

PUBLIC CITIZEN LITIGATION GROUP

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BY EMAIL TO mhigbee@higbeeassociates.com

February 1, 2019

Matthew Higbee, Esquire
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Re: Your Demand Letter to Homeless United for Friendship and Freedom

Dear Mr. Higbee:

I write in response to your January 2, 2019 demand letter, sent on behalf of Agence France-Press, complaining about the use of a photo that was published in the United States accompanying an August 6, 2012 article in the *New York Times* entitled “As Greece Rounds Up Migrants, Official Says ‘Invasion’ Imperils National Stability, <https://www.nytimes.com/2012/08/07/world/europe/vast-police-operation-targets-migrants-in-athens.html>. On the same date, the *Times* article was reposted by an unknown person to a page on the web site of Homeless United for Friendship and Freedom (“HUFF”), a citizens’ organization in Santa Cruz, California, that advocates for the rights of homeless and other poor people. As an attachment to your demand letter acknowledges, unlike the text of the newspaper article, the photo itself was not placed on the HUFF web site; rather, the site links back to the specific location on the *Times* web site where the photograph appears, <http://graphics8.nytimes.com/images/2012/08/07/world/europe/07greece/07greece-articleLarge-v2.jpg>, and frames that location within the HUFF web page in question. <http://huffsantacruz.org/wordpress/as-greece-rounds-up-migrants-official-says-invasion-imperils-national-stability/>. You contend that by allowing this link to be included in its web site, HUFF infringed the copyright; consequently, you demand that HUFF pay you \$1775 or face a claim for \$150,000 in statutory damages plus attorney fees, which, you warn, could result in the garnishment of HUFF’s wages.

Simply put, for the reasons explained below, HUFF has not infringed any copyrights. It is not going to remove the link from its web site, and it is not going to pay you any money. Indeed, unless you promptly retract your demand, HUFF 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, you have no claim because HUFF has not placed the photograph on its web site; it has only embedded a link to the location where the photograph is displayed by the *New York Times* which, I assume, received a license (although an attachment to your letter refers to the URL for the photograph as “[i]nfringing file locations”). In the Ninth Circuit, where both your



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firm and HUFF are located, the law is clear 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, although you say that you are proceeding on behalf of Agence France-Presse and PicRights Ltd., nothing in your letter establishes that either of these entities is entitled to sue for infringement of copyright in the photograph, or shows that they have authorized you to seek relief or to settle claims relating to this photograph. When the photo was published in the *New York Times*, that paper provided the following photo credit: “Angelos Tzortzinis/Agence France-Presse — Getty Images.” Your letter never specifically asserts that either Agence France-Presse or PicRights Ltd. owns the copyright in the photograph. Moreover, although you attached a generic Letter of Representation with those two entities, purportedly signed on “January 11, 18,” reciting that your firm was retained to pursue “a” copyright infringement matter, nothing in that letter refers to the photograph that is the subject of your demand letter. The letter attached to your demand appears to be identical to a letter attached to an almost identically worded demand letter to the Labor and Working-Class History Association, which also was not specific about any given photograph and similarly purportedly was signed on “January 11, 18.” (Oddly, your demand letter refers to “exhibits” showing use of “copyrighted works” even though there is only one exhibit and your demand relates to a single photograph.) I will, therefore, need to see evidence that your clients both are the current owners of the copyright and have authorized you to proceed on their behalf about **this** photograph.

Third, given that the *New York Times* carried the photograph, I am assuming that the *Times* received a license from the copyright owner. Generally speaking, I gather under the usual arrangement between Agence France-Presse and the *Times*, your client, rather than the *Times* itself, may well be entitled to sue over publication of the photograph on a web site in the United States, even if the deep linking and framing of the photograph were actionable. However, to be certain, I will need to see the license that copyright owner gave the *Times* before I can determine whether the copyright owner or the *Times* would be the proper plaintiff in a copyright infringement action. Of course, because you have threatened litigation on behalf of Agence France-Presse and PicRights Ltd., both of these entities would be proper defendants in an action for a declaratory judgment whether or not they would be proper plaintiffs.

Fourth, considering that the registration requirement is something that your firm has been prone to overlook in past situations where it nevertheless claimed a right to statutory damages and attorney fees, *e.g.*, *Adlife Mktg. & Commun. Co. v. Best Yet Mkt.*, 2017 WL 4564763, at *1 (E.D.N.Y. Oct. 11, 2017), I note that your demand letter does not represent that the copyright in this photograph has ever been registered. Unless and until your client registers the copyright, it cannot sue to enforce it. 17 U.S.C. § 411(a). Moreover, because the work was published in 2012, you would not be able to seek either statutory damages or attorney fees by registering the copyright now. 17 U.S.C. § 412(2). Our client would, therefore, be limited to any actual damages within the past

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three years (the limitations period) caused by the continued inclusion of this old photograph in the HUFF web site. What damages do you claim your client suffered? Although disgorgement of an infringer's profits can be a measure of damages, HUFF is a non-profit activist group has not derived any profits from having the photograph linked from its site. As for injunctive relief, that relief cannot be granted because the publication was fair use. In addition, the delay of more than six years in filing suit over the alleged infringement militates strongly against a grant of injunctive relief.

If you are determined to pursue this claim, therefore, please let me know as soon as possible whether the copyright has been registered and, if so, when that registration took place. I look forward to hearing from you about that subject, as well as about the other issues raised in this letter. Otherwise, I expect to receive a prompt retraction of the copyright demand. HUFF does not appreciate having been the target of your abusive letter, and does not want to wait to see whether you will file suit.

Sincerely yours,


Paul Alan Levy