July 12, 2023

VIA EMAIL

Paul A. Levy
plevy@citizen.org

RE: ***Cases K0MKMP and 4R0ZV6 –Eyes for Lies – Deception Detection Training***

Mr. Levy,

I am in receipt of your letter dated July 7, 2023 regarding your client, Eyes for Lies – Deception Detection Training, and the unlicensed commercial use of various photographs owned by Reuters and the Associated Press. Both clients only pursue claims against businesses who use the images for commercial purposes.

We are reviewing your client's claim that these images were posted by the business owner at a time when the site was not used for business purposes. If true, it would not negate liability, however, it might be something my clients would consider in determining what action will be taken next. We are having difficulty verifying this claim. Someone has intentionally removed the business's site from the index stored on Archive.org, which would normally allow us to look at past versions of the site. Please provide any information that you have that supports the business's claim and what date the site began soliciting business.

In meantime, I will address your legal arguments.

As you know, the statute of limitations for copyright infringement runs "three years *after the claim accrued*." 17 U.S.C. § 507(b) (emphasis added). In your letter you seem to be mistakenly conflating a volitional act[1] with the accrual of a copyright infringement claim. Under the "discovery rule" a cause of action for copyright infringement accrues only "when the plaintiff learns, or should as a reasonable person have learned, that the defendant was violating his rights." *Gaiman v. McFarlane*, 360 F.3d 644, 653 (7th Cir. 2004); *see also Taylor v. Meirick*, 712 F.2d 1112, 1117 (7th Cir. 1983).

As the Second Circuit has pointed out "every Circuit to have considered the issue of claim accrual in the context of infringement claims" follows the discovery rule. *Psihoyos v. John Wiley & Sons, Inc.*, 748 F.3d 120, 124 (2d Cir. 2014). Your client appears to be located in Chicago, which is encompassed by the Seventh Circuit. For nearly four decades, the Seventh Circuit has embraced the "discovery rule." *See Chi. Bldg. Design, P.C. v. Mongolian House, Inc*., 770 F.3d 610, 614 ("Our circuit recognizes a discovery rule in copyright cases" citing cases).

In this case, the infringements at issue were discovered in September of 2022. You have presented no evidence to suggest that Reuters or the Associated Press were aware or should have been aware of the infringements prior to that time. If evidence were ever to be required, it would show that despite using the best technology available for several years, the use unauthorized use evaded detection, and that claims accrued in September 2022, my clients have until September 2025 to bring timely claims for infringement against the business that used images without a license.

[1] For your edification the "volitional conduct" rule has to do with whether an infringement is categorized as "direct" or "secondary." A "direct" infringer is one who engages in volitional conduct. A "secondary" infringer, i.e. one who is contributory or vicariously liable for infringement, does not engage in volitional conduct themselves, but rather is liable for the volitional act of another.

Your citation to and analysis of the *Minden* cases is also flawed. First, you conveniently ignore that even within the Southern District of New York, the *Minden* cases are not uniformly accepted. *See e.g. Michael Grecco Prods. v. RADesign, Inc*., 2023 U.S. Dist. LEXIS 106853, *7 ("[C]ourts in this district have not uniformly accepted the rationale applied by the *Minden* line").

Second, the reasoning in Minden turned on the sophistication *of the copyright holder*. In your letter, you argue that because Higbee & Associates is a sophisticated litigator, the claims should have been discovered sooner. However, Higbee & Associates is a law firm and not the copyright holder. The sophistication of Higbee & Associates is irrelevant to whether Reuters or the Associated Press were aware or should have been aware of the infringements prior to September 2022. *See Michael Grecco Prods. v. RADesign, Inc.,* 2023 U.S. Dist. LEXIS 106853, *8 ("[A] plaintiff does not have a general duty to police the internet for infringements of its copyrighted works, and that this remained so even where the plaintiff was represented by a highly-sophisticated and experienced law firm which specialized in identifying and bringing copyright infringement claims."); *Parisienne v. Scripps Media, Inc*., 2021 U.S. Dist. LEXIS 154960, *1 ("While Scripps directs the Court's attention to the [Plaintiff's counsel'] sophistication and experience with copyright infringement cases, the record shows that the [Plaintiff's counsel] discovered the infringement within the statutory time period after being retained.").

To the extent that alleged "sophistication" is even a relevant inquiry, you have pointed to no evidence that Reuters or the Associates Press are sophisticated litigants or that they should have known of these infringements prior to September 2022 when they were actually discovered. Thus, under the uniformly accepted "discovery rule" the statute of limitations has not run on either claim.

Next, you passingly reference that these infringements may be covered by "fair use." However, your letter does not undertake any analysis of the four fair use factors or how they would apply to these claims. Rather, you simply point out that the infringed photographs at issue were used to merely illustrate the articles in which they appeared. This fact pattern has been litigated countless times and "the use of an image solely to illustrate the content of that image, in a commercial capacity, has yet to be found as fair use." *Otto v. Hearst Communs., Inc.,* 345 F. Supp. 3d 412, 428 (S.D.N.Y. 2018)*;see also Ferdman v. CBS Interactive, Inc*., 342 F. Supp. 3d 515, 534 (S.D.N.Y. 2018)(The article "did not comment on, criticize, or report news about the Images themselves; instead, they used the Images as illustrative aids because they depicted the subjects described in its articles. [Such use], if accepted, would eliminate copyright protection any time a copyrighted photograph was used in conjunction with a news story about the subject of that photograph. That is plainly not the law.").

Finally, you call in to question whether the photographs themselves were registered. The size and age of the photo archives managed by our clients often make providing the registration status and information a time-consuming process. As a result, it is often not practical to provide it during the pre-litigation stage. Proof of copyright registration has never been a requirement in the pre-litigation stage— the claim accrues regardless of the registration status. Furthermore, with the establishment of the Copyright Claims Board (CCB), a perfected registration is no longer required to file a claim of infringement. Considering the dollar amount at issue in these matters, if litigation became necessary, the case would likely be filed in front of the CCB rather than in Federal court, thus rendering any questions about the registration status moot.

Sincerely,