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By email to sgibson@millsoakley.com.au

February 16, 2016

Stuart Gibson, Esquire
Mills Oakley Lawyers
Level 6, 530 Collins Street
Melbourne, Victoria 3000
AUSTRALIA

Dear Mr. Gibson:

I write on behalf of Michael Masnick and Floor 64, Inc., in response to your letter and emails dated February 1, 2016, February 12, 2016, and February 13, 2016. Your letter complains about alleged defamation of your client Milorad Trkulja and threatens to sue for defamation in Australia and then to enforce a judgment in California. Your subsequent emails invite Masnick and Floor 64 to "accept Service of Proceedings and test their nonsensical dribble in Australian Courts," suggest that they secure "proper legal advice instead of publishing utter dribble," and rhetorically ask whether they "have the guts to accept Service." In the unlikely event that you initiate the litigation that you threaten here in the United States, we will represent Masnick and Floor 64. In the remainder of this letter, I'll refer to them jointly as "Masnick."

Turning first to the question posed in your most recent email, nothing is preventing you from transmitting physical documents to Masnick if that is a course of action that you deem advisable; you have a mailing address. Whether that would constitute effective "Service of Proceedings" under Australian law is not for me to say, but Masnick has never done anything to subject himself to the jurisdiction of courts in Australia and we are confident that any legal action you might undertake in those courts would not be consistent with constitutional due process as would be required to enable you to assert that any judgment in those courts is enforceable in the United States, wholly without reference to the SPEECH Act. Nor does Masnick have any intention of accepting your invitation to litigate this matter in Australia. Consequently, if you believe that your client has sound defamation claims, he will have to litigate them in the California courts, which would have personal jurisdiction.

Moreover, your letter errs in asserting that Masnick is "not protected by the Speech Act." Under the SPEECH Act, 28 U.S.C. § 4101 *et seq.*, a judgment for defamation cannot be enforced in any court in the United States unless (1) the law applied in the court's adjudication was consistent with the protections for free speech provided by the First Amendment to the United States Constitution and the law of the state where a plaintiff seeks to enforce the foreign judgment or, at least, the First Amendment would allow liability on the facts of the case, 28 U.S.C. § 4102(a)(1); (2) the rendition of the judgment is consistent with the due process principles of the United States Constitution, 28 U.S.C. § 4102(a)(2); and (3) the judgment is consistent with protections that the

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Communications Decency Act, 47 U.S.C. § 230, affords to providers of interactive computer services.

I have no basis for making a judgment whether Australian law gives you a fair chance of securing a judgment of liability. But I see no reason to believe that your client could prevail on any of the three SPEECH Act prongs mentioned above, and Trkulja would have to meet all of them to secure enforcement of an Australian judgment and hence avoid the mandatory award of attorney fees for which the SPEECH Act provides, 28 U.S.C. § 4105. I might add that California has an anti-SLAPP statute, which would likely apply to any action you might bring to enforce an Australian judgment, and would provide an alternative basis for an award of attorney fees against Trkulja.

There are several reasons why the SPEECH Act would bar enforcement. First, neither Masnick, nor indeed Timothy Geigner, the author of the article on Techdirt about which your client is exercised, called your client a gangster. If anything, Geigner's 2012 article, https://www.techdirt.com/articles/20121113/5502421032/australian-court-google-must-pay-guy-200k-due-to-image-search-turning-up-gangsters.shtml, expressed sympathy with your client's concern about the assumption that he is a gangster arising from the fact that he suffered a gunshot wound from having been, apparently innocently, in the wrong place at the wrong time. And this discussion occurred in the course of making legitimate comments about litigation in which your client prevailed, which the author suggests is based on a very wrong-headed public policy. Your letter's only complaint is not about the language of the blog piece itself, but rather about an offhand comment that some anonymous person placed on the blog, identifying Trkulja as a "gangster." https://www.techdirt.com/articles/20121113/05502421032/australian-court-google-must-pay-guy-200k-due-to-image-search-turning-up-gangsters.shtml#c332. Indeed, your letter admits that you have in mind to sue Masnick as a "moderator" for having failed to comply with what you say is a duty under Australian law for anyone who runs a discussion forum to **act** as a "moderator" and thus to pick and choose among comments. But this comment does not reflect Masnick's having intentionally directed tortious conduct at your client in Australia and is not a basis for subjecting him to personal jurisdiction in Australia.

Second, the comment was published more than three years ago, and hence is outside the one-year statute of limitations that the California courts apply to libel claims. California applies the single publication rule to Internet statements, so the fact that the comment remains on the blog today does not get your client out from under the timeliness bar.

Third, the single word "gangster" is likely to be treated by California libel law, and by the First Amendment, as jocular or as rhetorical opinion, rather than as a statement of fact. Libel suits can only be based on false statements of fact, not expressions of opinion. In that regard, although at the outset of your letter you suggest that the defamation of which you complain is the 2012 comment to which Trkulja's pro se demand letter was aimed, some of the five numbered points on the first page of your letter might be taken as suggesting that, simply by discussing Trkulja's pro se demand letter on his blog and rebutting it, point by point, Masnick's December 1, 2015 post further defamed him. But you

do not identify a single factual inaccuracy in the latter article, and Masnick's opinions about the soundness of Trkulja's contentions are not actionable under either United States or California law. The fact that someone might think the less of your client if they are persuaded by Masnick's reasoning does not make his opinions defamatory. I would be disappointed to learn that such pure opinions are actionable in Australia, but given that Masnick is not amenable to jurisdiction there, I need not investigate that question.

Fourth, because Trkulja is a limited purpose public figure by virtue of having been a plaintiff in the Australian litigation, he would have to prove by clear and convincing evidence that, at the time of publication, Masnick either knew that use of the word "gangster" was false, or published that word with reckless disregard of the probability that the statement was false – that is, that the publication was with actual malice. There would be no basis for such a contention. An unsworn and unsupported statement in a lawyer's letter, asserting his client's innocence, is not enough to put a blogger in the position of leaving the comment posted with actual malice, and in any event, in American law the blogger's state of mind at the time he received the lawyer's letter is irrelevant.

For all of these reasons, I see no reason to believe that you can surmount the hurdle that 28 U.S.C. § 4102(a)(1) would pose to your possible enforcement of an Australian defamation judgment here in the United States, even assuming that you could secure one. Given the lack of basis for personal jurisdiction, I see no reason to believe that you could surmount 28 U.S.C. § 4102(a)(2). Finally, because the comment was published on a forum on which any member of the public may express his or her opinion, Masnick qualifies as a provider of an interactive computer service; indeed, given the admission in your letter that your theory of liability turns on what you claim to be a duty to moderate under Australian law, your enforcement action would fail under 28 U.S.C. § 4102(a)(3).

I note that your letter contains a number of citation-free bullet points about the non-application of the SPEECH Act, about the enforceability of the judgment that you hope to obtain in the courts of the United States, about the "numerous judgments" that your firm has supposedly enforced in "[Masnick]'s jurisdiction," and the like. If you have citations and specifics to back up your assertions, I am ready to consider them.

Finally, your emails to Masnick (and, apparently, one to California lawyer Kenneth White, https://popehat.com/2016/02/15/milroad-trkulja-is-not-a-gangster-stuart-gibson-is-i-suppose-a-lawyer/,) consistently refer to analyses with which you disagree as "dribble." Actually, I believe that what you are trying to say is "drivel."

Sincerely yours,

Paul Alan Levy