PUBLIC CITIZEN LITIGATION GROUP
1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009-1001

(202) 588-1000

BY EMAIL TO mhigbee@higbeeassociates.com

February 4, 2019

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

Dear Mr. Higbee:

Thank you for your emailed response to my February 1, 2019 letter, which replied to your January 2, 2019 demand letter to Homeless United for Friendship and Freedom ("HUFF").

First of all, I appreciate your having clarified that, although your letter asserted that your demand was on behalf of both Agence France-Presse ("AFP") and PicRights Ltd., and that the letter was in furtherance of "PicRights Claim Number 452809628737," PicRights does not own the copyright in the photograph and hence would neither be a copyright plaintiff nor a proper defendant in an action for a declaratory judgment of noninfringement.

You expressed the opinion that the photograph in question is not a United States work; that consequently AFP's claim is not subject to the registration requirements of 17 U.S.C. §§ 411(a) and 412(2); and finally that, in any event, AFP need only register the work to be able to proceed with the litigation that you continue to threaten (I take it that you admit that the copyright in the work has not been registered). We dispute all three parts of your opinion.

First, although the photograph was taken in Greece, and was presumably uploaded to the Internet in the European Union, 17 U.S.C. § 101 does not limit the term "United States work" to photographs that were first published in the United States; it also includes works that were "first published . . . (B) simultaneously in the United States and another treaty party or parties . . .." Although the statute does not define the word "simultaneously," this provision was one of several technical amendments designed to implement international copyright treaties, including the Berne Convention, in which Article 3(4) provides that a work is "published simultaneously in several countries if it has been published in two or more countries within thirty days of its first publication." *See* House Judiciary Committee, *WIPO Copyright Treaties Implementation and On-line Copyright Infringement Liability Limitation*, House Report No. 105-551, Part I, 105th Cong., Second Sess. (May 22, 1998), at 9, 15, 30. Consequently, AFP will have to register the copyright before it can sue for infringement.

Moreover, although belated registration may allow AFP to proceed with a counterclaim, it

will **not** be entitled to seek attorney fees or statutory damages. Indeed, even if you were correct that the photograph in question is not a "United States work," that would only have excused registration; the Copyright Code does not excuse foreign works from the remedy limitations of section 412(2). *Kernal Records Oy v. Mosley*, 794 F. Supp. 2d 1355, 1367 (S.D. Fla. 2011), *aff'd sub nom. Kernel Records Oy v. Mosley*, 694 F.3d 1294 (11th Cir. 2012); *The Football Ass'n Premier League Ltd. v. YouTube, Inc.*, 633 F. Supp.2d 159, 164 (S.D.N.Y.2009). *See also* Judiciary Committee Report, at 15 (section 411(a) required definition of "United States work"; no intent indicated to limit section 412). Consequently, although your email suggests that you would present to your client an offer of settlement in the amount of a few hundred dollars, down from your original demand of $1775, there is simply no basis for your seeking **any** monetary relief absent some claim of actual damages. Your email did not address my question about what basis you might have for seeking actual damages

Finally, in support of your only remaining claim, which would be for injunctive relief, you suggest that I look to scattered district court decisions that have expressed disagreement with the Ninth Circuit's ruling in *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007), that the display and distribution rights are not infringed by the framing of images:

> Google does not, however, display a copy of full-size infringing photographic images for purposes of the Copyright Act when Google frames in-line linked images that appear on a user's computer screen. Because Google's computers do not store the photographic images, Google does not have a copy of the images for purposes of the Copyright Act. In other words, Google does not have any "material objects . . . in which a work is fixed . . . and from which the work can be perceived, reproduced, or otherwise communicated" and thus cannot communicate a copy. 17 U.S.C. § 101.
>
> *Id.* at 1160–61.

However, HUFF is a strictly local group and its blog is directed primarily to residents of Santa Cruz, California. It would not be subject to personal jurisdiction elsewhere. *E.g.*, *Penguin Group (USA) v. American Buddha*, 2013 WL 865486, at *7 (S.D.N.Y. Mar. 7, 2013). Consequently, the case will have to be litigated in California, and you will have to justify your claims under Ninth Circuit law.

In conclusion, I once again invite you to retract the infringement claim that you have advanced on behalf of Agence France-Presse. In the meantime, however, I am obtaining local counsel so that we may seek declaratory relief from the United States District Court for the Northern District of California.

Sincerely yours,

Paul Alan Levy