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**HOT ISSUES IN PHOTOGRAPHY**

**Treatment of photographers by police and protestors**

**By Mickey H. Osterreicher**

During last year’s pandemic and protest coverage, visual journalists continued to be squeezed on all sides while covering health, economic and social issues. More so than others, they could not work from home and risked their health and safety covering the COVID-19 pandemic and protests over the death of George Floyd. The reduction in staff by many news organizations, means that more and more journalists are not employees but rather independent contractors. This fact itself comes with its own unique challenges as visual journalists and other freelancers have experienced first-hand in California as a result of the [AB 5](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB5) law which became effective on January 1, 2020. That law is being [challenged](https://nppa.org/sites/default/files/show_temp.pl-2.pdf) in the courts by several organizations, including the National Press Photographers Association (NPPA). After a judge [denied the motion for a preliminary injunction](https://nppa.org/sites/default/files/20200320%20denial%20of%20preliminary%20injunction.pdf) and [dismissed the case](https://nppa.org/sites/default/files/20200320%20opinion%20dismissing%20case.pdf), [oral argument](https://www.ca9.uscourts.gov/media/video/?20210611/20-55734/) in the appeal to the Ninth Circuit took place on June 11, 2021.

In *Price v. Barr, et al*,1:19-cv-03672 (District Court, District of Columbia, 2019) involving an independent filmmaker who was cited for filming without a permit by the National Park Service, on January 22, 2021, the court issued a [memorandum opinion](https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1%3A2019cv03672/213478/36/) determining the permit and fee requirements applying to commercial filming under 54 USC 100905, 43 CFR Part 5, and 36 CFR Part 5 are unconstitutional. The government is appealing in what is now *Price v. Garland* (briefs due in late September).

The U.S. [Press Freedom Tracker](https://pressfreedomtracker.us/) has recorded an ever-increasing number of visual journalists being [arrested,](https://www.cnn.com/2020/05/30/media/protests-journalists-arrested-assaulted/index.html) [attacked](https://www.forbes.com/sites/sergeiklebnikov/2020/06/04/journalists-targeted-while-covering-protests-279-press-freedom-violations-and-counting/#20aa1ba8184f), [harassed](https://www.nytimes.com/2020/06/01/business/media/reporters-protests-george-floyd.html) and [interfered with](https://www.usatoday.com/in-depth/news/nation/2020/07/24/rubber-bullets-less-lethal-weapons-victims-police-protesters-decades/5410519002/) not just by [police, but also by protestors](https://www.theguardian.com/us-news/2020/may/31/george-floyd-protests-reporters-targeted-by-police-and-crowds) who do not wish to be photographed or recorded. We have seen many cases of photographers being told they are not welcome at protests and both verbally and physically assaulted by protestors on the left and right of the political spectrum. See: [*Guidance on Interactions*](https://nj.gov/oag/newsreleases21/AG-Guidance-Press-and-Police-Intractions-During-Protest-Events.pdf) *Between Law Enforcement and Press at Public Protests* and also attached IACP Police Chief Magazine Article.

In [Seattle](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwj6uprOh6DrAhVOmlkKHdQQAEkQFjABegQIARAB&url=https%3A%2F%2Fwww.seattletimes.com%2Fseattle-news%2Ffrom-the-editor-why-weve-fought-the-seattle-police-departments-subpoena-for-unpublished-protest-photos-and-video%2F&usg=AOvVaw2Cg5xPorHWwDPjk-cTnra4), where in 202 police subpoenaed the Seattle Times along with four television stations for all unedited and unpublished videos and photos taken over a 90-minute period in the downtown area during a demonstration protesting the killing of George Floyd. After much legal wrangling the police [withdrew the subpoena](https://www.rcfp.org/seattle-police-withdraw-subpoena/) after the arrest of the suspects. The DOJ and FBI have also been seeking unpublished images from the January 6, 2021 insurrection in DC. See: [*I filmed inside the Capitol riot. When I heard from the FBI, I faced a vexing dilemma*](https://slate.com/news-and-politics/2021/08/capitol-riot-footage-photos-online-detectives-fbi.html)*.*

Five visual journalists are [suing the NYPD](https://pressgazette.co.uk/five-photographers-sue-nypd-over-assaults-and-arrests-blm-protests/) for being assaulted and/or arrested while they covered the BLM protests in New York and plaintiffs in the Tenth Circuit case *Frasier v. Evans* have filed a [petition for cert](https://www.supremecourt.gov/DocketPDF/21/21-57/183377/20210708123143542_21-_Frasier%20PetitionForAWritOfCertiorari.pdf) as to “whether training or law enforcement policies can be relevant to whether a police officer is entitled to qualified immunity; and whether it has been ‘clearly established’ since at least 2014 that the First Amendment protects the right of individuals to record police officers carrying out their duties in public.” The Reporters Committee for Freedom of the Press, joined by 44 media organizations also filed an [amicus brief](https://www.supremecourt.gov/DocketPDF/21/21-57/187490/20210813153432191_RCFP%20-%20Frasier%20v.%20Evans%20for%20Filing.pdf) in support of that petition urging SCOTUS to clearly establish the right to photograph and record police officers performing their official duties in public. Also of note is the Florida case of [*Ford v. City of Boynton Beach*](https://casetext.com/case/ford-v-city-of-boynton-beach-1) as well as the Florida proposed bill [HB 11](https://www.flsenate.gov/Session/Bill/2022/11/BillText/Filed/PDF) and the Ohio bill [HB 22](https://search-prod.lis.state.oh.us/solarapi/v1/general_assembly_134/bills/hb22/PH/02/hb22_02_PH?format=pdf) which contains an exception permitting recording of police. Also see California SB 98 [*Public peace: media access*](file:///C%3A%5CUsers%5Cmicke%5CAppData%5CLocal%5CTemp%5C20210SB98_97.pdf)which passed both houses in September and is awaiting the governor’s signature.

**Linking and Embedding Photographs**

 **By Jean-Paul Jassy**

 Courts are divided as to whether and when a photograph that appears on a website or social media application without the copyright owner’s permission violates the owner’s exclusive display right. Some courts hold that linking or embedding a photograph does not violate the display right if the displayed image is hosted on a server owned or operated by an unrelated third party. Other courts hold that this “server test” is not rooted in the Copyright Act, and, even if an image is hosted on an unrelated server, that does not provide a shield from liability for an alleged violation of the display right.

 The seminal “server test” case is *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007). In pertinent part, the Ninth Circuit considered a claim of direct infringement of the display right against Google based on image search results where full size images would appear, but the images were stored on third-party servers and accessed by in-line linking, which, like embedding, is based on HTML code instructions behind the scenes to users.

 In 2012, the Seventh Circuit held that a “social bookmarker,” which enabled users with shared interests to point each other toward online materials through embedded code where the materials remained hosted on the original servers, would not be held liable for contributory copyright infringement. *Flava Works, Inc. v. Gunter*, 689 F.3d 754 (7th Cir. 2012). A few other district courts applied the server test in other contexts, but a significant development occurred in 2018.

 In *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585 (S.D.N.Y. 2018), the district court declined to apply the Ninth Circuit’s server test. The case involved a candid photograph of a football player that was uploaded by the copyright owner to the social media site Snapchat, then it went “viral” and was uploaded by various users to other platforms, including Twitter, and was ultimately used by defendants in various news stories, which embedded the photo (including the necessary embed code in HTML instructions) but did not host it on their servers. The Court reviewed and rejected application of the server test, holding that the Copyright Act and its legislative history did not provide for a “rule that allows the physical location or possession of an image to determine who may or may not have ‘displayed’ a work[.]” *Id.* at 593.

 Many considered the server test to be settled law, and the *Goldman* decision altered that perception. Following *Goldman*, a federal court in California – *i.e.*, within the Ninth Circuit, which decided *Perfect 10* – cited *Goldman* and expressed skepticism that the server test applies outside the search engine context. *Free Speech Systems, LLC v. Menzel*, 390 F. Supp. 3d 1162, 1172 (N.D. Cal. 2019) (without ruling on the issue, but noting that the alleged infringer “has not provided *any* case within the Ninth Circuit applying the server test outside of the search engine context or in the context [of the case at issue], the wholesale posting of copyrighted material on a news site”; emphasis in original).

 **In 2021, Judge Rakoff in the Southern District of New York followed the reasoning in *Goldman*, rejecting the Ninth Circuit’s server test. *Nicklen v. Sinclair Broadcast Group, Inc.*, --- F. Supp. 3d ---, 2021 WL 3239510 (S.D.N.Y. Jul. 30, 2021) (the starving polar bear case). The Court reasoned that “the Ninth Circuit’s reasoning in *Perfect 10* should be cabined by two facts specific to that case: (1) the defendant operated a search engine and (2) the copyrighted images were displayed only if a user clicked on a link.” *Id.* at \*4. The Court also summarized the policy dispute, albeit from the perspective of rejecting the server test:**

**Proponents of the server rule suggest that a contrary rule would impose far-reaching and ruinous liability, supposedly grinding the internet to a halt. These speculations seem farfetched, but are, in any case, just speculations. Moreover, the alternative provided by the server rule is no more palatable. Under the server rule, a photographer who promotes his work on Instagram or a filmmaker who posts her short film on YouTube surrenders control over how, when, and by whom their work is subsequently shown -- reducing the display right, effectively, to the limited right of first publication that the Copyright Act of 1976 rejects. The Sinclair Defendants argue that an author wishing to maintain control over how a work is shown could abstain from sharing the work on social media, pointing out that if Nicklen removed his work from Instagram, the Video would disappear from the Sinclair Defendants’ websites as well. But it cannot be that the Copyright Act grants authors an exclusive right to display their work publicly only if that public is not online.**

***Id.* [[1]](#footnote-1)**

**The Ninth Circuit reaffirmed its adherence to the server test on September 9, 2021, in *Bell v. Wilmott Storage Services, LLC*, --- F.4th ---, 2021 WL 4097499 (9th Cir. Sep. 9, 2021). In *Bell*, the Ninth Circuit applied the server test to find that a defendant infringed a photographer’s display right because defendant’s “server was continuously transmitting the image to those who used the specific pinpoint address or were conducting reverse image searches using the same or similar photo. If any user had visited the pinpoint address for the [subject] photo, under either of its file names, [defendant]’s server—where it is undisputed the photos were stored—would transmit that photo to the user, where the photo would ‘fill [the user’s] computer screen with a copy of the [Indianapolis photo] fixed in the computer's memory.’” *Id.* at \*5 (quoting *Perfect 10*, 508 F.3d at 1160).[[2]](#footnote-2)**

 Another turn came with the decision in *Sinclair v. Ziff Davis, LLC*, 454 F. Supp. 3d 352 (S.D.N.Y. 2020). In *Sinclair*, the plaintiff, a professional photographer, sued Mashable, Inc. and its parent company Ziff Davis, LLC for copyright infringement, alleging that the defendants infringed her copyright by embedding one of her photographs on the Mashable website as part of a news article. The court granted defendants’ motion to dismiss, holding that Mashable used plaintiff’s photograph pursuant to a valid sublicense from social media site Instagram, where plaintiff originally posted the photo at issue. The embedded photo was hosted on Instagram’s server. The court explained that Instagram’s policies allow users, such as Mashable, to use an “application programming interface” or “API” to embed photos previously posted on a public Instagram account. The court held that the plaintiff granted Instagram the right to sublicense the photograph at issue, and Instagram validly exercised that right by granting Mashable a sublicense to display the photograph. *Id.* at 344-345. The court held that, because Instagram granted Mashable a valid license to display the photograph, it “need not reach the question, addressed in *Goldman* but unsettled in this Circuit, of whether embedding an image constitutes ‘display’ that is capable of infringing a copyright in the image.” *Id.* at 346. On reconsideration, however, the court denied Mashable’s motion to dismiss, holding that “the pleadings contain insufficient evidence that Instagram exercised its right to grant a sublicense to Mashable … In reaching this conclusion, the Court did not give full force to the requirement that a license must convey the licensor’s ‘explicit consent’ to use a copyrighted work.” *Sinclair v. Ziff Davis, LLC*, 2020 WL 3450136 (S.D.N.Y. June 24, 2020) (citing *Ward v. Nat’l Geographic Soc.*, 208 F. Supp. 2d 429, 442-443 (S.D.N.Y. 2002)). The court explained that Instagram’s policies “could be interpreted to grant API users the right to use the API to embed the public content of other Instagram users,” but the policy was not sufficiently clear to support a motion to dismiss. *Id.* at \*1. **Between the two *Sinclair* decisions, Instagram announced that users who want to embed photos should seek permission directly from the original posters of the content. Timothy B. Lee, “Instagram just threw users of its embedding API under the bus,” *ArsTechnica*, June 4, 2020. A few months later, in *McGucken v. Newsweek LLC*, the court held that “despite Defendant’s assertions otherwise, [Instagram’s] so-called Embedding Policy is not a policy at all … Instead, the reasonable reader would understand that what Defendant refers to as an Embedding Policy is merely a set of instructions for developers.” 2020 WL 6135733, at \*2 (S.D.N.Y. Oct. 19, 2020). Noted commentator Eric Goldman had this to say about the *McGucken* decision: “All hope is not lost for Newsweek. A non-exclusive license does not have to be in writing. Newsweek is not limited to arguing that language in a written Instagram policy reflects an intent to grant a sublicense. Moreover, perhaps it can persuade the court to revisit the above-quoted language after the benefit of discovery. (While the policy uses the word “can” instead of “may,” it seems odd to provide detailed instructions on how to do something in the absence of permission to do the thing.)” https://blog.ericgoldman.org/archives/2020/10/were-still-unsure-if-instagram-grants-users-a-sublicense-to-embed-photos.htm.**

 In another recent case involving the use of images posted on Instagram, a photographer is suing Volvo, accusing them of [“willful and wanton” copyright infringement](https://petapixel.com/2020/06/15/photographer-and-model-sue-volvo-for-willful-and-wanton-copyright-infringement/). In response, Volvo is seeking to have the matter dismissed, arguing that the uses were non-infringing by virtue of social media platforms’ licenses. See *Schroeder v. Volvo Group of North America*, 2:20-cv-05127-VAP-PVC (C.D. Cal. 2020).

**Statute of Limitations and Discovery Rule**

 **By Jean-Paul Jassy**

 Copyright claims have a three-year statute of limitations, 17 U.S.C. § 507(b), and a copyright claim accrues when an infringing act occurs. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2004). In *Petrella*, the Supreme Court noted that “nine Courts of Appeals have adopted, as an alternative to the incident of injury rule, a ‘discovery rule,’ which starts the limitations period when the plaintiff discovers, or with due diligence should have discovered, the injury that forms the basis for the claim.” *Id.* at 670 n. 4 (internal quotation marks and citation omitted). Photographers are invoking the discovery rule to allege that infringements that occurred more than three years prior actually accrued later – *i.e.*, when the plaintiff “discovers” the alleged infringement. This approach was coming with mixed results, at least at the pleadings stage, but recent decisions favor plaintiffs.

In *Minden Pictures, Inc. v. Buzzfeed Inc.*, 390 F. Supp. 3d 461, 467 (S.D.N.Y. 2019), the court granted a motion to dismiss, holding that the discovery rule could not be applied to a photographer’s copyright infringement claim where a “reasonable copyright holder in [the plaintiff’s] position … should have discovered, with the exercise of due diligence, that its copyright was being infringed within the statutory time period.” *But cf. Hirsch v. Reis Galleries, Inc.*, Case No. 18-CV-11864 (VSB), 2020 WL 917213 (S.D.N.Y. Feb. 26, 2020), at \*5 (denying motion to dismiss photographer’s copyright infringement claims over famous photograph on statute of limitations grounds, citing the discovery rule).

A pair of cases in California federal district court involving the same plaintiff came to the same conclusion as the court in *Minden Pictures*. In *Michael Grecco Prods., Inc. v. Ziff Davis*, *LLC,* Case No. CV 19-4776 DSF (PJWx), 2019 WL 9467923 (C.D. Cal. Nov. 18, 2019), and *Michael Grecco Prods., Inc. v. BDG Media Inc.*, Case No. CV 19-04716-AB (KSx), 2020 WL 3957565 (C.D. Cal. Feb. 26, 2020), the court granted Rule 12(b)(6) motions on statute of limitations grounds, dismissing with prejudice copyright infringement claims and rejecting the plaintiff’s assertion of the “discovery rule.” In both cases, plaintiff’s allegations boiled down to the same basic contentions: the plaintiff has a lot of photos, and the internet is big and therefore not easy to search. In both cases, the court rejected such general allegations, particularly as they did not explain the failure to find the photos at issue sooner. The court noted that the plaintiff was sophisticated, the infringements appeared on heavily trafficked websites and that reverse-image search technology was available.

**The *Ziff Davis* case, however, was reversed and remanded on appeal to the Ninth Circuit. *Michael Grecco Prods., Inc. v. Ziff Davis*, *LLC*, 830 Fed.Appx. 233, 234 (9th Cir. 2020). The Ninth Circuit held that the “statute of limitations discovery rule analysis is a factual one,” and “whether the Google reverse image search technology would have captured the images is a question of fact, inappropriate for dismissal at the motion to dismiss stage. The facts alleged in [the plaintiff’s] First Amended Complaint are sufficient to survive a motion to dismiss.” *Id.* The one note that gave the defendant some hope for limiting the case is that the Ninth Circuit concluded its decision by stating, “the district court may order limited discovery that focuses on the statute of limitations question.” *Id.***

**Similarly, the *BDG* decision was reversed in part and affirmed in part by the Ninth Circuit. *Michael Grecco Prods., Inc. v. BDG Media Inc.*, 834 Fed. Appx. 353, 354 (9th Cir. 2021). The Ninth Circuit ruled that the district court erred in holding that plaintiff’s copyright infringement claim on a key photo at issue was time-barred. *Id.* The court held that the discovery issue is factual in nature, particularly “[a]t what time these search processes would or should have captured alleged infringements is a question of fact that cannot be determined on a motion to dismiss.” *Id.* However, for another photo, the Ninth Circuit affirmed dismissal with prejudice where the plaintiff admitted in its operative complaint that it had discovered the alleged infringement more than three years prior. *Id.* Relying on the Ninth Circuit’s *BDG* decision, a federal district court in Washington denied a motion to dismiss. *Benton v. Executive Hotel Seattle LLC*, 2021 WL 764135, at \*5 (W.D. Wash. Feb. 26, 2021) (“accepting all allegations in [plaintiff’s] amended complaint as true and drawing all reasonable inferences in his favor, he has sufficiently pleaded that he brought the copyright claim within three years after he discovered, or reasonably should have discovered, [defendant’s] alleged infringement”). Also relying on the Ninth Circuit’s *BDG* decision, the district court that decided the later-reversed *Ziff Davis* case denied a defendant’s motion for summary judgment, holding, “[t]he Court agrees there remains a genuine issue of material fact as to whether [plaintiff] should have reasonably discovered the infringement earlier.” *Michael Grecco Prods., Inc v. Livingly Media, Inc.*, 2021 WL 2546749, at \*13 (C.D. Cal. Apr. 16, 2021).**

In *Werner v. BN Media, LLC*, 477 F.Supp.3d 452 (E.D. Va. 2020), the court held that a photographer plaintiff had adequately invoked the discovery rule on a motion to dismiss by alleging that, despite the availability of reverse-image search technology, it was difficult to search for and discover infringements and his claim should not be barred by the statute of limitations.

The case of *Monsarrat v. Zaiger*, 303 F.Supp.3d 164 (D. Mass. 2018), offers another scenario to consider. In *Monsarrat*, the court denied a motion to reconsider dismissal where a photographer plaintiff filed an untimely copyright infringement action because, the plaintiff alleged, he could not identify the defendant. The court made clear that, under the discovery rule, the statute of limitations begins to run when the plaintiff has reason to know about the allegedly infringing *conduct*, not the identity of the infringer.

1. **Another important aspect of the *Nicklen* decision is that it rejected a defense of fair use at the motion to dismiss stage where the starving polar bear image at image at issue was used in articles about how the image itself went viral. *Id.* at \*5-\*7.** [↑](#footnote-ref-1)
2. **In another important aspect of the *Bell* decision, the Ninth Circuit ruled that the *de minimis* rule examines the amount or substantiality of copying (*i.e.,* the quality or quantity of the taking) sufficient to amount to infringement, and, if infringement is established, then *de minimis* use is not an affirmative defense to infringement. *Id.* at \*6-\*8.** [↑](#footnote-ref-2)