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August 1, 2023

Matthew Higbee, Esquire
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Re: Your Demand Letter to Organic Growers School

Dear Mr. Higbee:

I write in response to your May 30, 2023 demand letter to Organic Growers School on behalf of Peter Edwards and/or his licensing agent, Redux Pictures, complaining that the School posted on its blog, in February 2016, a photograph of people eating at a table on the field of a farm. You contend that the use of this photograph constituted copyright infringement, and demand that Organic Growers School pay you $3700 to settle your client's claim for damages. However, as I explain below, Organic Growers School, a modest non-profit in Asheville, North Carolina that educates local farmers, is not willing to pay you anything, both because your purported infringement claims are untimely, and because your damages claim is inflated.

The statute of limitations for copyright infringement claims is three years. 17 U.S.C. § 507(c). The School's "volitional act," 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), was committed when it placed the photograph on its website more than seven years ago. The mere fact that it has remained on its website, and even assuming that it was seen more recently by anybody other than image search software and your firm's staff in the course of preparing your demand letter, does not constitute an additional act 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 claims 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) (single publication rule applies to Privacy Act claims), the statute of limitations began to run 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). Additionally, courts have refused to allow plaintiffs to invoke the discovery rule to avoid limitations defenses to suits claiming that mass media and Internet publications violated the plaintiff's rights. *Yeager v. Bowlin*, 693 F.3d 1076, 1081-82 (9th Cir. 2012). Thus, although the discovery rule can be invoked by copyright plaintiffs, it does not apply to save your belated reverse-image search locating the use on the Organic Grower's School website.

In addition to these defenses, some judges have expressed particular skepticism when what they call "seasoned litigator[s]," those who have filed a significant number of copyright infringement actions, invoke 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 *4 (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.

You are a seasoned litigator; both you and your media clients regularly crawl the internet to find infringing uses. I note that your power of attorney for Redux Pictures is dated August, 2019, so it is reasonable to assume that, since that time, you have been crawling the internet looking for infringement of its copyrights and transmitting settlement demand letters on its behalf. (If that assumption is wrong, please let me know). Under the reasoning of the cases cited above, the claims you threaten to bring against Organic Growers' School are time-barred.

You have told me, in response to our discussion of some similarly stale infringement claims, that you have frequently defeated the foregoing statute of limitations defenses in your other cases. But when I asked you to send me the decisions so that I could evaluate your claimed successes, you did not respond.

Moreover, your damages claim appears to be inflated. You have given the School no reason to believe that the market value of a license for digital-only use of that photo on a web site is even as much as a hundred dollars or so. We have looked at several stock photo sites and, doing searches for "farm to table dinner" or "farm to fork dinner," found prices ranging from the low two figures to a bit more than $100. For example, several similar photographs can be found on iStock for $33. At Alamy, the standard price for website use is $49. At Shutterstock, many comparable images are available for free download with a free one-month trial (followed by a monthly price of $29), or for $49 for a pack of 5 photos. I would be glad to point you to those examples if you are open to

discussing the actual market value of the work whose copyright you claim was infringed. Even if Edwards registered the copyright for the photo before 2016, which would enable you to seek statutory damages, applying the common multiplier of two or three times the actual damages, your statutory damages claim would not likely be higher than $750. You have not, however, furnished a copyright registration, and you have not furnished any evidence of actual licenses for the use of the photograph on a web site comparable to the use made by Organic Growers School. The license sold to BNP Wealth Management for an international print and online advertising campaign lasting for a year is not comparable.

In addition, your legal assistant, Kenneth Green, refused to provide the School's representative with the copyright registrations for the photograph in question. The registration could validate, or contradict, the assertion in your letters that Edwards is, in fact, the owner of the copyright the photograph. Moreover, because the time of registration affects your client's 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 if your client does have a timely registration. A target of your demands needs to have this knowledge to inform its negotiating posture even when your staff claim that they are only "negotiating" over a payment to be made for an actual damages claim.

When I first started responding to your demand letters, or advising 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. That was, in my view, an ethical response to the inquiries. Over the last couple of years, however, your firm appears to have reversed its approach.

You have told me that the reason why you are no longer candid with your targets about whether there is a timely registration of the copyright is that, given the fairly low value of the claims about which you send target letters, the Copyright Claims Board is the logical place to pursue those claims, and the legislation creating the CCB allows it to award statutory damages regardless of when the copyright was registered. But that logic does not hold – a CCB claim must state the date of registration, and if the CCB claim document reveals that the registration was effected after the date of the alleged infringement, no well-counseled respondent would consent to CCB jurisdiction Moreover, your settlement claim demand for $3700 for alleged infringement of the copyright in a single photograph is not a small figure.

In my judgment, your refusal to provide the registration, or to acknowledge that there was no registration before Organic Growers School's posting of the photo, makes your negotiation posture unreasonable, and a judge might well take that into account in assessing a claim for statutory damages if you seek them or, indeed, in deciding that your pre-litigation demands were unreasonable. *See*

Oakland Community Pools Project, 2020 WL 13695114, at *5 (N.D. Cal. Oct. 14, 2020).

Sincerely yours,

Paul Alan Levy