

No. 19-56465

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

MICHAEL GRECCO PRODUCTIONS, INC.,
Plaintiff-Appellant,

v.

ZIFF DAVIS, LLC,
Defendant-Appellee.

On Appeal from the United States District Court
for the Central District of California
Hon. Dale S. Fischer
No. 2:19-cv-04776

APPELLANT'S OPENING BRIEF

Mathew K. Higbee
Ryan E. Carreon
Naomi M. Sarega
HIGBEE & ASSOCIATES
1504 Brookhollow Drive, Suite 112
Santa Ana, California 92705
Tel: 714-617-8336
mhigbee@higbeeassociates.com
rcarreon@higbeeassociates.com
nsarega@higbeeassociates.com

Attorneys for Plaintiff-Appellant Michael Grecco Productions, Inc.

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: April 16, 2020

Respectfully submitted,

/s/ Ryan E. Carreon
Ryan E. Carreon, Esq.
Cal. Bar No. 311668
HIGBEE & ASSOCIATES
1504 Brookhollow Dr., Ste 112
Santa Ana, CA 92705-5418
(714) 617-8336
(714) 597-6559 facsimile

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT	i
TABLE OF AUTHORITIES	iv
STATEMENT OF JURISDICTION	1
ISSUE PRESENTED.....	2
PERTINENT RULES AND STATUTES	3
STATEMENT OF THE CASE	4
I. INTRODUCTION.....	4
A. Michael Grecco Is A Renowned Celebrity Photographer.....	4
B. Ziff Davis, LLC Is A Global Digital Media Company.....	4
C. Ziff Davis Infringed MGP’s X-Files Images.....	5
D. The District Court Erroneously Dismisses MGP’s Complaint. .	6
STANDARD OF REVIEW	8
SUMMARY OF THE ARGUMENT	9
ARGUMENT.....	10
I. MGP PLAUSIBLY ALLEGED THAT IT LACKED ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE INFRINGEMENT PRECLUDING THE CLAIM FROM ACCRUING PRIOR TO 2018	10
A. A Copyright Claim Accrues Only When A Plaintiff Is Chargeable With Knowledge Of The Infringement.....	10
B. This Court Should Adopt An “Inquiry Notice” Standard To Determine When Infringement Should Reasonably Be Discovered.	12

1.	MGP Plausibly Alleged That It Was Not On Inquiry Notice Of The Infringement Prior To Discovery In 2018.....	15
2.	The Fact That Ziff Davis’ Websites Are Heavily Trafficked Did Not Put MGP On Inquiry Notice.....	17
3.	The Date That Google Image Search Was Released Is Irrelevant To Whether MGP’s Efforts Were Reasonable..	19
4.	MGP’s History Of Detecting Infringements Is Not Relevant To Whether It Acted With Reasonable Diligence.....	21
C.	The District Court’s Reasoning Effectively Eliminates The “Discovery Rule” For Online Infringement Of Photographs. .	23
1.	The District Court Held MGP To The Impossible Pleading Standard Of Proving A Negative.....	25
2.	Reversal Would Not Create An “Open Ended” Statute Of Limitations As The District Court Asserts.	26
II.	REVERSAL WOULD NOT PRECLUDE AN ADJUDICATION ON THE MERITS OF THE STATUTE OF LIMITATIONS ISSUE.....	27
III.	CONCLUSION	28

STATEMENT OF RELATED CASES

CERTIFICATE OF COMPLIANCE

ADDENDUM

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

<i>Ayala v. Frito Lay, Inc.</i> , 263 F. Supp. 3d 891, 913 (E.D. Cal. 2017).....	15
<i>Bean v. John Wiley & Sons, Inc.</i> , 2012 U.S. Dist. LEXIS 44501, 2012 WL 1078662, at *3 (D. Ariz. Mar. 30, 2012)	22
<i>Beasley v. John Wiley & Sons, Inc.</i> , 56 F. Supp.3d 937, 946 (N.D. Ill. July 21, 2014)	23
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544, 555 (2007).....	15
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 325 (1986)	25
<i>Cervantes v. City of San Diego</i> , 5 F.3d 1273, 1276 (9th Cir. 1993).....	10, 11
<i>Chicago Bldg. Design, P.C. v. Mongolian House, Inc.</i> , 770 F.3d 610, 615 (7th Cir. 2014)	18
<i>Conley v. Gibson</i> , 355 U.S. 41 (1957).....	11
<i>Degginger v. McGraw-Hill Glob. Educ. Holdings LLC</i> , 2015 U.S. Dist. LEXIS 173974, 2015 WL 917938 at *8 (D. Ariz. Nov. 4, 2015).....	23
<i>Design Basics, LLC v. Chelsea Lumber Co.</i> , 977 F. Supp. 2d 714, 725 (E.D. Mich. 2013)	16, 17, 20
<i>Elkins v. United States</i> , 364 U.S. 206, 218 (1960)	25
<i>Emrich v. Touche Ross & Co.</i> , 846 F.2d 1190, 1199 (9th Cir. 1988).....	11
<i>Energy Intelligence Grp., Inc. v. CHS McPherson Refinery, Inc.</i> , 300 F. Supp. 3d 1356, 1367 (D. Kan. 2018)	22
<i>Fahmy v. Jay-Z</i> , 835 F. Supp. 2d 783, 790 (C.D. Cal. 2011)	14
<i>Free Speech Sys., LLC v. Menzel</i> , 390 F. Supp. 3d 1162, 1170 (N.D. Cal. 2019)	passim
<i>Frerck v. John Wiley & Sons, Inc.</i> , 2014 U.S. Dist. LEXIS 95099, 2014 WL 3512991, at *6 (N.D. Ill. July 14, 2014).....	23
<i>Graham-Sult v. Clainos</i> , 756 F.3d 724, 745 (9th Cir. 2014)	14
<i>Jablon v. Dean Witter & Co.</i> , 614 F.2d 677, 682 (9th Cir. 1980)	10

<i>MacLean Assoc., Inc. v. WM. M. Mercer-Meidinger-Hansen, Inc.</i> , 952 F.2d 769, 780 (3d Cir. 1991).....	13, 18, 20
<i>Media Rights Techs., Inc. v. Microsoft Corp.</i> , 922 F.3d 1014, 1022 (9th Cir. 2019)	14
<i>Michael Grecco Prods. v. Valuwalk LLC</i> , 345 F. Supp. 3d 482, 511 (S.D.N.Y. 2018).....	27
<i>Minden Pictures, Inc. v. BuzzFeed, Inc.</i> , 390 F. Supp. 3d 461 (S.D.N.Y. 2019)....	21, 22
<i>Netzer v. Continuity Graphic Assocs.</i> , 963 F. Supp. 1308, 1315 (S.D.N.Y. 1997)	12
<i>Pincay v. Andrews</i> , 238 F.3d 1106, 1110 (9th Cir. 2001)	14
<i>Polar Bear Prods., Inc. v. Timex Corp.</i> , 384 F.3d 700, 706 (9th Cir. 2004)...	10, 12, 13, 24
<i>Roley v. New World Pictures, Ltd.</i> , 19 F.3d 479, 481 (9th Cir. 1994).....	10, 13
<i>Scheuer v. Rhodes</i> , 416 U.S. 232, 236 (1974)	15
<i>Supermail Cargo, Inc. v. United States</i> , 68 F.3d 1204, 1207 (9th Cir. 1995)	11
<i>U.S. ex rel. Air Control Techs., Inc. v. Pre Con Induss., Inc.</i> , 720 F.3d 1174, 1178 (9th Cir. 2013)	15
<i>UMG Recordings, Inc. v. Glob. Eagle Entm't, Inc.</i> , 2016 U.S. Dist. LEXIS 77853, 2016 WL 3457179 (C.D. Cal. Apr. 20, 2016)	14
<i>United States v. Dominguez-Mestas</i> , 929 F.2d 1379, 1384 (9th Cir. 1991)	25
<i>United States v. Fei Lin</i> , 139 F.3d 1303, 1308 (9th Cir. 1998)	25
<i>Warren Freedensfeld Assocs. v. McTigue</i> , 531 F.3d 38, 44 (1st Cir. 2008)	12, 17, 18
<i>Weimerskirch v. Comm'r of Internal Revenue</i> , 596 F.2d 358, 361 (9th Cir. 1979)	25
<i>William A. Graham Co. v. Haughey</i> , 568 F.3d 425, 438 (3d Cir. 2009).....	12, 13
<i>Wood v. Santa Barbara Chamber of Commerce, Inc.</i> , 705 F.2d 1515, 1521 (9th Cir. 1983).....	13, 19
<i>Wu v. John Wiley & Sons, Inc.</i> , 2015 U.S. Dist. LEXIS 120707, 2015 WL 5254885, at *6 (Sept. 10, 2015 S.D.N.Y.).....	22

Statutes

17 U.S.C. § 507(b) 10

Rules

Federal Rule of Civil Procedure 8(a)(2) 15, 26

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”) 15, 33.

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 and judgment was entered on November 19, 2019. ER 11-14. Pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A), a Notice of Appeal was timely filed on December 17, 2019. ER 1-4.

ISSUE 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 and where it has alleged that it was not aware of the infringer or the infringer’s website prior to discovering the infringement.

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 16, 38. 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 16-17, 38-39.

Grecco’s work is regularly featured in prestigious galleries around the world. ER 17. Due to the high quality and limited availability of Grecco’s Works, MGP routinely licenses individual photographs for thousands of dollars. ER 17, 39.

MGP is the exclusive rights holder to two photographs taken by Grecco of actors Gillian Anderson and David Duchovney who starred on the hit television show The X-Files (“X-Files Images”). ER 17, 23-24, 39, 45-46. MGP registered the X-Files Images with the United States Copyright Office. ER 17, 39.

B. Ziff Davis, LLC Is A Global Digital Media Company.

Appellee Ziff Davis, LLC (“Ziff Davis”) is a leading global digital-media company that produces and distributes premium content across multiple platforms and devices. ER 17, 35. Ziff Davis claims that its platform has garnered 1.1 billion video views, 1.6 billion total visits and 86 million shopping clicks. ER 17, 39.

In 2013, Ziff Davis acquired AskMen[®] which it claims “is the No. 1 authority on men’s lifestyle in the world, boasting a truly global audience reached by editions in the US, Canada, UK, Australia and licensed editions in Germany, Turkey, the Middle East and beyond.” ER 17, 39. Ziff Davis also owns IGN[®] “the leading Internet media company focused on the video game and entertainment

enthusiast markets. IGN reaches more than 151 million monthly users and is followed by more than 11 million subscribers on YouTube and 30 million users on social platforms.” ER 17-18, 39-40. Ziff Davis owns and operates the websites www.askmen.com and www.ign.com through which is promotes its AskMen[®] and IGN[®] properties. ER 18, 40.

C. Ziff Davis Infringed MGP’s X-Files Images.

After conducting a reverse image search on or about November 2018, MGP discovered that Ziff Davis used the X-Files Images on www.askmen.com and www.ign.com. ER 18, 40. The first X-Files Image appeared in an article titled “Emmy-Winning TV Series On Netflix: 18 Incredible Shows You’ve Never Seen Before That You Need To Netflix, ASAP,” which was originally published on www.askmen.com on or about August 25, 2014. ER 18, 28-32, 34-35, 40, 50-54. The second X-Files Image appeared in an article titled “Gillian Anderson doesn’t think an X-Files movie would happen until 2016; possibly too late for an invasion storyline,” which was originally published on www.ign.com on or about January 19, 2014. ER 18, 26-27, 34, 40, 48-49.

MGP did not authorize Ziff Davis to use its X-Files Images on www.askmen.com or www.ign.com, and believes that Ziff Davis, a large sophisticated media company, was aware that its use of the X-files Images was infringing. ER 18, 40.

Prior to discovering the unauthorized use of the X-Files Images in November of 2018, MGP was not aware of Ziff Davis or the websites www.askmen.com and www.ign.com, and had never been aware of any of its photographs being used by Ziff Davis or on any of Ziff Davis’ websites. ER 11-12, 18.

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

Approximately six months after discovering the infringements, on May 31, 2019, MGP filed a complaint against Ziff Davis alleging copyright infringement. ER 37-56. On August 14, 2019, Ziff Davis moved to dismiss MGP’s complaint on the basis that it was barred by the three-year statute of limitations and for failure to adequately plead willfulness and entitlement to statutory damages and attorneys’ fees. ER 7, 55.

On September 9, 2019, the District Court, Hon. Dale S. Fischer presiding, granted in part and denied in part Ziff Davis’ motion, holding that willfulness and statutory damages had been sufficiently alleged¹. ER 7-9. Regarding the statute of limitations, the District Court noted that “[T]he general federal rule is that a limitations period begins to run when the plaintiff knows or has reason to know of the injury which is the basis of the action [citation]” and held that because MGP had only alleged the date of discovery that the complaint would be dismissed with leave to amend to allow MGP to allege “any facts that would suggest that it had no reason to know of the infringement prior to that date.” ER 7-9.

On September 30, 2019, MGP filed an amended complaint². ER 15-32. In accordance with the District Court’s directive that MGP plead facts to suggest that it had no reason to know of the infringements prior to the date of discovery

¹ In its Opposition, MGP conceded that only one of the two X-Files Images was entitled to an award of statutory damages because it was timely registered with the United States Copyright Office pursuant to 17 U.S.C. § 412. The court found MGP had sufficiently pled that it was entitled to statutory damages and attorneys’ fees for the timely registered Image.

² The originally filed amended complaint contained an inadvertent typographical error and MGP filed an erratum with a corrected version on October 9, 2019. The corrected version is included in the Excerpt of Record.

alleged, MGP specifically alleged in its amended complaint that it discovered the infringements as a result of a reverse image search, and that prior to discovering the unauthorized use of its X-Files Images in November of 2018, MGP was not aware of Ziff Davis or the websites www.askmen.com and www.ign.com and had never been aware of any of its photographs being used by Ziff Davis or on any of Ziff Davis' websites. ER 11-12, 18.

On October 28, 2019 Ziff Davis once again moved to dismiss the amended complaint on grounds that the statute of limitations had run. ER 56. On November 18, 2019, the District Court granted Ziff Davis' motion to dismiss, dismissed MGP's amended complaint with prejudice, and entered judgment in favor of Ziff Davis and against MGP. ER 11-12, 14.

In its Order dismissing the amended complaint, the District Court reasoned that, notwithstanding MGP's pled ignorance of Ziff Davis, its websites, and the use of the X-Files Images prior to discovering the infringements in 2018, MGP did not did not plead any facts that would suggest that it had no reason to know of the infringement prior to the date of actual discovery. ER 12. The District Court further reasoned that the infringements were "open and discoverable" and concluded that because Google Image Search was available to the public as early as 2011, MGP could not allege that reverse image search technology was not available prior to its use of reverse image search to discovery the infringements in 2018. ER 12. For this proposition, the District Court relied on a 2011 article from the website www.techcrunch.com announcing the release of the first version of Google Image Search, which neither party had referenced or cited in its pleadings or briefs. Indeed, other than its citation to the TechCrunch article, the District Court did not cite to a single statute, case, or other legal authority to support any of its reasoning to dismiss MGP's amended complaint with prejudice. ER 11-12.

On December 17, 2019, MGP timely filed a notice of appeal. ER 1-4, 56.

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).

SUMMARY OF THE ARGUMENT

MGP alleged three key facts in its amended complaint that are sufficient to invoke the “delayed discovery” rule embraced by the Ninth Circuit: (1) that it first discovered the infringements at issue in 2018; (2) that it discovered the infringements after conducting a reverse image search; and (3) that MGP was not aware of Ziff Davis or either of the websites at issue prior to conducting the search. Under the “inquiry notice” standard, MGP’s has plausibly alleged that it lacked both actual and constructive notice of Ziff Davis’ infringing acts prior to discovering them in 2018 sufficient to satisfy the liberal pleading standards of Rule 8 and render MGP’s complaint timely.

The District Court incorrectly concluded that because the infringements were “unconcealed ... on a massively trafficked website” and because Google Reverse Image Search was available to the public as early as 2011, MGP could have discovered the infringements earlier with reasonable diligence. However, a copyright holder is only obligated to act with reasonable diligence after receiving actual or constructive notice of an infringement. The facts relied on by the District Court, standing alone, are not sufficient to put MGP notice to investigate Ziff Davis or its websites absent any storm warnings or other triggering event.

If the District Court’s reasoning were to be embraced, it would effectively eliminate the “discovery rule” for copyright infringement occurring on the Internet by requiring copyright holders to endlessly search for potential infringements since Google search for images, text, and video is ubiquitous and freely available.

Finally, because the “discovery rule” involves questions of fact, a reversal would not preclude Ziff Davis from continuing to litigate, and potentially prevailing, on the merits of its statute of limitations defense.

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

ARGUMENT

I. MGP PLAUSIBLY ALLEGED THAT IT LACKED ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE INFRINGEMENT WHICH PRECLUDED THE CLAIM FROM ACCRUING PRIOR TO 2018

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). “A cause of action for copyright infringement accrues when one has knowledge of a violation or is chargeable with such knowledge.” *Roley v. New World Pictures, Ltd.*, 19 F.3d 479, 481 (9th Cir. 1994). Thus, “the statute of limitations does not prohibit recovery of damages incurred more than three years prior to the filing of suit if the copyright plaintiff was unaware of the infringement, and that lack of knowledge was reasonable under the circumstances.” *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 706 (9th Cir. 2004).

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.”).

MGP alleged three key facts in its amended complaint: (1) that it first discovered the infringements at issue in 2018; (2) that it discovered the infringements after conducting a reverse image search; and (3) that MGP was not aware of Ziff Davis or either of the websites at issue prior to conducting the search. ER 11-12, 18. MGP has plausibly alleged that its claim accrued less than three years before the lawsuit was filed because MGP lacked both actual and constructive notice of Ziff Davis’ infringing acts prior to discovering them in 2018. These factual allegations are sufficient to satisfy the liberal pleading standards of Rule 8 and render MGP’s complaint timely.

With respect to determining when a copyright plaintiff is chargeable with knowledge of an infringement such that the claim accrues, this Court should embrace 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. This Court Should Adopt An “Inquiry Notice” Standard 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 Freedendfeld*, 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).

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.); *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., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1022 (9th Cir. 2019); *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 formal adoption of 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. Under this standard, MGP has sufficiently alleged that it was not on inquiry notice of Ziff Davis’ infringements prior to discovering them in 2018. 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 In 2018.

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”).

“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). A claim may be dismissed as untimely pursuant to a 12(b)(6) motion only “when the running of the statute of limitations is apparent on the face of the complaint.” *U.S. ex rel. Air Control Techs., Inc. v. Pre Con Induss., Inc.*, 720 F.3d 1174, 1178 (9th Cir. 2013) (internal quotation omitted).

Here, MGP’s amended complaint 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 in 2018 and thus lacked actual knowledge prior to that time. ER 8, 18, 40.

Similarly, MGP has also plausibly alleged that it was not aware of the Ziff Davis or the websites where the infringements occurred prior to conducting the reverse image search, which revealed the infringements in 2018. ER 11-12, 40. In the first portion of its Order dismissing the amended complaint, the District Court concluded that MGP’s new allegations constituted statements of fact:

“The only relevant changes are that Plaintiff **added the fact** that it discovered the alleged infringement by way of a reverse image search, FAC ¶ 21, **and the fact** that ‘[p]rior to discovering Defendant’s unauthorized use of the Images, MGP was not aware of Defendant or Defendant’s Websites, nor had never been aware of any of its photographs being used by Defendant or on any of Defendant’s Websites.’ FAC ¶ 22.”

ER 11-12³ (emphasis added). However, in the last paragraph of its Order, the District Court contradicted itself by dismissing the new allegations as “very minor, mostly conclusory amendments.” ER 12. While these new allegations may amount to only a few sentences, they are significant and certainly not conclusory. There was simply no way for MGP to state in more detail the straightforward fact that it was not aware of Ziff Davis or its websites prior to 2018. Furthermore, the allegations do not suggest any sort of legal conclusion, but merely recite what MGP was or was not aware of prior to discovering the infringements.

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 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). The only factual allegations in the record — that MGP was unaware of Ziff Davis, its websites, or the infringements prior to 2018 — taken as

³ In a footnote, the District Court also criticized the phrasing of the allegations as “not correct” without elaboration.

true, plausibly suggests that MGP was not on inquiry notice that Ziff Davis infringed the X-Files Images prior to 2018 and compels the conclusion that MGP had no reason investigate Ziff Davis or even know to investigate Ziff Davis prior to discovering the infringement. *See* ER 11-12, 18. Whether MGP’s lack of awareness about Ziff Davis was reasonable under the circumstances is a question of fact not to be determined on a motion to dismiss. *Free Speech Sys.*, 390 F. Supp. 3d at 1170 (N.D. Cal. 2019).

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

2. *The Fact That Ziff Davis’ Websites Are Heavily Trafficked Did Not Put MGP On Inquiry Notice Of The Infringements.*

The District Court concluded that because the infringements were unconcealed and that Ziff Davis’ websites were heavily trafficked, a reasonably diligent plaintiff in MGP’s position could have discovered the infringements earlier than 2018. *See* ER 12. However, the fact that potentially infringing materials were publicly available does not, without some additional “triggering event,” suggest that MGP was on inquiry notice of the infringement. *See Design Basics*, 977 F. Supp. 2d at 725.

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.

Even if Ziff Davis’ infringements were publicly accessible on a highly trafficked website, this fact, standing alone, is not sufficient to put MGP on inquiry

notice of the infringement. While it may be true that Ziff Davis' websites are heavily trafficked in general, there is no evidence in the record to suggest that the articles containing the infringing X-Files Images themselves were heavily trafficked or otherwise widely disseminated or that MGP or any of its employees were aware of them prior to 2018. Indeed, MGP specifically pled that it was not aware of them prior to 2018. *See* ER 11-12, 18.

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 Ziff Davis, MGP cannot be charged with knowledge of Ziff Davis' infringing acts merely because they were not concealed on a heavily trafficked website.

Indeed, the Internet hosts millions, perhaps billions, of individual webpages. The vastness and breadth of the modern Internet would make it impractical for an entity like MGP which, as the result of a successful decades long career of its principal Michael Grecco has amassed thousands of valuable photographs depicting prominent individuals and subject matter, to diligently seek out detect all infringing uses of its intellectual property occurring on a publically accessible website.

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.

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

3. *The Date That Google Image Search Was Released Is Irrelevant To Whether MGP's Efforts Were Reasonable.*

The District Court also concluded that Google Image Search technology was made available to the public in 2011⁴, thus precluding MGP from being able to plausibly allege that the reverse image search technology used was not available until 2018, and impliedly suggesting that had MGP utilized Google Image Search earlier and more diligently the infringements would have been detected sooner. ER 12. The District Court's rationale is flawed for a number of reasons.

Firstly, the District Court's reasoning seems to imply that Google Image Search could have actually revealed the infringement sooner than 2018. There is no evidence in the record to suggest that Google Image Search was capable of detecting the infringement prior to 2018, and the District Court's implication that it could is nothing more than pure speculation. The technical limitations of reverse image search technology, as well as when and how MGP uses such technology, are questions of fact not appropriate for resolution on a motion to dismiss. *See Free Speech Sys.*, 390 F. Supp. 3d at 1170 (N.D. Cal. 2019). Suffice to say, the mere fact that reverse image search technology existed, does not automatically mean that such technology would have revealed Ziff Davis' infringements earlier than 2018.

Secondly, the District Court misapplied the standard of "diligence" that is required to successfully invoke the "discovery rule." The correct standard only requires that a copyright holder act with diligence once it has reason to suspect that an infringement has occurred. *See Wood*, 705 F.2d at 1521. Otherwise, a copyright holder generally has no independent duty to seek out, diligently or otherwise, unknown or unsuspected infringements. *See Design Basics*, 977 F. Supp. 2d at

⁴ The District Court apparently assumed that the Google Image Search technology released in 2011 and available in 2014 when the infringements occurred would be equally capable of detecting the infringements on Ziff Davis' Website as in 2018.

724-25 (“[I]t would be unreasonably burdensome to impose on a copyright owner a ‘never ending obligation to discover’” infringements. (quoting *MacLean Assoc., Inc.*, 952 F.2d at 780)).

In contrast to the correct application of the “diligence” standard, the District Court concluded that the mere fact that Google Image Search existed prior to the infringements occurring in 2014 means that MGP did not act with the requisite diligence because it could have used the technology to discover the infringements sooner than 2018 despite MGP pleading that was unaware of Ziff Davis or its websites prior to that time. *See* ER 12. However, the District Court again relied purely on speculative assumptions rather than any facts in the record. MGP does not allege that the 2018 was the first time that it utilized reverse image search technology or the first time that it had used such technology to search for the X-Files Images. Rather, MGP specifically alleges that a reverse image search conducted in 2018 revealed Ziff Davis’ infringing acts and Ziff Davis’ identity for the first time. *See* ER 18.

Regardless, the “diligence” standard applied by the District Court imposes too high a burden on copyright holders by requiring them to actively seek out infringements. MGP is, first and foremost, a professional media and photography company that devotes the majority of its time and resources creating high quality content and servicing its customers. *See* ER 16, 38. While MGP does devote considerable time and resources to detecting and combatting infringements, the “diligence” standard imposed by the District Court would require that MGP invest substantially all of its time and resources in both technology and labor to constantly and aimlessly scan the Internet for theoretical copyright infringements lest it lose its ability to bring a timely claim. This standard is not only unworkable, but would serve to punish those copyright holders who lack the necessary resources to constantly seek out infringements.

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

4. MGP's History Of Detecting Other Infringements Is Not Relevant To Whether It Acted With Reasonable Diligence.

Finally, although not directly addressed in the District Court's dismissal order, Ziff Davis argued in the District Court that MGP should be held to a higher standard of diligence since it has filed multiple copyright infringement suits in the past and actively utilizes reverse image search technologies to monitor for infringements.

In its briefs in the District Court, Ziff Davis relied heavily on the case *Minden Pictures, Inc. v. BuzzFeed, Inc.*, 390 F. Supp. 3d 461 (S.D.N.Y. 2019). In *Minden*, a wildlife and nature photo-licensing agency sued the Internet publication BuzzFeed for infringing a number of photographs on its website. *Id.* at 465. BuzzFeed moved to dismiss the complaint arguing that a number of the alleged infringements occurred outside the three-year statute of limitations. *Ibid.* In conclusory fashion, the court determined that,

“a reasonable copyright holder in Minden Pictures' position — that is, a seasoned litigator that has filed 36 lawsuits to protect its copyrights, beginning as early as July of 2010 — should have discovered, with the exercise of due diligence, that its copyright was being infringed within the statutory time period.”

Id. at 467.

MGP anticipates that Ziff Davis will again seek to invoke *Minden* to argue that because MGP has filed infringement lawsuits in the past that it is supposedly “sophisticated” such that it should have detected Ziff Davis' infringing acts at an earlier date. However, the holding in *Minden* is flawed for a number of reasons.

First, the *Minden* court does little to explain why it concluded that Minden lacked diligence in discovering BuzzFeed's infringements. To the contrary, the statistics cited by the court, that Minden had filed 36 lawsuits, suggests that, unlike

most copyright holders, Minden acts with tremendous diligence in seeking out infringements and enforcing its copyrights. *Id.* at 467. If anything, this demonstrates that large-scale infringement occurring on a heavily trafficked website may still elude even the most diligent copyright holder.

Second, *Minden* incorrectly concluded that supposed “sophisticated litigants” should be held to a higher standard with respect to discovering infringements. This rationale makes little sense. Just because one copyright holder has filed numerous lawsuits or because their intellectual property is infringed at a higher rate, does not imply that it is more or less capable of detecting infringements. *See e.g., Energy Intelligence Grp., Inc. v. CHS McPherson Refinery, Inc.*, 300 F. Supp. 3d 1356, 1367 (D. Kan. 2018) (“[T]he Court declines to impose a more stringent standard ... The Refinery has cited no case law in the copyright context indicating that EIG should be held to have ‘special knowledge’ about copyright infringement because of its enforcement policies.”)

The *Minden* court essentially concluded that because Minden was aware of infringement of its photographs occurring on the Internet generally, it had a heightened duty to actively seek out and discover *all* infringement occurring on the Internet within three years of it occurring. *See Minden Pictures*, 390 F. Supp. 3d at 467. However, many Courts have rejected similar “general awareness” reasoning. For example, in the context of photography infringement in textbooks, numerous courts have rejected the idea that general knowledge of textbook companies committing infringement or of a textbook company infringing another photographer’s work constitutes constructive discovery. *See Wu v. John Wiley & Sons, Inc.*, 2015 U.S. Dist. LEXIS 120707, 2015 WL 5254885, at *6 (Sept. 10, 2015 S.D.N.Y.) (report and recommendation); *Bean v. John Wiley & Sons, Inc.*, 2012 U.S. Dist. LEXIS 44501, 2012 WL 1078662, at *3 (D. Ariz. Mar. 30, 2012) (finding no evidence that knowledge of one publisher’s infringement should

alert a photographer to another publisher's infringement); *Beasley v. John Wiley & Sons, Inc.*, 56 F. Supp.3d 937, 946 (N.D. Ill. July 21, 2014) (“News reports and articles about ‘potential violations’ by textbook publishers in general would not provide Beasley with any inkling that Wiley in particular was infringing his copyrights.”); *Frerck v. John Wiley & Sons, Inc.*, 2014 U.S. Dist. LEXIS 95099, 2014 WL 3512991, at *6 (N.D. Ill. July 14, 2014) (general publishing industry knowledge about infringement does not trigger a duty to investigate years of licenses; under such a rule “photographers likely would spend more money monitoring their licenses than they receive from issuing licenses.”); *Degginger v. McGraw-Hill Glob. Educ. Holdings LLC*, 2015 U.S. Dist. LEXIS 173974, 2015 WL 917938 at *8 (D. Ariz. Nov. 4, 2015) (Rejecting contention that plaintiff had a duty to investigate where “the stock photography industry was aware generally that publishers, including [defendant], were infringing the work of photographers.”).

Similar to the plaintiff in *Minden*, MGP has actively enforced its intellectual property rights by attempting to locate infringements and filing lawsuits where necessary. However, the holding in *Minden* should be disregarded, as these unrelated proceedings shed little light on whether MGP acted with reasonable diligence with respect to discovering and pursuing its claims against Ziff Davis. As suggested above, the “inquiry notice” standard provides the appropriate framework to determine whether MGP acted with reasonable diligence in this matter.

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

C. The District Court’s Reasoning Effectively Eliminates The “Discovery Rule” For Online Infringement Of Photographs.

If the District Court’s reasoning were to be sustained, it would effectively eliminate the “discovery rule” for online copyright infringement of photographs. The District Court concluded that Google Image Search has been publically

available since 2011 and the infringements were “open and discoverable” since 2014. ER 12. The District Court reasoned that the availability of reverse image search technology coupled with the unconcealed nature of the infringements precluded MGP from asserting that had no reason to know of the infringement prior to the actual date of discovery in 2018. ER 12.

Taken to its logical conclusion, this reasoning would prevent any copyright holder in a photograph from invoking the “discovery rule” for infringements occurring on the Internet since, according to the District Court, a simple Google Image Search would immediately reveal all unconcealed infringements. Thus, any failure to detect an online infringement of a photograph within three years is the result of lack of diligence. Moreover, Google search for images, text, and video is ubiquitous and freely available and thus, according to the reasoning of the District Court, any copyright holder who fails to regularly use these tools to search for infringements is not acting with reasonable diligence.

This, of course, is not the law. As noted above, copyright holders generally have no independent duty to seek out infringements until they are put on inquiry notice that an infringement may exist. Furthermore, the District Court’s reasoning would prevent litigants, such as MGP, who actively utilizes reverse image search technology from legitimately invoking delayed discovery, even when, through no fault of their own, the limitations of the technology causes certain infringements not to be immediately discovered. *See Polar Bear Prods.*, 384 F.3d at 706 (“Without the benefit of tolling in this situation, a copyright plaintiff who, through no fault of its own, discovers an act of infringement more than three years after the infringement occurred would be out of luck. Such a harsh rule would distort the tenor of the statute.”).

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

1. The District Court Held MGP To The Impossible Pleading Standard Of Proving A Negative.

In both its original and subsequent orders dismissing MGP's complaint, the District Court held that MGP did not "plead any facts that would suggest that it had no reason to know of the infringement" prior to the date of actual discovery in 2018. ER 7-8, 12. While MGP contends that it did, in fact, plead such facts when it alleged that it was not aware of Ziff Davis or the websites at issue prior to the actual date of discovery (ER 11-12, 18), nonetheless, the District Court rejected these new factual allegations as insufficient.

In essence, the District Court wanted MGP to prove a negative, i.e. something that did not exist, but was not satisfied when MGP sought to do just that by pleading its ignorance of Ziff Davis and the infringements at issue. When a party has the burden of proving a negative, it is not unusual for a court to accept a less-than-exhaustive showing. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (holding that the burden of providing the absence of genuine issues of material fact may "be discharged by 'showing' --that is, pointing out to the district court--that there is an absence of evidence to support the nonmoving party's case"); *Weimerskirch v. Comm'r of Internal Revenue*, 596 F.2d 358, 361 (9th Cir. 1979) (recognizing the "practical" difficulty of attempting "to prove a negative" (quoting *Elkins v. United States*, 364 U.S. 206, 218 (1960))); *United States v. Fei Lin*, 139 F.3d 1303, 1308 (9th Cir. 1998) (noting "the difficulties inherent in requiring [a party] to prove a negative" (citing *United States v. Dominguez-Mestas*, 929 F.2d 1379, 1384 (9th Cir. 1991))).

The District Court, sought to hold MGP to the impossible standard of requiring it to set forth detailed allegations explaining how it did not know of the things it did not know. Simply put, MGP did not know of Ziff Davis or its websites prior to 2018 because MGP did not know of Ziff Davis or its websites prior to

2018. Not only is the District Court’s pleading standard illogical, it is at odds with the clear wording of Federal Rule of Civil Procedure 8(a)(2), which requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,” a standard that MGP’s amended complaint quite easily satisfied.

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

2. *Reversal Would Not Create An “Open Ended” Statute Of Limitations As The District Court Asserts.*

In dismissing the amended complaint, the District Court raised the concern that allowing a lawsuit to go forward for an “unconcealed copyright infringement on a massively trafficked website” with reverse image search technology publically available to detect the infringement, would effectively create and “open-ended statute of limitations.” ER 12. This apprehension, while well meaning, is unfounded.

Allowing MGP’s lawsuit to go forward would not create an open-ended statute of limitations any more than the current “discovery rule” already does. Nor would it abrogate the pleading requirements of those litigants who seek to invoke the “discovery rule.” Copyright holders who file claims more than three years after the infringement occurred would still be required to plead facts suggesting they lacked actual or constructive notice of the infringement during the initial three-year window. As explained more fully in Section II, *infra*, just because a litigant successfully pleads that it can plausibly invoke the “discovery rule” at the pleadings stage does not guarantee that it will prevail on the ultimate merits. In that sense, the statute of limitations is not “open ended” since it will, in all likelihood, be subject to the more intense scrutiny of discovery.

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

II. REVERSAL WOULD NOT PRECLUDE AN 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, Ziff Davis 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 prior to 2018 was reasonable.

Thus, a reversal of the District Court’s dismissal and a remand for further proceedings would not preclude Ziff Davis 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.”).

///

///

///

III. CONCLUSION

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

Dated: April 16, 2020

Respectfully submitted,

/s/ Ryan E. Carreon
Ryan E. Carreon, Esq.
Cal. Bar No. 311668
HIGBEE & ASSOCIATES
1504 Brookhollow Dr., Ste 112
Santa Ana, CA 92705-5418
(714) 617-8336
(714) 597-6559 facsimile

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 10,443 words, 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: April 16, 2020

Respectfully submitted,

/s/ Ryan E. Carreon
Ryan E. Carreon, Esq.
Cal. Bar No. 311668
HIGBEE & ASSOCIATES
1504 Brookhollow Dr., Ste 112
Santa Ana, CA 92705-5418
(714) 617-8336
(714) 597-6559 facsimile

ADDENDUM

Table of Contents

Fed. R. Civ. Proc. 8	A-1
Fed. R. Civ. Proc. 12	A-4

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.

CERTIFICATE OF SERVICE

I hereby certify that on April 16, 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: April 16, 2020

Respectfully submitted,

/s/ Ryan E. Carreon
Ryan E. Carreon, Esq.
Cal. Bar No. 311668
HIGBEE & ASSOCIATES
1504 Brookhollow Dr., Ste 112
Santa Ana, CA 92705-5418
(714) 617-8336
(714) 597-6559 facsimile