, MGP was precluded from filing its FAC before the limitations period on those allegations had passed.

The District Court should therefore be reversed, and this matter remanded for further proceedings.

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IV. CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and the case remanded further proceedings.

Dated: August 3, 2020

Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellant Michael Grecco Productions, Inc. states that it is unaware of any related cases pending before this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,917 words and 1,075 lines, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Dated: August 3, 2020

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ADDENDUM

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Rule 8. General Rules of Pleading

(a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) DEFENSES; ADMISSIONS AND DENIALS.

(1) *In General*. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) *Denials—Responding to the Substance*. A denial must fairly respond to the substance of the allegation.

(3) *General and Specific Denials*. A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation*. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) *Lacking Knowledge or Information*. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) *Effect of Failing to Deny*. An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) AFFIRMATIVE DEFENSES.

(1) *In General*. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken Designation.* If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) PLEADING TO BE CONCISE AND DIRECT; ALTERNATIVE STATEMENTS; INCONSISTENCY.

(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense.* A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses.* A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) CONSTRUING PLEADINGS. Pleadings must be construed so as to do justice.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

- (i) within 21 days after being served with the summons and complaint; or
- (ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) **HOW TO PRESENT DEFENSES.** Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;
- (3) improper venue;
- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted; and
- (7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) **MOTION FOR JUDGMENT ON THE PLEADINGS.** After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) **RESULT OF PRESENTING MATTERS OUTSIDE THE PLEADINGS.** If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) **MOTION FOR A MORE DEFINITE STATEMENT.** A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) MOTION TO STRIKE. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) JOINING MOTIONS.

(1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) HEARING BEFORE TRIAL. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule

12(c) must be heard and decided before trial unless the court orders a deferral until trial.

Rule 15. Amended and Supplemental Pleadings

(a) AMENDMENTS BEFORE TRIAL.

(1) *Amending as a Matter of Course.* A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) *Other Amendments.* In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

(3) *Time to Respond.* Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.

(b) AMENDMENTS DURING AND AFTER TRIAL.

(1) *Based on an Objection at Trial.* If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

(2) *For Issues Tried by Consent.* When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move—at any time, even after judgment—to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. But failure to amend does not affect the result of the trial of that issue.

(c) RELATION BACK OF AMENDMENTS.

(1) *When an Amendment Relates Back.* An amendment to a pleading relates back to the date of the original pleading when:

(A) the law that provides the applicable statute of limitations allows relation back;

(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading; or

(C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

(i) received such notice of the action that it will not be prejudiced in defending on the merits; and

(ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

(2) *Notice to the United States.* When the United States or a United States officer or agency is added as a defendant by amendment, the notice requirements of Rule 15(c)(1)(C)(i) and (ii) are satisfied if, during the stated period, process was delivered or mailed to the United States attorney or the United States attorney's designee, to the Attorney General of the United States, or to the officer or agency.

(d) SUPPLEMENTAL PLEADINGS. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

17 U.S. Code § 507. Limitations on actions

(a) CRIMINAL PROCEEDINGS.—

Except as expressly provided otherwise in this title, no criminal proceeding shall be maintained under the provisions of this title unless it is commenced within 5 years after the cause of action arose.

(b) CIVIL ACTIONS.—

No civil action shall be maintained under the provisions of this title unless it is commenced within three years after the claim accrued.

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: August 3, 2020

Respectfully submitted,

/s/ Ryan E. Carreon
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