

October 18, 2006

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Ms. Sue Hale  
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Dear Ms. Hale:

We represent Just the Facts America ("JTFA"). We have reviewed your puzzling letter concerning JTFA's use of the Oklahoman's nameplate and story in an advertisement entitled "She," which is currently airing on Oklahoma television stations. It is surprising to see your newspaper – with its rich history of fighting to protect the first Amendment – now attempting to squelch the public's right to hear all sides of an issue of public importance by invoking its own commercial interests in its "copyrighted nameplate and story."

At the outset, the wording of your letter raises important questions: does your policy merely prohibit any mention of specific copyrighted Oklahoman articles, or do you believe you can prohibit JTFA from even discussing any facts the newspaper has ever reported? Do you contend that the Oklahoman "owns" the news it reports about Oklahoma officeholders? Do you believe that the Oklahoman's reporting of a story gives it the subsequent right to play police officer in the marketplace of ideas?

As the Supreme Court has explained on numerous occasions, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes." *Mills v. Alabama*, 384 U.S. 214, 218-19 (1966); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.")

It is abundantly clear that the advertisement at issue lies at the heart of JTFA's First Amendment right to discuss Kim Holland's ethical transgressions. Furthermore, the use of the newspaper article and the Oklahoman masthead is squarely protected by the "fair use" exception to copyright law. The ad and the brief images and words for which you claim commercial ownership provide important information to the citizens of Oklahoma. Whether the Oklahoman agrees with JTFA's point of view is simply not relevant.

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Indeed, we question whether your “policy” applies uniformly to all entities and individuals who quote your stories, or whether you are singling out JTFA. See, e.g., Kim Holland’s campaign website, <http://hollandforoklahoma.com/news/index.php>, which appears to reprint an Oklahoman article in its entirety. Would you mind sending us the letter you sent to the Holland campaign?

### Fair Use Doctrine

JTFA’s use of your masthead and article is protected by the “fair use” doctrine, which was first codified by Congress in the Copyright Act of 1976. Section 107 provides a non-exhaustive list of examples of fair use, including criticism, comment, scholarship, research, news reporting and teaching.

The statute also provides four guiding factors courts consider when evaluating whether a use is “fair” or not. These factors are: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use on the potential market for or value of the copyrighted work.

These factors are designed to reveal whether the copyright law’s goal of promoting “the Progress of Science and the useful Arts,” U.S. Const., Art. I, § 8, cl. 8, “would be better served by allowing the use than by preventing it.” *Arca Inst. Inc. v. Palmer*, 970 F.2d 1067, 1077 (2d Cir. 1992). Applying these factors to JTFA’s advertisement, it is abundantly clear that the fair use doctrine applies here.

#### 1. Purpose and character of the use

As aforementioned, the Supreme Court has spoken loudly and clearly on JTFA’s right to speak out on issues related to government and politics. As the Supreme Court explained in *Sullivan*, these constitutional safeguards were “fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Roth v. United States*, 354 U.S. 476, 484 (1957).

Indeed, “[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.” *Stromberg v. California*, 283 U.S. 359, 369 (1931). “[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.” *Bridges v. California*, 314 U.S. 252, 270 (1941).

JTFA used the Oklahoman masthead and article quotes in the context of discussing Oklahoma Insurance Commissioner Kim Holland's many ethical transgressions. Several courts have held that use of copyrighted material in political and governmental discourse is a purpose strongly favoring fair use. In *Keep Thomson Governor Committee v. Citizens for Gallen Committee*, 457 F. Supp. 957, 961 (D. N.H. 1978), the Court found that the defendant political action committee's use of a copyrighted song owned by the plaintiff political action committee "is clearly part of a political campaign message, non-commercial in nature, and First Amendment issues of freedom of expression in a political campaign are clearly implicated." *Id.*

In fact, the Court believed that this first factor is the most important determinant of fair use when the facts involve political messages, explaining that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution[.]" *Id.* at 959.

JTFA also believes that its use of masthead and article quotes were for fair use criticism and comment. See *Baraban v. Time Warner, Inc.*, 54 U.S.P.Q.2d 1759 (2000). Though its advertisement, JTFA seeks to educate citizens about Ms. Holland's unethical and unprincipled activities. Because such a use clearly falls within the permissible use categories of comment and criticism, any dispute leans "decidedly in the direction of finding fair use even as it looks at the other three factors." *Mathieson v. Associated Press*, 23 U.S.P.Q.2d 1685, 1689 (1992).

Further, JTFA's minimal use of your news materials is not commercial. Like the Ralph Nader parody advertisements at issue in *MasterCard International Incorporated v. Nader 2000 Primary Committee, Inc.*, 2004 WL 434404 (S.D.N.Y. 2004), JTFA can support its fair use argument by establishing that "the stated purpose of [its] advertisement was to raise public awareness of" an officeholder's actions and public policy agenda. *Id.* at \*12.

In addition, JTFA's communication does not "merely supersede[ ]" the original article, but instead "adds something new with a further purpose or different character, altering [the work] with new expression meaning or message." *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)). In fact, JTFA believes that its ad merely used your masthead and article quotes as raw material and transformed them into new information, insights or understandings. See *MasterCard*, 2004 WL 434404 at \*13.

## 2. Nature of the copyrighted work

The copyrighted works at issue are of your masthead, which is a small portion of your newspaper, as well as two pull quotes from a blurred article image that the advertisement graphic entitles "One third of funds are from out of state." Since these materials have previously been

published, they are entitled to less protection than a work that has not been published. See generally *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

Furthermore, images are factual rather than creative, and thus generally afforded less protection under copyright law. This factor, however, is less important in the analysis when “assessed in the context of certain transformative uses” like JTFA’s ad. *Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.*, 150 F.3d 132, 144 (2d Cir. 1998).

3. Amount of work used

It is beyond dispute that the quantity of the materials taken, as well as their quality and importance to the original work, was minimal. Furthermore, the snippet was necessary to the information JTFA believes needed to be imparted in its ad. *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992). In its “pull quotes,” JTFA uses less than 25 words of your approximately 725-word article. Furthermore, your masthead, while a prominent feature of the newspaper, occupies a miniscule percentage of your daily copy. In *Keep Thomson Governor Committee*, 457 F. Supp at 961, the Court found that since the alleged infringement was 15 seconds from a total recording of three minutes, it was clear that “the effect of the use upon the potential market or value of the copyrighted work is nil.” *Id.*

4. Effect on potential market for use

The copyright laws protect a commercial interest of those who hold the copyright. As implied above, JTFA’s use of your article and masthead will have no impact on the market for news, is unlikely to supplant potential future news markets, and is clearly unlikely to fulfill the demand for the original work. Moreover, as the United States Supreme Court noted in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448-51 (1984), the nonprofit nature of JTFA’s use favors a finding of fair use.

Certainly, JTFA did not harm the secondary market for Oklahoman news coverage, although Kim Holland’s use of your full article on her website likely does. In addition, JTFA’s ad does not offer itself as a market substitute for Oklahoman news articles. See generally *Davis v. The Gap, Inc.*, 246 F.3d 152 (2d Cir. 2001). In fact, the ad serves an entirely different purpose than your news coverage, namely to further discussion about the record and actions of Ms. Holland. This makes this factor weigh heavily in favor of a finding of fair use. See generally *Phoenix Hill Enterprises, Inc. v. Dickerson*, 1999 WL 33603127 (W.D. Ky. 1999).

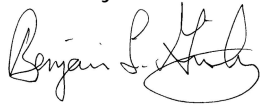
In short, JTFA’s use of the Oklahoman’s articles masthead could not be more clearly protected by the First Amendment and United States copyright laws. We sincerely hope you will not continue to contradict your newspaper’s otherwise firm commitment to First Amendment ideals. Should

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your policy against my clients continue, I fully expect that you plan to begin enforcing it against every political party, candidate, political action committee, corporation, and individual in the state of Oklahoma and elsewhere. As I am sure you are aware, the use of newspaper quotes and newspaper nameplates in political discourse is widespread.

Please do not hesitate to contact me if you have questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Benjamin L. Ginsberg". The signature is fluid and cursive, with a large loop at the end.

Benjamin L. Ginsberg