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May 2, 2014

Via Email only
Rhill@beankinney.com

Rachelle E. Hill, Esq.
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2300 Wilson Boulevard, 7th Floor
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Re: Notice of Copyright Infringement and Privacy Violation, Revised Copy

Dear Ms. Hill:

This law firm has the privilege of serving as counsel to Mr. Paul Elam and the blog, "AVoiceForMen." We are in receipt of your demand letter of April 15, 2014 and we have been asked to respond.

1. Introduction and Background

The genesis of this dispute appears to be that Mr. Christopher Hines Machnij a/k/a Christopher Hines Mackney and his estranged wife were in an acrimonious relationship. Due to the strains of that relationship, Mr. Mackney started a blog in order to express his thoughts about his treatment in the family law system. This culminated in a suicide note, which he published to his blog from Washington, D.C. on December 29, 2013, and then he committed suicide on December 29, 2013. His writing and his suicide note were admittedly unflattering to your client. Your client then petitioned a Virginia state court to grant her some ambiguous (and questionable) intellectual property rights to the blog's contents, which she is using to attempt to purge Mr. Mackney's expression from every corner possible. One of those corners is my client's blog.

2. Copyright Issue – Fair Use

It is our position that A Voice for Men's republication of the suicide note is not copyright infringement, pursuant to 17 U.S.C. § 107. Accordingly, even if Mr. Mackney were to rise from the dead and insist upon the de-publication of the suicide note, it is my client's position that it has a right to continue publication of the letter.

3. Copyright Issue – Implied License

Mr. Mackney intended for his suicide note to be published. He did not intend for it to be a private matter, and clearly wished for it to be distributed as widely as possible. While we cannot divine what his actual thoughts were before he took his own life, we can certainly review how he published it, where he published it, and infer that prior to his death, he granted an implied license to my client and any other party who wished to excerpt or republish the note in its entirety. Once that license was granted, it could not be revoked. Even if it could be revoked, someone who was not the copyright owner at the time cannot revoke it after the fact.[1]

4. Copyright Issue – 17 U.S.C. § 512(f)

Under 17 U.S.C. § 512(f), any party who uses a DMCA takedown notice improperly may be held liable for that misuse of the DMCA. The U.S. Court of Appeals for the Ninth Circuit recently held in *Garcia v. Google* that copyrights can be quite expansive. Even under the broad re-definition of copyrights in that case, I do not believe your client would have any possible justification to claim a copyright in any part of the suicide note prior to her dubious "acquisition" of the rights in the Virginia state court. In fact, if you were to claim a *Garcia v. Google* copyright, it would seem that her only part in the creation of the note would be her purported behavior in driving Mr. Mackney to his unfortunate end. We would find it to be a quite creative use of Title 17 for a person to drive another person to suicide, and then to claim a copyright in any story about that, because she was in instrumental actor in the underlying story. I presume that you would not be so brash as to rely upon this as a theory, but I wish to at least address it and caution you from doing so.

Courts have been willing to hear 17 U.S.C. § 512(f) claims in the face of rights much less ambiguous than those your client claims here. In *Lenz v. Universal Music Corp.*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008), the seminal case on 512(f) claims, defendant Universal Music Corporation sent Youtube.com a takedown notice after the plaintiff posted a video of her children dancing to the song "Let's Go Crazy," a song to which Universal actually owned the rights. After YouTube took down the video, the plaintiff sued Universal for sending a DMCA takedown notice containing knowing, material misrepresentations under 17 U.S.C. § 512(f).

Based on Lenz's claim of fair use, the court denied Universal's motion to dismiss, stating that the purpose of 17 U.S.C. § 512(f) is to prevent abuse through the sending of unnecessary takedown notices. The court found that "the unnecessary removal of non-infringing material causes significant injury to the public where time-sensitive or controversial subjects are involved and the counter-notification remedy does not sufficiently address the harms. A good faith consideration of whether a particular use is fair use is consistent with the purpose of the statute." *Lenz*, 572 F. Supp. 2d at 1156. The court even concluded that Lenz had successfully shown damages in the form of her attorneys' fees resulting from Universal's misrepresentation of infringement.

[1] We do not concede that Mrs. Mackney is actually the proper copyright holder. However, even if she were, her acquisition of the copyright after publication and republication would not be a valid basis on which to revoke the license.

It is my client's right (as well as the right of every other service provider or blog that you have bullied into taking down this note) to bring suit against your client under 17 U.S.C. § 512(f). We can assure you that if your client insists upon pressing forward with her attempts to censor this material, my client will file a counterclaim under 17 U.S.C. § 512(f). [2]

5. First Amendment Issue

Fair Use is found at the confluence of free speech. However we feel there is an additional First Amendment element to this case. Mr. Mackney clearly intended for his expression to be published and disseminated far and wide. He published information that was critical of your client, which (if he were still alive) she would never be able to suppress, as she would never have a claim to any ownership of the copyright. Now that he has passed on, it may appear to you that my client should not have such a feeling of having a dog in this fight. Nevertheless, there is a manifest injustice in your client seeking to do something procedurally, which she could never do substantively. She is attempting to take the dying words of this man as her own property, despite no intention by him to grant her any such right. Then, she is attempting to *use* that right in order to erase his expression from any further public existence.

I personally take no position on whether what Mr. Mackney had to say is true, or just. I am certain Mrs. Mackney has a side of the story as well. I do not wish to be uncompassionate toward her or her family. She certainly has the ability to rebut everything he had to say in that letter, if she wishes to do so. In fact, I find it difficult to believe that she would not be granted an interview with almost any journalist with whom she sought an audience. Further, she could seemingly express herself continuously, and without being challenged by Mr. Mackney, by virtue of the fact that he is no longer with us. Accordingly, it seems there is equal opportunity for her to promote her side of the story, without engaging in the somewhat horrific act of attempting to turn this dead man into an non-person, and squelching everything he had to say while he was in this world, including his dying words.

6. **Conclusion**

We are not insensitive to some of the more heart-wrenching elements of this case. In fact, prior to engaging you, my client and I engaged in the exercise of considering the effect of this case upon Mr. Mackney's family, including his minor children. With our compassion sensors deployed, it was our determination that not only does Mr. Mackney have a right to continue to speak from beyond the grave, not only does society have an interest in hearing what he had to say, but his children have an interest in maintaining that their father not be wiped from the slate of existence, simply because their mother was creative enough to attempt to use intellectual property law to smother his voice after his death.

If she believes that what she is doing is in her children's best interest, we would suggest that at some point during this dispute, not only should the intellectual property issues be questioned, but there

[2] We do not wish to mislead you into thinking that we could *only* bring this as a counterclaim. My client reserves the right to bring this as an independent claim, and is considering doing so.

should also be representation *ad litem* for both the children and Mr. Mackney's continuing First Amendment rights.

We would also like to note that any republication of Mr. Mackney's letter was fading well into obscurity before your client attempted to suppress it from publication. At this point, the matter has taken on a life of its own, beyond anything it might have had before this ill-considered attempt at censorship. You may wish to consider this, prior to following through on any actual or implied threats to attempt to litigate this matter. We can assure you we are prepared to litigate the matter, and we will not rest for as long these efforts to silence Mr. Mackney remain intact.

Best regards,

Marc J. Randazza

cc: Mark Bennett