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BY EMAIL TO mhigbee@higbeeassociates.com

April 16, 2019

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

Re: Your Demand Letter to David Leip

Dear Mr. Higbee:

I write in response to your February 12, 2019 demand letter to Dave Leip, on behalf Michael Grecco Photography ("Grecco"), complaining about the appearance on Leip's Election Atlas web site of a 1980 photograph taken by Michael Grecco portraying John Anderson's independent presidential candidacy. As an attachment to your letter acknowledges, the photo itself was not mounted on USElectionAtlas.org; rather, a participant in the discussion forum within that web site provided a deep link to that image at http://cache3.asset-cache.net/, which, in turn, is a web site controlled by Getty Images, which, I must assume, was licensed by your client to publish the photograph. The forum participant linked to that location within a post she placed on the discussion forum page, illustrating her comments. You contend that by allowing this link to be included in its web site, Leip infringed the copyright, and you demand that Leip pay $15,000 in damages.

Simply put, for the reasons explained below, Leip has not infringed any copyrights. The photograph was no longer framed within the forum page at the time your demand letter was received, so there is no basis for injunctive relief, and Leip is not going to pay any money. Indeed, unless you promptly retract your demand, Leip 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, Grecco has no infringement claim because the forum user did not place the photograph on the forum page; she only embedded a link to the location where the photograph is displayed by Getty Images. In the Ninth Circuit, where both your firm and Grecco 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 not Leip who placed it there; it was a user of the forum. Leip had no

knowledge that the allegedly infringing work was linked from the forum, and received no direct financial interest in the allegedly infringing activity. Consequently, he cannot be held liable either for direct infringement, or for either of the two prongs of secondary liability for 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 adoption of the Digital Millennium Copyright Act in 1998, which provided an immunity regime along with the notice and counternotice procedure, did not abrogate pre-existing requirements under which hosts can avoid liability for copyright infringement. *Id.* at 443-444 (citing cases).[1]

Third, even if Leip faced any liability, the amount of damages that you have demanded that he pay would be vastly excessive. I do appreciate that your standard demand letters no longer refer routinely to statutory damages and attorney fees, which can only be sought when the copyright was registered on a timely basis, considering that many of your clients' photographs do not meet that criterion. But your demand letter mentions the possibility of seeking an award of attorney fees, and the request for a payment of $15,000 for the use of the John Anderson campaign photograph implicitly seeks moneys that would have to be justified as a form of statutory damages or attorney fees. In that regard, although you have attached a 2009 copyright registration for the photograph, the photograph is from 1980. So far as we are able to discern, Grecco did not begin to register the copyright in his photographs until 1986. Consequently, it appears that the registration was more than 28 years too late for his photography firm to seek either statutory damages or attorney fees. 17 U.S.C. § 412(2). Your letter suggests that your damages demand might be based on "the costs of detection and enforcement," but that sounds like a claim for attorney fees, which, as I have noted, are not available given the date of registration. Please let me know if my factual assumption is mistaken.

Moreover, whether or not Grecco's photographs are "typically" licensed for amounts ranging from $15,000 to $35,000 per year, the highest license fee that our client has seen as even being demanded for the 1980 photograph is $1800 for a two-year license (from the mgp stock photo web site). What license fees have actually been paid in recent years for that photograph? In that regard, courts have warned against owners who claim "unreasonable" or "exaggerated" amounts as the license fee. *On Davis v. The Gap, Inc.*, 246 F.3d 152, 166 (2d Cir. 2001).

If you are determined to pursue this claim, therefore, please let me know as soon as possible.

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[1] Contrary to what your colleague Thomas Sell has argued in another case, 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.*

Otherwise, I expect to receive a prompt retraction of the copyright demand.

Sincerely yours,

Paul Alan Levy