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

(202) 588-1000

BY EMAIL TO mhigbee@higbeeassociates.com

July 21, 2023

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

Re: Your Demand Letters to Renee Ellory

Dear Mr. Higbee:

I have re-read your letter responding to mine of July 7, 2023, and your emails in response to the questions I posed about your letter. I am not persuaded.

As you know, the non-commercial character of Ellory's blog at the time of publication has some impact on the evaluation of the fair use factors (and as my first letter to you made clear, Ellory has not simply illustrated her posts with stock photos; with respect to each of the photos save one, she analyzes the expression and body language reflected in the images). The noncommercial character will be established by affidavit if you file suit. You claim that non-commercial character is important to your clients in other ways. I confess I am skeptical of that based on what I know of how your staff respond when a target of your demand letters cites noncommercial use, but in the end you will have to decide for yourself whether to take her word for it or instead to sue and wait for her affidavit.

I have read the statute of limitations cases cited in your letter. They don't help you. But this line intrigues me: "We have litigated and defeated similar statute of limitation defenses on multiple occasions." Certainly I would like to see those decisions, as well as the underlying briefs so that I can see just what it is that you defeated.

The fact that you may intend to invoke the jurisdiction of the Copyright Claims Board to evade the registration requirement does not mean that you will succeed in keeping the case there. Unless you have a timely registration (and section 222.2(c)(7)(ii)(C) will require your filing to specify the registration and its effective date), I should think Ellory would be ill advised to consent to the CCB's jurisdiction. And the fact that you keep playing hide the ball makes me doubt that you HAVE a timely registration. Moreover, the database of CCB cases does not contain a single claim filed by either Reuters or AP.

You say that the issue is not whether Higbee and Associates is a sophisticated copyright enforcer but whether AP and Reuters are. But I doubt any judge would find your two clients to be less than sophisticated, and to my knowledge, you have been making claims for them based on your reverse image search techniques for, as your letter notes, "several years." So even if your discovery rule theory applied to mass publications, such as publications on the internet, which we would dispute, it requires you to show not only that you did not discover, but could not reasonably have discovered, the alleged infringement earlier than three years before your date of suit.

But let me ask this: How many times, over those several years, did you run searches for the specific images whose copyright you charge Ellory with infringing?

Finally, I am not moved by your line about preventing photographers from enforcing their copyrights. I don't oppose that. Your clients have every right to enforce their copyrights. All your clients have to do is enforce them within three years of the infringement, rather than waiting more than a decade to bring stale claims. And when you assert claims on their behalf, it is fair to expect you to make reasonable damages claims, instead of asking for $500 per image when their own stated license fee is $35, and then hoping to intimidate your targets into paying amounts many times higher than the claims are worth by repeatedly threatening to sue them if they don't agree to excessive settlements.

Sincerely yours,

Paul Alan Levy