

PUBLIC CITIZEN LITIGATION GROUP

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BY EMAIL TO mhigbee@higbeeassociates.com

July 6, 2023

Matthew Higbee, Esquire
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Re: Your Demand Letter to Donald Masters

Dear Mr. Higbee:

I write in response to your May 31, 2023 demand letter to Donald Masters, the proprietor of Master Home and Building Inspections, LLC (“MHBI”) on behalf of Associated Press, complaining about his having posted on his website (in July 2017 and June 2018, respectively) two photographs said to have been taken by that company’s staff or freelance photographers. You contend that the use of these photographs constituted copyright infringement, and demand that MHBI pay you \$6500 to settle your client’s claims for damages. However, as I explain below, MHBI is not willing to pay you anything, both because your purported infringement claims are untimely, and because your damages claims are wildly inflated.

The statute of limitations for copyright infringement claims is three years. 17 U.S.C. § 507(c). The “volitional acts” of MHBI’s claimed infringements, necessary to establish a claim for direct infringement, *BWP Media USA. v. T & S Software Associates*, 852 F.3d 436, 439 (5th Cir. 2017) (citing cases); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 548 (4th Cir. 2004), were committed when it placed the photographs on its web site six and five years ago, respectively. The mere fact that they have been on the website, and even assuming that they were seen more recently by anybody other than image search software and your firm’s staff in the course of preparing your demand letters, are not additional acts of infringement. *See Bell v. The Oakland Comty. Pools Project*, 2020 WL 4458890, at *5 & n.3 (N.D. Cal. May 4, 2020) (collecting cases and concluding that “the mere fact that a document remained online does not trigger the separate-accrual rule”). Moreover, under the single publication rule, which applies in assessing statute of limitations claims for causes of action under federal law, *see Oja v. U.S. Army Corps of Eng’rs.*, 440 F.3d 1122, 1133 (9th Cir. 2006) (single publication rule applies to Privacy Act claims), the statute of limitations began to run from the first allegedly tortious publication. “[W]hile information may be repeatedly accessed long after publication, the ‘single publication rule’ provides that the statute of limitations runs only from the date of original dissemination.” *Doe v. Garland*, 17 F.4th 941, 945 (9th Cir. 2021).

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Moreover, courts have refused to allow plaintiffs to invoke the discovery rule to avoid limitations defenses to suits claiming that mass media and Internet publications violated the plaintiff's rights. *Yeager v. Bowlin*, 693 F.3d 1076, 1081-82 (9th Cir. 2012).

In recent years, judges have expressed particular skepticism when what they call "seasoned litigator[s]," those who have filed a significant number of copyright infringement actions, invoke the discovery rule to avoid dismissal on limitations grounds. *E.g.*, *Minden Pictures v. BuzzFeed, Inc.*, 390 F. Supp. 3d 461, 467 (S.D.N.Y. 2019) (plaintiff had filed forty infringement suits). *See also Minden Pictures v. Complex Media*, 2023 WL 2648027, at *3 (S.D.N.Y. Mar. 27, 2023) (plaintiff had filed 100 infringement suits); *Lixenberg v. Complex Media*, 2023 WL 144663, at *3 (S.D.N.Y. Jan. 10, 2023) (plaintiff had filed nearly twenty such lawsuits). In *Minden Pictures v. Complex Media*, the court noted that the plaintiff "uses sophisticated methods to detect infringing images, . . . enlisting technology companies that crawl the internet to identify infringing uses. . . . Given that Plaintiff's business is designed to protect and enforce the copyrighted works that it licenses, and employs intricate means of doing so, it is not plausible that Plaintiff, in exercising reasonable diligence, would not have discovered the alleged infringing use here until nearly ten years after the infringement occurred." 2023 WL 2648027, at *3.

You are a seasoned litigator; both you and your media clients regularly crawl the internet to find infringing uses. Under the reasoning of the cases cited above, the claims you threaten to bring against MHBI are time-barred.

Moreover, your damages claims are wildly inflated. So far as we can tell, the market value of a license for digital-only use on a web site of each of these photos is under \$50. Even if AP registered the copyright for these photos before MHBI's use began, which would enable you to seek statutory damages, applying the common multiplier of two or three times the actual damages, your statutory damages claim would not likely be higher than \$750 per infringed work. You have not, however, furnished copyright registrations.

Indeed your "Compliance Resolution Specialist," Kenneth Green, refused to provide MHBI with copies of the copyright registrations for the photographs in question. The registrations could validate, or contradict, the assertion in your letters that Associated Press is, in fact, the owner of the copyrights in each of the photographs. Moreover, because the time of registration affects your client's ability to seek awards of statutory damages, the targets of your demand letters need to see the registrations so that they can assess the downside risk of refusing to give in to your demands for excessive damages and, thus, having to litigate against a claim for statutory damages, even when your staff claim that they are only "negotiating" over a payment to be made for an actual damages claim.

When I first started responding to your demand letters, or advising targets of your litigation about how copyright law affected their financial exposure, your office routinely responded to questions about the time of registration either by providing copies of the copyright registration, or by

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candidly confessing that the copyright was not yet registered but that it could be registered to enable litigation. That was, in my view, an ethical response to the inquiries. Over the last couple of years, however, your firm appears to have reversed its approach, never saying whether the copyright was registered and refusing to provide requested registrations.

In my judgment, that makes your negotiation posture unreasonable, and a judge might well take that into account in assessing a claim for statutory damages or, indeed, in deciding that your pre-litigation demands were unreasonable. Unreasonable pre-litigation demands, made in a case that was dismissed on statute of limitations grounds similar to what MHBI will argue here, was one reason why a judge awarded attorney fees against a repeat copyright plaintiff. *Bell v. Oakland Community Pools Project*, 2020 WL 13695114, at *3-*4 (N.D. Cal. Oct. 14, 2020).

Sincerely yours



Paul Alan Levy