

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 28, 2024

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ASH NEWELL,

Plaintiff,

v.

INLAND PUBLICATIONS INC.,

Defendant.

No. 2:23-CV-00025-SAB

**ORDER DENYING
DEFENDANT'S MOTION TO
DISMISS**

ECF No. 19

Before the Court is Defendant's Motion to Dismiss, ECF No. 19. Defendant is represented by Hannah Brown and Richard Sybert. Craig Sanders represents Plaintiff. The matter was heard without oral argument. Having reviewed the First Amended Complaint, ECF No. 15, and the file in this matter, the Court is fully informed and denies Defendant's motion.

Background

Plaintiff's First Amended Complaint alleges as follows:

Plaintiff is a professional photographer. ECF No. 15 at 3. On September 1, 2011, Plaintiff authored a photograph ("the Photograph") of Kris Kristofferson.¹ *Id.* at 4. Defendant is the publisher of a weekly print publication serving the Pacific

¹ Kris Kristofferson is an award-winning American country singer-songwriter and actor.

1 Northwest and also publishes content online. *Id.* at 3. On February 14, 2019,
2 Defendant published a story to its website which included the Photograph without
3 license or permission of Plaintiff. *Id.* at 4. On or about the same date, February 14,
4 2019, Plaintiff applied to register the Photograph with the United States Copyright
5 Office and the Photograph was registered with the same effective date. *Id.* Plaintiff
6 is a citizen of the State of Kentucky and “first observed” Defendant’s use of the
7 Photograph on April 28, 2022. *Id.* at 5.

8 Plaintiff alleges he could not have reasonably discovered the infringement at
9 any time prior to his actual date of discovery as there were no “storm warnings” of
10 Defendant’s infringement and due to the “vast size of the Internet,” “the statistical
11 improbability of finding any particular content item therein in a commercially
12 feasible timeframe and cost,” “even with the assistance of a ‘reverse search
13 engine.”” ECF No. 15 at 5-6.

14 On February 1, 2023, Plaintiff commenced suit asserting a single claim for
15 direct copyright infringement. Plaintiff seeks injunctive relief, actual damages,
16 disgorgement of profits, or in the alternative, statutory damages pursuant to 17
17 U.S.C. § 504(c), attorney’s fees and costs. *Id.* at 12.

18 **Legal Standards**

19 Federal Rule of Civil Procedure 12(b)(6) allows a party to move for
20 dismissal of one or more claims if the pleading fails to state a claim upon which
21 relief can be granted. Fed. R. Civ. P. 12(b)(6). A complaint must “contain
22 sufficient factual matter, accepted as true, to state a claim to relief that is plausible
23 on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).
24 Dismissal is warranted for a “lack of a cognizable legal theory or the absence of
25 sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica*
26 *Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988) (citation omitted).

27 In ruling on a Rule 12(b)(6) motion, a court may generally consider only
28 allegations contained in the pleadings, exhibits attached to the complaint, and

1 matters properly subject to judicial notice. *Swartz v. KPMG LLP*, 476 F.3d 756,
2 763 (9th Cir. 2007). A court must presume all factual allegations of the complaint
3 to be true and draw all reasonable inferences in favor of the non-moving party.
4 *Klarfeld v. United States*, 944 F.2d 583, 585 (9th Cir. 1991). The question is not
5 whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to
6 present evidence to support its claims. *Jackson v. Birmingham Bd. of Educ.*, 544
7 U.S. 167, 184 (2005) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).
8 While a complaint need not contain detailed factual allegations, a plaintiff must
9 provide more than “labels and conclusions” or “a formulaic recitation of the
10 elements of a cause of action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555
11 (2007). However, “a well-pleaded complaint may proceed even if it strikes a savvy
12 judge that actual proof of those facts is improbable, and ‘that a recovery is very
13 remote and unlikely.’ ” *Id.* at 556 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236
14 (1974)).

15 A statute of limitations defense can support dismissal under Rule 12(b)(6)
16 only if “it appears beyond doubt that the plaintiff can prove no set of facts that
17 would establish the timeliness of the claim.” *Von Saher v. Norton Simon Museum*
18 *of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010).

19 Discussion

20 1. Judicial Notice

21 Before turning to the merits of the motion, the Court addresses Defendant’s
22 Request for Judicial Notice, ECF No. 19-1, which is unopposed.

23 A court may take judicial notice of an adjudicative fact that is “not subject to
24 reasonable dispute because it: (1) is generally known within the trial court’s
25 territorial jurisdiction; or (2) can be accurately and readily determined from
26 sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b).
27 Matters of public record may be judicially noticed, but disputed facts contained
28 therein may not. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir.

1 2018). “[A]ccuracy is only part of the inquiry under Rule 201(b).” *Id.* “A court
 2 must also consider—and identify—which fact or facts it is noticing from” the
 3 documents. *Id.*

4 The Court takes judicial notice of court records filed with other United
 5 States District Courts. *See United States v. Howard*, 381 F.3d 873, 876 n. 1 (9th
 6 Cir. 2004) (a court may take judicial notice of court records in another case). This
 7 includes, Defendant’s Exhibit B, which is a minute order from *Moreland v.*
 8 *Cafeconleche Inc.*, Cause No. C22-0809-TSZ (Dec. 13, 2022 W.D. Wash.). In
 9 addition, a search of PACER case management system shows that prior to the
 10 instant case, Plaintiff filed eight copyright infringement actions in federal courts in
 11 Arizona, California, Massachusetts, New York, Oregon, Pennsylvania, Texas, and
 12 Wisconsin. In 2019, 2021, and 2022, Plaintiff filed five cases alleging infringement
 13 of the same copyright involved in the instant action. In all five of these cases, the
 14 alleged discovery of infringing uses occurred no later than in 2019.

Case	Case Number	Court	Date Filed	Alleged date(s) of infringement	Alleged date Plaintiff discovered the infringing use
<i>Newell v. Los Angeles Times</i>	2:21-cv-04293-JFW-KS	CDCA	05/24/2021	08/10/2015	9/7/2018
<i>Newell v. Morris Higham Mgmt LLC and Kris Kristofferson</i>	2:21-cv-6986-GW-JEM	CDCA	08/30/2021	06/06/2017 – 7/30/2019	9/7/2018
<i>Newell v. Bill Blumenreich Presents, Inc.</i>	1:22-cv-11495-NMG	D. Mass.	09/13/2022	Not alleged	10/05/2019
<i>Newell v. Wisdom Digital Media, LLC</i>	1:19-cv-3562-VSB	S.D. N.Y.	04/22/2019	Not alleged	Not alleged
<i>Newell v. Central Oregon Media Group, LLC</i>	6:119-cv-1258-MK	D. Or.	08/11/2019	02/22/2019	Not alleged

25 The Court also takes judicial notice of the existence of the archived webpage
 26 available through the WayBack Machine:

27 <https://web.archive.org/web/20190214151111/%20https://www.inlander.com/spoka>
 28

1 ne/a-look-at-kris-kristoffersons-career-as-one-of-the-preeminent-musical-voices-
2 of-his-generation/Content?oid=16486022. See *UL LLC v. Space Chariot, Inc.*, 250
3 F. Supp. 3d 596, 603 n.2 (C.D. Cal. 2017) (“[T]he Court takes judicial notice of
4 archived [] webpages because they ‘can be accurately and readily determined from
5 sources whose accuracy cannot reasonably be questioned.’ ”). The Court also takes
6 judicial notice of this website’s content reflected in the screen capture contained in
7 Defendant’s Exhibit B, stating: “The original print version of this article was
8 headlined ‘Renaissance Man.’” ECF No. 19-3.

9 The Court also takes judicial notice of the existence of the webpage
10 available at https://issuu.com/theinlander/docs/inlander_02-14-2019, and
11 Defendant’s Exhibit D, which is a screen capture from this website stating
12 “Inlander 02/14/2019” and “Published on Feb. 13, 2019.” ECF No. 19-5.

13 2. *Statute of Limitations*

14 Defendant contends that Plaintiff’s copyright claim is barred by the statute
15 of limitations.

16 Copyright infringement claims must be “commenced within three years after
17 the claim accrued.” 17 U.S.C. § 507(b). There are two recognized rules for
18 determining accrual in federal copyright infringement cases: the “incident of injury
19 rule” and the “discovery rule.” *Starz Entertainment, LLC v. MGM Domestic*
20 *Television Distribution, LLC*, 39 F.4th 1236, 1246 (9th Cir. 2022). Under the
21 incident of injury rule, a copyright claim accrues when the “when the infringement
22 or violation of one of the copyright holder’s exclusive rights occurs,” no matter
23 when the plaintiff learns of it. *Id.* at 1237. Under the “discovery rule,” “[a]
24 copyright infringement claim accrues—and the statute of limitations begins to
25 run—when a party discovers, or reasonably should have discovered, the alleged
26 infringement.” *Media Rights Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1022
27 (9th Cir. 2019). The injury rule is referred to as “the standard rule” and the
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1 discovery rule an exception to it. *SEC v. Gabelli*, 568 U.S. 442, 448 (2013); *see*
2 *also Starz Ent., LLC*, 39 F.4th at 1246.

3 Although Plaintiff alleges that he did not discover Defendant’s alleged
4 infringement until 2022, constructive knowledge triggers the statute of limitations.
5 “The plaintiff is deemed to have had constructive knowledge if it had enough
6 information to warrant an investigation which, if reasonably diligent, would have
7 led to discovery of the [claim].” *Pincay v. Andrews*, 238 F.3d 1106, 1110 (9th Cir.
8 2001) (citation omitted). “[S]uspicion” of copyright infringement “place[s] upon
9 [the plaintiff] a duty to investigate further into possible infringements of [its]
10 copyrights.” *Wood v. Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515,
11 1521 (9th Cir. 1983). Even if the plaintiff “may not actually have conducted this
12 further investigation, equity will impute to [the plaintiff] knowledge of facts that
13 would have been revealed by reasonably required further investigation.” *Id.*; *see*
14 *also Bibeau v. Pac. Nw. Res. Found. Inc.*, 188 F.3d 1105, 1108 (9th Cir. 1999)
15 (citation omitted), as amended, 208 F.3d 831 (9th Cir. 2000) (explaining that the
16 “twist” of the discovery rule is that it requires “[t]he plaintiff [to] be diligent in
17 discovering the critical facts,” i.e., “that he has been hurt and who has inflicted the
18 injury” (citation omitted)).

19 Defendant makes two primary arguments in support of dismissal of the
20 Amended Complaint. First, citing Washington state law, Defendant claims the
21 incident of injury rule governs and the discovery rule does not apply. In this case,
22 if the injury rule were to apply, Plaintiff would be time barred from recovery on
23 any acts of infringement that occurred prior to February 1, 2020. Defendant
24 contends the discovery rule does not apply because the alleged infringement
25 occurred “on a publicly-available website on February 14[, 2019],” the same day
26 he applied for copyright registration, and there was “nothing concealing the
27 website from him or stopping him from finding it for the next three years.” ECF
28 No. 19 at 6. There is no statutory or other directive mandating use of the injury

1 rule, the Ninth Circuit has recently indicated that it “continue[s] to apply the
2 discovery rule” for determining accrual “in copyright cases,” and it has not limited
3 its use to a certain types of copyright cases. *Starz Ent., LLC*, 39 F.4th at 1240-41.
4 The Court declines Defendant’s request to depart from this precedent.

5 Second, Defendant argues Plaintiff has not “plausibly pled” application of
6 the discovery rule because it is “simply implausible that Plaintiff could not find the
7 [Defendant’s] use,” given that he is a “seasoned litigator” who discovered others’
8 uses of the same photograph at least since 2019. ECF No. 19 at 7-8; ECF No. 26 at
9 5. In the Reply, Defendant asks the Court to “impute [constructive] knowledge”
10 since 2019 as Plaintiff was “able to locate other infringements during that time”
11 and it is “certainly reasonable that Plaintiff would have or should have discovered
12 the Inland article prior to 2022.” ECF No. 26 at 5.

13 Defendant’s statute of limitations defense hinges on the start date for the
14 statute of limitations – the date on which Plaintiff either actually knew of or
15 constructively discovered the alleged Defendant’s use of the Photograph. This
16 requires a determination of whether Plaintiff, in the exercise of reasonable
17 diligence, should have known of the basis for his claim. The Amended Complaint
18 alleges Plaintiff did not have reasonable basis for learning of the infringement
19 sooner because 1) there were no “storm warnings” alerting Plaintiff to *Defendant’s*
20 use of the Photograph; 2) Defendant’s readership is in the Pacific Northwest and
21 far from where Plaintiff resides; and 3) the internet is vast and monitoring it for a
22 single image requires an “incredible amount of time.” *See* ECF No. 15 at 5-8.
23 Defendant argues that it is “certainly reasonable” to assume a diligent investigation
24 would have revealed the Inland article “prior to 2022.” ECF No. 26 at 5. While
25 there may be merit to this argument, Plaintiff’s claim is time-barred only if the
26 statute of limitations was triggered prior to February 1, 2020, not 2022. The
27 determination of what a party “should have discovered” by conducting a
28 “reasonably required” investigation is a factually laden inquiry that cannot be

1 resolved at the motion to dismiss stage. That by 2019 Plaintiff had discovered
2 other uses of the Photograph and Defendant’s use was on the internet, does not
3 make the Amended Complaint’s allegations “implausible.” A motion to dismiss is
4 not an appropriate procedural mechanism to decide questions measured by a
5 standard of reasonableness.

6 At this time, it does not appear beyond doubt that Plaintiff can prove no set
7 of facts that would establish the timeliness of the claim and the question of whether
8 this action is timely must be decided later in the case with the benefit of discovery.

9 *3. Statutory Damages and Attorneys’ Fees*

10 Lastly, Defendant seeks dismissal of Plaintiff’s claims for statutory damages
11 and attorneys’ fees because the alleged infringement “commenced” prior to the
12 date Plaintiff obtained copyright registration for the Photograph.

13 Plaintiff is entitled to statutory damages and attorneys’ fees “only to the
14 extent infringement occurred after the work was registered.” *Enter. Mgmt. Ltd.,*
15 *Inc. v. Construx Software Builders, Inc.*, 73 F.4th 1048, 1056 n.6 (9th Cir. 2023)
16 (citing 17 U.S.C. § 412).² Infringement commences for purposes of § 412 of the
17 Copyright Act when “the first act in a series of acts constituting continuing
18 infringement occurs.” *Derek Andrew, Inc. v. Poof Apparel Corp.*, 528 F.3d 696,
19 700–01 (9th Cir. 2008).

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21
22 ² Section 412 of the Copyright Act provides that:

23 no award of statutory damages or of attorneys’ fees . . . shall be made for -
24 “(1) any infringement of copyright in an unpublished work commenced
25 before the effective date of its registration; or (2) any infringement of
26 copyright commenced after first publication of the work and before the
27 effective date of its registration, unless such registration is made within three
months after the first publication of the work.

28 17 U.S.C. § 412.

1 Defendant contends it is “simply not plausible” that the registration occurred
2 before the Photograph appeared online. ECF No. 19 at 9. The Amended Complaint
3 alleges that both registration and infringement occurred on the same date.
4 Accordingly, the Court cannot conclude that the facts alleged in the Amended
5 Complaint or record on the motion make it implausible that one event occurred
6 before the other.

7 Defendant also argues that “the record in this case is clear” that the first act
8 of infringement commenced on February 13, 2019 when it published the
9 Photograph in its print publication and the online publication is just part of an
10 ongoing infringement that commenced prior to registration. *See* ECF No. 26 at 6;
11 ECF No. 19 at 9-11. However, the record at this stage does not contain evidence of
12 an alleged infringement on February 13, 2019. *See* ECF No. 15; ECF No. 19 at 2-4
13 (Section II containing Defendant’s “Factual Allegations”). Defendant’s screen
14 capture contained in Exhibit D does not evidence or show Defendant’s use of the
15 Photograph on February 13, 2019. Though other content at the associated URL
16 may, it is not the Court’s duty to search websites for evidence to present in support
17 of party’s case. Without a record of Defendant’s pre-registration use of the
18 Photograph on February 13, 2019, the Court cannot rule on whether one
19 infringement constitutes a continuation of the other.

20 However, as Plaintiff seems to admit that Defendant’s use of the photograph
21 on publication on February 14, 2019 was “in a different medium on a different
22 day,” ECF No. 25 at 20, the Court notes that this does not apparently prevent a
23 series of infringements from being considered continuous according to published
24 case law, as well as the unpublished cases cited by Defendant only in its Reply. *See*
25 *e.g., City of Carlsbad v. Shah*, 850 F. Supp. 2d 1087, 1103 (S.D. Cal. 2012)
26 (concluding there was no legally significant difference in defendant’s repeated use
27 of a copyright on various websites, business cards, letterheads and t-shirts and
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1 hats); ECF No. 26 at 7. If Plaintiff chooses to continue to pursue statutory damages
2 and attorney's fees, resolution of this issue must occur another day.

3 Accordingly, **IT IS HEREBY ORDERED:**

4 1. Defendant's Motion to Dismiss, **ECF No. 19**, is **DENIED**.

5 **IT IS SO ORDERED.** The District Court Executive is hereby directed to
6 file this Order and provide copies to counsel.

7 **DATED** this 28th day of March 2024.



15 *Stanley A. Bastian*

16 Stanley A. Bastian
17 Chief United States District Judge
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