ACLU Northern California

November 6, 2017

Via U.S. Mail and Electronic Mail

William J. Briggs, II
Venable LLP
2049 Century Park East
Suite 2300
Los Angeles, CA 90067
wjbriggs@venable.com

Re: Letter to Meghan Herning and PopFront dated October 25, 2017

Dear Mr. Briggs:

We are writing on behalf of Meghan Herning and PopFront in response to your October 25, 2017 letter to her concerning the blog post "Swiftly to the alt-right: Taylor subtly gets the lower case kkk in formation."[1] In that letter, you demanded that our clients issue a retraction by October 24, 2017 (the day before you sent the letter), remove the story from all media sources, and "cease and desist." You also assert that your threatening letter is somehow confidential and protected by copyright and warn them against disseminating it or any part of it.

Ms. Herning and PopFront will not in any way accede to your attempt to suppress their constitutionally protected speech. The blog post is a mix of core political speech and critical commentary; it discusses current politics in this country, the recent rise of white supremacy, and the fact that some white supremacists have apparently embraced Ms. Swift, along with a critical interpretation of some of Ms. Swift's music, lyrics, and videos.

Much of the blog post is devoted to a discussion of the current resurgence of white supremacy and the fact that at least some white supremacists have tried to co-opt Ms. Swift and her music to serve their own ugly, racist purposes. Another section of it discusses the history of the eugenics movement in this country and that movement's continuing ill effects. All of this is core political speech that cannot possibly be defamatory because it is not even about Ms. Swift.

[1] The blog post is available at http://popfront.us/2017/09/swiftly-to-the-alt-right-taylor-subtly-get-the-lower-case-kkk-in-formation/#more-657.

Between its generalized statements of indignation, your letter points to four specific concerns about the blog post that do relate more directly to Ms. Swift, alleging that the post:

> propagates such hideous falsehoods as: 1) "Taylor's lyrics play to [a] subtle, quiet white support of a racial hierarchy;" 2) that there are similarities between Ms. Swift and Adolf Hitler; 3) that the "lyrics [of "Look What You Made Me Do"] are the most explicit in speaking to white anger and affirming white supremacy;" and 4) that Ms. Swift's purported silence regarding white supremacy means she supports Donald Trump and identifies with the white supremacist/al-right [sic] movement.

Even if these characterizations were correct (and as discussed below, they are not), they simply highlight how wrong your position is.

As you no doubt appreciate, Ms. Swift, as a celebrity and household name, is a general public figure under the First Amendment. *See Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1294 (D.C. Cir. 1980) ("a general public figure is a well-known celebrity, [her] name a household word."). Thus, the statements on the blog are protected by the First Amendment unless they are demonstrably false *and* you can show that the author made them knowing that they were false or with reckless disregard as to whether they were false. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). As your client knows all too well, celebrity is a double-edged sword: "Fame … brings power, money, respect, adulation, and self-gratification. It also may bring close scrutiny that can lead to adverse as well as favorable comment. When someone steps into the public spotlight, or when he remains there once cast into it, he must take the bad with the good." *Waldbaum*, 627 F.2d at 1294. Criticism is never pleasant, but a celebrity has to shake it off, even if the critique may damage her reputation.

Equally important, a statement of opinion—meaning one that is "not capable of being proved true or false"—cannot constitute defamation. *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995); *see Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 695–96 (2012) ("Although statements of fact may be actionable as libel, statements of opinion are constitutionally protected."). More specifically, "an opinion based on an implication arising from disclosed facts is not actionable when the disclosed facts themselves are not actionable." *Dodds v. Am. Broad. Co.*, 145 F.3d 1053, 1067 (9th Cir. 1998); *see Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 1053 (2008).

Here, as is often the case under the First Amendment, context matters: because "online blogs and message boards are places where readers expect to see strongly worded opinions rather than objective facts," this "context further undermines the reader's expectation that the posts are to be understood as assertions of fact." *Summit Bank*, 206 Cal. App. 4th at 697, 698-99. Thus, in the online world, "rhetorical hyperbole, vigorous epithet, lusty and imaginative

expressions of . . . contempt, and language used in a loose, figurative sense have all been accorded constitutional protection." *Id.* at 699 (internal quotation marks, citations omitted).

Applying these fundamental constitutional principles to your four "hideous falsehoods" shows that not even in your wildest dreams can they constitute defamation.

First, the blog's statement that "Taylor's lyrics *seem* to play to the same subtle, quiet white support of a racial hierarchy that benefits them," is protected opinion. As an initial matter, your letter misquotes the blog post by omitting the word "seem," a term signaling that what follows is an opinion. This omission suggests that you well understand that the actual post is stating an opinion, protected by the Constitution. If you are going to write a letter accusing a person of misrepresentation, you should avoid misrepresenting what she wrote. In any event, either version of the sentence—yours or the true one—is protected opinion. The question of what a song's lyrics mean or do not mean is one for the critics, not for the courts. *See Dodds*, 145 F.3d at 1067; *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 229 (1998) ("The courts do not, and constitutionally could not, sit as superior editors of the press.").

Second, the statement "[t]hat there are similarities between Ms. Swift and Adolf Hitler" is also constitutionally protected opinion. Comparisons to Hitler are offensive, but they are not defamatory because they inevitably are opinions. *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 454 (3d Cir. 1987).[2] Here, the blog post simply draws a comparison between a shot from your client's video and a photograph of Hitler, stating that "at one point Taylor is lording over an army of models from a podium as Hitler had in Nazi[] Germany." There is no suggestion that the author has secret knowledge connecting Swift to the Nazi dictator; just an opinion that the images (both of which are shown) share some characteristics. As then-judge Kennedy wrote in a case involving comparisons with a Nazi war criminal, "[s]tatements not themselves factual, and which do not suggest that a conclusion is being drawn from facts not disclosed in the statement, are commonly statements of opinion, not fact." *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987). Call it what you want, but the statement in the blog post is, like the comparisons in *Dunn* and *Koch*, constitutionally protected opinion.

Third, the post's interpretation of "the lyrics [of "Look What You Made Me Do"]" as "the most explicit in speaking to white anger and affirming white supremacy" is also pure opinion. The post quotes the lyrics in question so that readers can, once again, draw their own conclusions about whether

[2] The *Dunn* case involved an open letter that "compare[d] [the plaintiff] with two notorious dictators," one of whom was Hitler. 833 F.2d at 454. The court held that this was constitutionally protected opinion, noting that the "First Amendment invariably has been held to protect this comparison." *Id.*

the opinion is justified. This statement, too, is absolutely protected by the First Amendment. *See id.*; *Dodds*, 145 F.3d at 1067.

Finally, your letter asserts what the blog does not, "that Ms. Swift's purported silence regarding white supremacy means she supports Donald Trump and identifies with the white supremacist/al-right [sic] movement." It is not clear what your statement refers to, because there is nothing in the post that says this. The post does state that "there is no way to know for sure if Taylor is a Trump supporter or identifies with the white nationalist message, but her silence has not gone unnoticed." But this is a far cry from stating that she supports Trump or identifies with the alt-right. You are of course absolutely right that "Ms. Swift has no obligation to campaign for any particular candidate or broadcast her political views." But nor does she (or, probably more to the point, her lawyers) have the authority to tell other people the conclusions they can draw from her decision to keep silent.

Thus, however, "hideous" you consider these statements to be, none of them are actionable.

We also noticed that your letter makes a pair of incorrect legal assertions that bear correcting:

First, you claim that "PopFront has an independent and non-delegable duty to conduct a reasonable investigation of the information it publishes and disseminates and the failure to do so is a violation of law and the rights of those targeted by such unfounded allegations." But the United States Supreme Court stated just the opposite way back in 1989, as you might remember: "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard" of the truth, which must be shown to show defamation of a public figure. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989); *see Reader's Digest Assn. v. Superior Court*, 37 Cal. 3d 244, 258 (1984). ("The failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy.").

Second, you erroneously suggest that the fact that statements in other media, including an "excerpt from Ms. Swift's attorney denouncing any such association" with the alt-right, mean that PopFront cannot publish information that conflicts with these statements. This is absurd; if the press could never say anything that conflicted with what some attorney had claimed, it could never say anything at all, much less anything critical of a public figure with a bevy of lawyers on retainer. And, again, the U.S. Supreme Court has spoken on this precise issue, emphasizing that when the press publishes material that contradicts a public figure's denials of the truth of those statements, it "need not accept [those] denials, however vehement; such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error." *Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 691 n.37.

In short, your claims that the blog post has defamed Ms. Swift are completely unsupported. If the blog post's interpretation of Ms. Swift's lyrics were defamatory, your letter's slanted interpretation of that post would be, too (and more so, since you misquote the post). The First Amendment and our nation's "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" prevents these types of differences of opinion from being censored by the threat of defamation lawsuits. *Sullivan*, 376 U.S. at 270.

Finally, the ominous paragraph at the end of your letter—warning that the letter is a "confidential legal notice," and that "[a]ny publication, dissemination or broadcast of any portion of th[e] letter will constitute a breach of confidence and a violation of the Copyright Act"—is utter nonsense.

First, the claim of confidentiality can only be described as odd, particularly coming from a lawyer; you cannot really expect that a person who receives a letter like this will feel any duty to keep this matter a little secret between the two of you. And it is not without irony that at one point you ask that your "letter stand as yet another unequivocal denouncement by Ms. Swift of white supremacy and the alt-right," but then purport to forbid anybody from making the letter public.

Second, you cannot use copyright law as a weapon to suppress your letter, because reproduction of it here is fair use under 17 U.S.C. § 107. Attaching the letter to this one transforms it from a clumsy legal threat to suppress constitutionally protected speech into an exposé of that attempt in order to educate others who might receive these types of letters that they need not be intimidated. Although the text of the letter has not changed, the use has, which weighs in favor of fair use. *See Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000); *White v. W. Pub. Corp.*, 29 F. Supp. 3d 396, 399 (S.D.N.Y. 2014). The letter is ostensibly factual in nature, rather than fictional, which also weighs in favor of fair use. *Id.* Because your letter is not otherwise available to the public, it is necessary to use it in its entirety so that readers can fully appreciate it. *See Fisher v. Dees*, 794 F.2d 432, 439 (9th Cir. 1986). Publishing excerpts would not show the full extent of the letter and would allow one to claim that we were taking the statements quoted above out of context. *Cf. Nunez*, 235 F.3d at 24.

Finally, this is not a commercial use, and there is no market for this letter, in part because it is tied to the facts of this specific case. These factors also weigh in favor of fair use. *See id.* at 24-25; *White*, 29 F. Supp. at 400; *see also Katz v. Google Inc.*, 802 F.3d 1178; 1184 (11th Cir. 2015) ("Due to [plaintiff's] attempt to utilize copyright as an instrument of censorship against unwanted criticism, there is no potential market for his work.").

Copyright is meant to "promote the Progress of Science and useful Arts," not to allow lawyers to send threatening, speech-suppressing letters in secret. *See* U.S. Const. art. I, § 8, cl. 8. It cannot be used "as a sword to suppress publication of embarrassing content rather than as a shield to protect … intellectual property." *Online Policy Grp. v. Diebold, Inc.*, 337 F. Supp. 2d 1195, 1205 (N.D. Cal. 2004). In

short, you may no more use copyright law to hide the contents of your letter from public scrutiny than a kidnapper could use it to prevent his victim's family from giving a copy of the ransom note to the police.

Please let us know by November 13, 2017 if you disagree with any of this, if you intend to proceed with the promised litigation, or if you would like to discuss this matter.

Yours,

Michael D Risher

Michael Risher
Senior Staff Attorney

Christine Sun
Legal and Policy Director

Matt Cagle
Technology & Civil Liberties
Policy Attorney