

PUBLIC CITIZEN LITIGATION GROUP

1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009-1001

(202) 588-1000

BY EMAIL TO mhigbee@higbeeassociates.com

May 6, 2019

Matthew Higbee, Esquire
Higbee & Associates
Suite 112
1505 Brookhollow Drive
Santa Ana, California 92705

Re: Your Demand Letter to Kevin Schlossberg

Dear Mr. Higbee:

I write in response to your March 22, 2019 demand letter to Kevin Schlossberg. Writing on behalf of Quang Tuan Luong, you complain about the appearance on Blade Forums (the web site at www.bladeforums.com) of a photograph taken by Luong. As an attachment to your letter acknowledges, the photo itself was not mounted on Blade Forums; rather, a participant in the discussion forum provided a deep link to that image as it appears at www.terragalleries.com, which, in turn, is your client's own web site. The forum participant linked to that location within a post he placed on the discussion forum page, illustrating his comments. You contend that by allowing this link to be included in its web site, Schlossberg infringed the copyright, and you demand that he pay \$2500 in damages.

For the reasons explained below, neither Schlossberg nor 12 Bravo LLC, which owns the web site, bears any liability for infringement of any copyrights. Proceeding in good faith, and without having either spoken with your firm or consulted counsel, Schlossberg promptly removed the link to the photograph—not because he believed he had any liability, but in an effort to avoid any further controversy. Considering that you have persisted in your infringement claims despite that gesture, his plan is to keep the link down until one of two things happens: either you retract Luong's claim of infringement, or a judge rules that the link was not infringing. There is, in any event, no basis for injunctive relief, and Schlossberg is not going to pay you any money. Indeed, unless Luong promptly retracts his demand, Schlossberg reserves the possibility of filing an action for a declaratory judgment of non-infringement. I hope such a lawsuit will not be necessary.

First, and most important, Luong has no infringement claim because the forum user did not place the photograph on the forum page; he only embedded a link to the location where the photograph is displayed by your client's own web site. Your client could easily have used technical measures to prevent others from providing deep links that allowed members of the public to view



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the photograph on your client's own web site, but he chose not to do so. In the Ninth Circuit, where both your firm and Luong are located, the established law is that "framing" a photograph within a web site, without actually making a copy of the photograph and placing such a copy on the site's own servers, is not copyright infringement. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1161 (9th Cir. 2007).

Second, even if the photograph itself had been placed on the forum instead of being linked from that forum, it was neither Schlossberg nor his company that placed it there; it was a user of the forum. The Blade Forums hosts more than eighteen million separate posts, arranged in nearly one-and-a-half million separate threads. In the last month alone, more than eighteen thousand new threads were created, and more than two hundred thousand new posts were placed by the forum's users. Schlossberg cannot and does not keep track of them all, and he had no knowledge that the allegedly infringing work was linked from the forum. He did nothing to encourage copyright infringement on the forum and has no financial interest in the allegedly infringing activity. Blade Forums' terms and conditions expressly forbid users from posting content that even "risks copyright infringement." Consequently, Luong cannot expect to hold the forum host liable either for direct infringement or for either of the two prongs of secondary liability, vicarious infringement or contributory infringement. *VHT, Inc. v. Zillow Group*, 918 F.3d 723, 732, 745-747 (9th Cir. 2019). *VHT v. Zillow* is just the most recent of a line of appellate decisions holding that hosts do not infringe without volitional conduct, *BWP Media USA v. T & S Software Assocs.*, 852 F.3d 436, 440 (5th Cir. 2017), and that the Digital Millennium Copyright Act in 1998, which provided an immunity regime along with the notice and counternotice procedure, does not abrogate requirements under the pre-existing statute for holding hosts liable for copyright infringement. *Id.* at 443-444 (citing cases).

Moreover, contrary to what your associate Theodore Sell told Schlossberg in an email, the Ninth Circuit's decision in *VHT v. Zillow* does not limit to search engines *Perfect 10*'s holding that the "display" right is not infringed by deep-linking. *VHT v. Zillow* involved a provider of real estate information that hosted thumbnail versions of copyrighted photographs on its servers. The decision limited the applicability of *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 817 (9th Cir. 2003), but not of *Perfect 10 v. Amazon.com*.

Your demand letter to Schlossberg threatened to seek an award of attorney fees, and emails from one of your paralegals, Shannon Quarles, have repeatedly threatened to bring in the "litigation team," and have included threats to sue for statutory damages. Given that you do not have sound claims for statutory damages, there is no need to address that issue separately. Schlossberg is not willing to allow your threats of litigation to linger, however. The emails from both Quarles and your associate refer repeatedly to your firm's track record of following through on demand letters by filing law suits. There is plainly a live controversy between your client and ours, and given the substantial volume of the threats of litigation that your firm issues, we have to assume that this is not the last time he may hear from you. And, it would be most appropriate for a judge to resolve the questions whether deep-linking can be provided in the Blade Forums, and whether its host can be held liable

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for alleged infringements by his users during the three years before he registered his DMCA agent, without the threat of crippling liability.

Finally: in previous cases, in which I have responded to your demand letters to other clients, you have refused to respond because my office is in Washington, D.C., and because I belong only to the D.C. and New York bars. You have suggested that I cannot provide assistance to a client who is located in a jurisdiction other than those, and in opposition to a party who is in a jurisdiction other than those; you suggested that this is unauthorized practice of law. You are mistaken. The standard procedure in such situations is for the lawyer to do the necessary work in preparation for litigation, to identify local counsel before the litigation actually begins, and to seek admission pro hac vice once the litigation has begun. Each time I have written to you, I have completed those first two steps. Moreover, considering that your own firm's web site touts your "national firm . . . that feel[s] local no matter where you are," you must be aware of Rule 5.5(c)(2) of the ABA's Model Rules, which allows a lawyer to provide services that are related to a potential proceeding in a jurisdiction where the lawyer "reasonably expects to be . . . authorized" to appear pro hac vice. Most states take that approach. *E.g.*, California Rules of Court 9.47(c)(2); *Winterrowd v. American General Annuity Insurance Co.*, 321 F.3d 933 (9th Cir. 2009). That, indeed, appears to be your own law firm's practice (considering that your associate Mr. Sell, who is admitted to practice only in Colorado, sent a threatening email from your Nevada office, on behalf of a client in California, to my client, located in Kentucky). I hope, therefore, that you will respond promptly and on the merits to my effort to avoid litigation over your threatened copyright claims.

Accordingly, we have prepared a complaint for a declaratory judgment of noninfringement, on which we are ready to proceed unless you promptly retract your copyright demand. We are giving your client until the close of business on May 8, 2019 to retract his claim. Absent such a retraction, your client should expect to receive service of a lawsuit without further notice.

Sincerely yours,


Paul Alan Levy

cc: Theodore Sell, Esquire