

From: Mathew Higbee <mathewhigbee@higbeeassociates.com>
Sent: Friday, November 1, 2019 6:08 PM
To: Paul Levy
Cc: Phil Malone
Subject: Re: Meet and confer

Paul- In general, my clients litigate when, among other things, they believe there is a legal basis and economic incentive to do so— and almost always only after giving the infringer a chance to resolve the matter out of court. As one of your clients recently settled one of these claims with one of my clients, we both know that there is a solid basis for liability for infringement claims involving inline links and secondary liability for forum hosts. The case for liability is especially strong with the latter when, as in one of these cases, an image is posted by the site’s agent or moderator. However, while my clients believe there is a legal basis to litigate these claims, they see no economic incentive to do so. The information provided by your clients, their counsel and court filings, along with an asset search, make it clear that there are few, if any, assets to recover in litigation. The claim involving The Mockingbird Foundation was closed long before you filed this claim. The last action our client took on that claim was July 10, 2019, more than two months before the filing of the declaratory action. The case was officially closed after we received correspondence from their previous counsel. We do acknowledge that there is some uncertainty in the 9th Circuit about the liability that is incurred by someone displaying an image via an inline link that references an image that is not on a server they own or control. We agree with Judge William Orrick, whose June 18, 2019 ruling on a motion to dismiss in *Free Speech Sys., LLC v. Menzel* pointed out that there are problems applying “the server test” outside of the narrow context of *Perfect 10*. Further noting that courts outside of the 9th Circuit have rejected “the server test.” See, e.g., *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 592 (S.D.N.Y. 2018); *The Leader's Inst., LLC v. Jackson (TLI)*, 2017 U.S. Dist. LEXIS 193555, 2017 WL 5629514, at *11 (N.D. Tex. Nov. 22, 2017). Our clients were willing to consider litigating this matter as a test case that would give the 9th Circuit a chance to provide clarity on the issue of inline linking. However, since your clients, who appear to be judgment proof, will not agree to mutually waive claims of attorneys fees, it makes no sense for my clients to subject themselves to economic risk, no matter how small, if there is no economic upside— especially since all infringement has stopped. Accordingly, to save their resources and the court’s resources, they have granted retroactive licenses to cover the past use and any future use on the pages as previously used. This email, along with the power of attorney previously provided by my office, shall serve as documentation of the licenses under the terms described below. Seeing as this removes any controversy, we ask that your clients withdraw their complaints or provide a legal basis to maintain the action.

If you would like to discuss the matter via phone, I am available Tuesday afternoon. Just let me know what time works for you and Mr. Malone. Thank you very much.

-Mat

LICENSES

Steven Hirsch grants the owners and operators of AwardsWatch.com a retroactive and future license to display his image of 5_25_2018,_Weinstein,_Hirsch.jpg (which is attached as an example) on its forum page located at

<https://awardswatch.com/forums/showthread.php?48411-Best-Picture-March-2019/page3>

Mark Seliger grants the owners and operators of AwardsWatch.com a retroactive and future license to display the image 97042_Gillian_Anderson_Lucy.jpg on its forum page located at <http://awardswatch.com/forums/showthread.php?39682-American-Gods-Adaptation-Casts-Its-Lead/page2>

Mark Seliger grants the owners and operators of AwardsWatch.com a retroactive and future license to display the image 2016_167_20605_VNF_01K_MG_A_0156_R5S27T30_CT01S11.jpg on its forum page located at <http://awardswatch.com/forums/showthread.php?35758-Nicole-Kidman-and-Reese-Witherspoon-joining-forces-for-Big-Little-Lies/page28>

Quan-Tuan Luong grants the owners and operators of Phish.net a retroactive and future license to display the image grte25409.jpeg on its forum page located at <https://forum.phish.net/forum/show/1377192102>

On Oct 29, 2019, at 12:29 PM, Paul Levy <plevy@citizen.org> wrote:

Mat, our clients are not willing to accede to your entire proposal. Specifically, we are not willing to forego the claim for attorney fees.

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<https://www.citizen.org/article/internet-free-speech/>

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Public Citizen Foundation participates in the Combined Federal Campaign with the CFC Code 11168