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BY EMAIL TO mhigbee@higbeeassociates.com

July 7, 2023

Mathew Higbee, Esquire
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Re: Your Demand Letters to Renee Ellory

Dear Mr. Higbee:

I write in response to your three demand letters dated April 28, 2023, and May 15, 2023, to Eyes for Lies, on behalf of Reuters and Associated Press. Your letters complain that, at various times from 2009 to 2012, Renee Ellory posted some photographs taken by those companies' staff or freelance photographers to the Eyes for Lies blog. In your original letters, you contended that the use of these photographs constitutes copyright infringement and demanded that she pay $4125 to settle your clients' claims for damages. However, as I explain below, Ellory rejects your demand and will not pay you anything, both because your claims of purported infringements are wildly untimely and because she has made fair use of most of the photos.

Renee Ellory is an expert at identifying deception through a close examination of facial expressions and body language. She has trained law enforcement personnel in her techniques, initially entirely for free, and later for compensation. On the blog where the photos about which you complain are posted, she posts photographs and video excerpts and dissects, in detail, the tone, the verbal language, the body language and the facial expressions, applying her expertise to explain why she concludes that the people depicted are telling the truth or lying, and what emotions are on display. At the time she posted the photos in question, her blog was entirely noncommercial – it was only later that she began to accept compensation for her training work.

Your two original letters complained about Ellory's use of photographs of former Illinois governor Rod Blagojevich after his conviction in June 2011, of Amanda Knox in 2011 during the court proceedings on her murder charges, of President Barack Obama in July 2009 with an unidentified man and in January 2012 with Arizona Governor Jan Brewer, of Joran van der Sloot in January 2012 after his guilty plea in a homicide case, and in June 2010 of a woman whom van der Sloot was accused of killing.

The statute of limitations for copyright infringement claims is three years. 17 U.S.C. § 507(c). The "volitional acts" of Ellory's claimed infringements, necessary to establish a claim for direct infringement, *BWP Media USA. v. T & S Software Associates,* 852 F.3d 436, 439 (5th Cir. 2017) (citing cases); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 548 (4th Cir. 2004), were committed when she placed the photographs on her blog—eleven, twelve, thirteen and fourteen years ago. The mere fact that they have sat on her blog, even assuming that they were seen more recently by anybody other than your image search software and your firm's staff in the course of preparing your demand letters to her, would not constitute additional acts of infringement. *See Bell v. The Oakland Comty. Pools Project*, 2020 WL 4458890, at *5, n.3 (N.D. Cal. May 4, 2020) (collecting cases and concluding that "the mere fact that a document remained online does not trigger the separate-accrual rule"). Moreover, under the single publication rule, which applies in assessing statute of limitations defenses for causes of action under federal law, see *Oja v. U.S. Army Corps of Eng'rs.*, 440 F.3d 1122, 1133 (9th Cir.2006), the statute of limitations begins to run only from the first allegedly tortious publication. "[W]hile information may be repeatedly accessed long after publication, the 'single publication rule' provides that the statute of limitations runs only from the date of original dissemination." *Doe v. Garland,* 17 F.4th 941, 945 (9th Cir. 2021). Moreover, courts have refused to allow plaintiffs to invoke the discovery rule to avoid limitations defenses to suits against mass media and Internet publications. *Yeager v. Bowlin*, 693 F.3d 1076, 1081-82 (9th Cir. 2012).

In recent years, judges have expressed particular skepticism when what they call "seasoned litigator[s]," those who have filed a significant number copyright infringement actions, have invoked the discovery rule to avoid dismissal on limitations grounds. *E.g.*, *Minden Pictures v. Buzzfeed, Inc.*, 390 F. Supp. 3d 461, 467 (S.D.N.Y. 2019) (plaintiff had filed forty infringement suits). *See also Minden Pictures v. Complex Media*, 2023 WL 2648027, at *3 (S.D.N.Y. Mar. 27, 2023) (plaintiff had filed 100 infringement suits); *Lixenberg v. Complex Media*, 2023 WL 144663, at *3 (S.D.N.Y. Jan. 10, 2023) (plaintiff had filed nearly twenty such lawsuits). In *Minden Pictures v Complex Media*, the court noted that the plaintiff "uses sophisticated methods to detect infringing images, . . . enlisting technology companies that crawl the internet to identify infringing uses. . . . Given that Plaintiff's business is designed to protect and enforce the copyrighted works that it licenses, and employs intricate means of doing so, it is not plausible that Plaintiff, in exercising reasonable diligence, would not have discovered the alleged infringing use here until nearly ten years after the infringement occurred." 2023 WL 2648027, at *3.

I think you and I can agree that you are a seasoned copyright litigator, and that both you and your media clients regularly crawl the internet to find infringing uses. Under the reasoning of the cases cited above, the claims you threaten to bring against Renee Ellory based on her alleged infringements from eleven to fourteen years ago are time-barred.

Moreover, most of the blog posts in which Ellory posted the photos cited in your two demand letters make fair use of the photos. For example, the photograph of Blagojevich which you claim

infringes a copyright owned by Reuters, was posted with an article about his conviction, Ellory begins, "Former Illinois Governor Rod Blagojevich is likely frustrated today, as he demonstrates in the photo above," and continues, "Purse[d] lips (to me as seen above) are a clear sign that a person is feeling frustrated and misunderstood. Blago knew people weren't buying his story, though he arrogantly continued to try to sway the crowd in stubborn defiance . . .." Similarly, in the AP photograph of Jan Brewer and Barack Obama, Ellory begins by saying, "This photo has some fascinating body language," and continues with such observations as "Brewer is upright, stiff and lifting her finger—either making a point or telling Obama off. When we look at Obama, we can see that he is actually leaning away. This is indicative that Brewer is the aggressor at this moment." She continues with several other comments on the respective postures of Brewer and Obama and what that says about their meeting.

Finally, I was disappointed to see the repeated refusal of your "Compliance Resolution Specialist," Alexi Kreuz, to provide Ellory with copies of the copyright registrations for the photographs in question. The registrations could validate, or contradict, the assertion in your letters that the clients you identify are, in fact, the owners of the copyrights in each of the photographs.[1] Moreover, because the time of registration affects your clients' ability to seek awards of statutory damages, the targets of your demand letters need to see the registrations so that they can assess the downside risk of refusing to give in to your demands for excessive damages and, thus, having to litigate against a claim for statutory damages, even when your staff claim that they are only "negotiating" over a payment to be made for an actual damages claim.[2]

When I first started assisting targets of your litigation about how copyright law affected their financial exposure, your office routinely responded to questions about the time of registration either by providing copies of the copyright registration, or by candidly confessing that the copyright was not yet registered but that it could be registered to enable litigation. Over the last couple of years, however, your firm appears to have reversed its approach, never saying whether the copyright was

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[1] In fact, after Ellory was able to ascertain that AP might not have been the owner of the photograph of van der Sloot's homicide victim, and told Kreuz of her discovery, Kreuz sent a revised letter, also bearing your personal signature, and **still** dated May 15, 2023, with a demand amount $250 lower. Checking the copyright registrations before sending the demand letters might save your firm such embarrassments in the future.

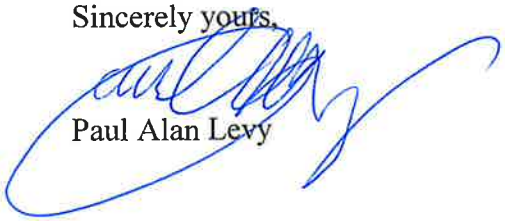
[2] I note that the valuations your firm has placed on the lost license fees appear to be inflated. The fact that the second version of your May 15 letter dropped the demand by only $250 once your firm learned from Ellory that one of the five photos claimed to infringe AP's copyright might not have been an AP photo, even though the demand in the original version of that letter had been for $2500 for five photos, tends to undercut your implicit contention that each was worth $500. But even more important, when Ellory inquired of AP about the cost of licensing photos for use on her blog, it told her that the cost would be $35 apiece.

registered and refusing to provide requested registrations.

In my judgment, the current approach makes your negotiation posture unreasonable, and a judge might well take that into account in assessing a claim for statutory damages or, indeed, in deciding that your pre-litigation demands were unreasonable. Unreasonable pre-litigation demands, made in a case that was dismissed on statute of limitations grounds similar to what Ellory will argue here if you sue her, provided one reason why a judge awarded attorney fees against a repeat copyright plaintiff. *Bell v. Oakland Community Pools Project*, 2020 WL 13695114, at *3-*4 (N.D. Cal. Oct. 14, 2020).

I urge you to reconsider this approach.

Sincerely yours,



Paul Alan Levy