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October 23, 2003

BY EMAIL AND FIRST CLASS MAIL

Glenn D. Bellamy
Greenebaum Doll & McDonald PLLC
2800 Chemed Center
255 East Fifth Street
Cincinnati, Ohio 45202

Re: Violence Policy Center/Mr. Oleg Volk

Dear Mr. Bellamy:

This firm is counsel for Violence Policy Center (“VPC”). This letter responds to your “cease and desist” letter of October 9, 2003 relating to VPC’s use of two images displayed on a website bearing the home address <http://www.a-human-right.com>. Both images accompany lengthy textual discussions concerning “Effective Guns” and “Necessary Evil” which advocate the use of firearms for self-defense and generally support the gun lobby. We do not agree that VPC’s use of the images infringes your client’s copyright. Indeed, it is clear that VPC’s use of the images was and is a “fair use.”

As you know, the Copyright Act provides a “fair use” defense conferring a privilege to use copyrighted material in a reasonable manner, as VPC has done in this case, without the copyrights owner’s consent. 17 U.S.C. § 107 (2000). In order to determine whether a given use of a work is a fair use, the following factors must be considered:

1. Purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. Nature of the copyrighted work;
3. Amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. Effect of the use upon the potential market for, or value of, the copyrighted work.

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17 U.S.C. § 107 (2000). Each of these factors weighs in favor of a finding of fair use here.

Purpose and Character of the Use: The Copyright Act expressly permits fair use for the purpose of criticism and comment. Hustler Magazine, Inc. v. Moral Majority, Inc., 796 F.2d 1148, 1153 (9th Cir. 1986). This is, of course, precisely what VPC has done.

Indeed, the Second Circuit determined, in a case with similar facts, that the selection of verbatim portions of a pro-choice book “organize[d] ... into a topical framework to make the case against abortion” was precisely the kind of criticism and comment permitted by the Copyright Act. Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1260 (2d Cir. 1986).

VPC has used the pro-gun images at issue in a flash video that makes a case for more gun regulation. Under Maxtone-Graham, this is criticism and comment and supports a finding of fair use. See also, Núñez v. Caribbean Int’l News Corp. 235 F.3d 18, 23 (1st Cir. 2000) (finding fair use where defendant newspaper used a nude photo in conjunction with editorial commentary, thereby giving it “a further purpose”); Wojnarowicz v. American Family Ass’n, 745 F. Supp. 130, 143-46 (S.D.N.Y. 1990) (finding that it was fair use to copy portions of plaintiff’s sexually explicit art for the purpose of protesting plaintiff’s NEA funding).

Nature of the Copyrighted Work: “The scope of fair use is greater when ‘informational’ as opposed to ‘creative’ works are involved.” Hustler, 796 F.2d at 1153-54. Mr. Volk’s website and images convey information to readers regarding guns, ammunition and gun control efforts. As the work is more informative than creative in nature, this factor weighs, again, in favor of a finding of fair use.

The Amount and Substantiality of the Portion Used: Here, VPC’s use of the images is so trivial so as to “fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying.” Ringgold v. Black Entm’t Televisions, Inc., 136 F.3d 70, 74 (2d Cir. 1997). The images at issue appear as part of a flash video montage, each displayed for only a fraction of a second. The images are simply not observable for any significant length of time, and so the use of the images does not rise to the level of actionable copying. See Gordon v. Nextel Communications & Mullen Advertising, Inc., No. 2003 WL 22282869, *2-3 (6th Cir. 2003) (holding use of illustrations in a television commercial which were “observable for less than a second” was *de minimus* and “[fell] below the quantitative threshold of actionable copying”).

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Effect on the Market: According to the Supreme Court, this is “undoubtedly the single most important element of fair use.” Harper & Row Publishers, Inc. v. Nation Enters, 471 U.S. 539, 549 (1985). It is preposterous to suggest that VPC’s use of Mr. Volk’s images will have an adverse effect on the market for Mr. Volk’s website and other sales. As the Court said in Maxtone-Graham, 803 F.2d at 1264, “it is unthinkable that potential customers for a series of sympathetic interviews on abortion and adoption would [not purchase the work] because a small portion of the work was used in an essay sharply critical of abortion.”

Similarly, it is unthinkable that readers and customers of Mr. Volk’s website will stop patronizing the website or purchasing related products simply because of VPC’s use of these images in a flash video critical of the gun lobby and industry. Even more, when commentary such as a “scathing theater review” -- or in this case, a criticism of the gun lobby -- “kills demand for the original, it does not produce a harm cognizable under the Copyright Act.” Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591-92 (1994).

Accordingly, Mr. Volk’s cease and desist demand is unwarranted, and any claim of copyright infringement -- in light of the overwhelming facts of fair use -- would be frivolous. Were Mr. Volk to bring such a claim, VPC will defend itself vigorously and seek all appropriate relief, including attorneys’ fees.

Sincerely,



Ronald G. Dove, Jr.

RGD/rf