

Jay Ward Brown

Dana R. Green

March 9, 2015

VIA E-MAIL

François Stefanaggi
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France
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Re: Your Client Andre Saraiva

Dear Mr. Stefanaggi:

We write in response to your letter dated March 3, 2015, on behalf of your client, Andre Saraiva. We are counsel to Casey Schreiner, the founder of and a contributing writer to the website Modernhiker.com. I do not intend to respond point-by-point to the allegations made in your letter. A few observations, however, are in order.

First, you allege in your letter that Mr. Schreiner is disseminating “defamatory information” about your client. In the United States, your client bears the burden of proving the article was false in some substantial way. *See Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-78 (U.S. Supreme Ct. 1986) (plaintiff has burden of proving falsity). However nowhere do you identify what, if anything, is inaccurate or misleading about Mr. Schreiner’s article.

In fact, your letter confirms the substance of Mr. Schreiner’s article: that on February 25, 2015, your client painted a rock in Joshua Tree National Park with a large black “OX” mark. As you are presumably now are aware, “[d]estroying, injuring, defacing, or damaging” a national park is prohibited under federal law and may be punishable by a fine and imprisonment. *See* 36 C.F.R. 1.3; 36 C.F.R. 2.31(a)(3). It is irrelevant whether Mr. Saraiva is an artist or whether he voluntarily removed the inscription a “few days later.” Mr. Saraiva’s act violated federal law.

It is axiomatic that a statement is not defamatory if it is substantially true. *See, e.g., Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-17 (U.S. Supreme Ct. 1991) (A statement is not defamatory “so long as the substance, the gist, the sting of the libelous charge [is] justified.”) (citation and quotation marks omitted). While our representation is limited to U.S. law, we note that truthful statements also are not actionably defamatory under French law. *See Loi sur la liberté de la presse du 29 juillet 1881*.

Second, you allege that Mr. Schreiner has somehow violated Mr. Saraiva’s “personal rights” and “the privacy laws of the United States.” By this, we presume you to mean the laws of California. In order to bring a privacy claim in California, Mr. Saraiva must have “(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.” *See Ruiz v. Gap, Inc.*, 380 Fed. App’x 689, 692 (9th Cir. 2010) (citation and quotation marks omitted).

Mr. Saraiva’s claims fail for the fundamental reason that Mr. Saraiva had no expectation of privacy. All of the information in Mr. Schreiner’s article was obtained from public sources. These included: 1) your client’s own Instagram account, which was public; 2) your client’s comments on other Instagram accounts, which were public; 3) photographs of Joshua Tree National Park, a public place; 4) a public website, *Readyornot*, showing information your client disseminated by geotagging his own public social media activity; 5) your client’s website, which was and remains public; and 6) an article in GQ magazine.

As a matter of California law, this public information cannot be considered “private.” *See Sipple v. Chronicle Publishing Co.*, 201 Cal. Rptr. 665, 669 (Cal. Ct. App. 1984) (“[T]here can be no privacy with respect to a matter which is already public.”); *Melvin v. Reid*, 112 Cal. App. 285, 290 (Cal. Dist. Ct. App. 1931) (“There can be no privacy in that which is already public.”). California courts consistently reject privacy claims where the plaintiff himself first publicized the information. *See, e.g., Buzayan v. City of Davis*, 927 F. Supp. 2d 893, 904 (E.D. Cal. 2013) (no invasion of privacy where plaintiffs “actively sought out publicity” and were the first to publicize their names, ages, and addresses); *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 26 (Cal. Supreme Ct. 1994) (to sustain a privacy claim, plaintiff “must have conducted himself . . . in a manner consistent with an actual expectation of privacy” and cannot have voluntarily publicized the information himself). We understand that French law takes a similar approach: a claimant who has voluntarily disclosed private facts cannot then bring a claim against others for disclosing those same facts.

Third, your allegation that Mr. Schreiner is “taking advantage of the artist’s reputation” and engaging in “unfair commercial practice” has no basis in law. Mr. Schreiner is reporting on a matter of public interest and concern: graffiti in an American national park, which is unlawful and a threat to the natural beauty of our public spaces, by a well-known “street artist.” Your client’s right of publicity cannot prevent reporting of newsworthy information. *See Zacchini v.*

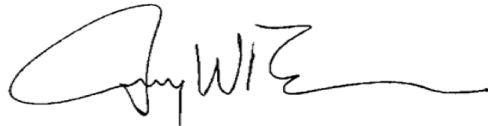
Scripps-Howard Broad. Co., 433 U.S. 562, 574 (U.S. Supreme Ct. 1977) (the right of publicity does not prevent reporting on newsworthy facts). Nor does Mr. Schreiner's article constitute commercial misappropriation of name or likeness under California law: "news, public affairs, or sports broadcast or account" are expressly exempt from liability. *See* Cal. Civ. Code § 3344(d).

In short, your client has no plausible legal claim arising out of Mr. Schreiner's article, which is clearly protected speech under the U.S. Constitution. If you nevertheless file a lawsuit in the United States, Mr. Schreiner will file a special motion to strike pursuant to California's anti-SLAPP statute, C.C.P. § 425.16. If the motion is granted, that statute provides that Mr. Schreiner will be entitled to recover his reasonable attorneys fees from your client. *See* C.C.P. § 425.16(c)). Furthermore, if your client brings a claim in France, even in the unlikely event he were to obtain a libel judgment, it would be unlikely to be enforceable in the United States. Under the federal SPEECH Act, 28 U.S.C. § 4102, U.S. courts must refuse enforcement of foreign defamation judgments unless the foreign law provides at least as much protection for freedom of speech as U.S. law. *See, e.g., Trout Point Lodge, Ltd. v. Handshoe*, 729 F.3d 481 (5th Cir. 2013) (refusing to enforce Canadian libel judgment on ground that Canadian law is not co-extensive with U.S. protections for freedom of expression).

Attempting to suppress truthful reporting through threats of litigation is unlikely to enhance your client's reputation, particularly when Mr. Saraiva purports to support freedom of expression. In that regard, please note that Modernhiker.com plans presently to post a copy of both your letter to Mr. Schreiner and this reply, so that the public may be fully informed regarding your client's conduct. In addition, if your client wishes to make any other public reply to Mr. Schreiner's article, Modernhiker.com would consider publishing it, subject to its normal editorial standards.

Sincerely,

LEVINE SULLIVAN KOCH & SCHULZ, LLP



By: _____

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