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March 22, 2006

VIA FACSIMILE AND U.S. MAIL

Mathew D. Staver, Esq.
Liberty Counsel
P.O. Box 540774
Orlando, Florida 32854

Re: Ex-Gay Watch/Exodus International

Dear Mr. Staver:

I am writing on behalf of Michael Airhart in further response to your letter dated March 1, 2006.

As we advised you last week, Mr. Airhart respects the intellectual property rights of others and has not infringed any copyright or trademark rights that Exodus International ("Exodus") may have. Your assertion that Mr. Airhart's republication of an image from justinsomnia.org "infringes on the intellectual property rights of Exodus" cannot withstand serious scrutiny. Copyright and trademark rights are limited exceptions to the First Amendment, and neither provides your client a license to quash the use of its copyrighted expression or trademarks by another who is communicating ideas or expressing points of view. Exodus may desire to heed its "call[ing] to encourage, strengthen, unify and equip Christians to minister the transforming power of the Lord Jesus Christ to those affected by homosexuality" without the distraction of commentary or criticism from those who hold different views. However, Exodus has no right to curtail free speech, and its frivolous threats of litigation find no support in law.

We understand that the image at issue, which you identify as an altered version of a photograph that first appeared at Exodus's website, was originally posted by Justin Watt on his blog at justinsomnia.org. The original photograph was of a billboard that Exodus erected to promote its message of "freedom from homosexuality through the power of Jesus Christ." The billboard consisted of two words – "Gay? *Unhappy?*" – written across a non-descript background with a barely visible slanted "e," which you identify as Exodus's "E" logo mark, in the bottom left corner. Centered beneath the text was the address for Exodus's website (www.exodus.to). Notwithstanding Exodus's selection of a Tonga domain extension for its

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website, we understand from your letter that Exodus has erected its billboard not in Tonga, but instead "across America and online."¹

In the altered image, to which Exodus objects, the text "Gay? *Unhappy?*" is replaced with "Straight? *Unhappy?*" and the web address is changed from www.exodus.to to www.gay.com. We understand that the original billboard is utilized by Exodus as part of its campaign to abolish the "sin" of homosexuality by encouraging gays and lesbians to leave their "unhappy" existences and to join Exodus on a journey towards a heterosexual or celibate lifestyle. The altered image, which we understand has only been posted on non-commercial blogs, ridicules this message by suggesting that perhaps it is heterosexuals, and not homosexuals, who would benefit from a lifestyle change. The altered image is quintessential parody.

Mr. Airhart posted the parody on his blog at www.exgaywatch.com ("Ex-Gay Watch"). Ex-Gay Watch provides a counterpoint to the unsubstantiated assertions and propaganda of ex-gay ministries. Ex-Gay Watch is a non-commercial site, with the following decidedly non-commercial agenda:

Ex-Gay Watch believes that celibacy is a valid choice, but not the only valid one, for people who are attracted to the same gender.

The site affirms efforts to reduce the incidence of sexual addiction, depression, divorce, and domestic violence across all of society.

The site opposes laws that may infringe on freedom of speech, especially in regard to religion or sexual orientation.

We oppose laws that compel government, businesses, churches, or individuals to discriminate against people on the basis of religion or sexual orientation.

We believe private individuals, businesses and organizations have a **right** to discriminate, just as they have a right to commit other wrongs, but we believe the actual **choice** to discriminate is unethical and worthy of opposition.

We view with concern the weak science, religious biases, binge behaviors, and partisan politics that are, unfortunately, common among ex-gay political activist leaders and spokespersons.

¹ Exodus's selection of the ".to" domain is nonetheless oddly appropriate given that, in Tonga, sexual activity among two consenting adult males is a crime punishable by imprisonment for up to ten years.

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We believe that the manipulation of human sexuality and personality to serve religious or political agendas is harmful to gays and ex-gays – and a threat to the health and diversity of religious communities.

Since the ex-gay movement currently abides by no published standard of accountability, we encourage the formation of uniform standards by which the beliefs, practices, and performance (success and failure rates) of individual ex-gay programs can be independently measured and rated.

Mr. Airhart believed (and believes) that Mr. Watt's parody aptly comments upon and ridicules the original Exodus billboard and the ex-gay message it encapsulates. Accordingly, Mr. Airhart determined that the parody was an appropriate posting for Ex-Gay Watch.

Even assuming Exodus's billboard constitutes protectable expression under the Copyright Act, Mr. Watt's parody, and Mr. Airhart's posting of the parody on Ex-Gay Watch, are protected as fair use under Section 107 of the Copyright Act, 17 U.S.C. § 107. All of the fair use factors weigh heavily against your client:

First, the purpose and character of the parody is purely non-commercial. The parody was prepared and has been used solely to comment upon and ridicule the original Exodus billboard and its ex-gay message. The parody is highly transformative, and it turns the message of the original billboard on its head. Mr. Watt has thus created "the sort of social criticism and parodic speech protected by the First Amendment and promoted by the Copyright Act." Mattel Inc. v. Walking Mountain Prods., 353 F.3d 792, 803 (9th Cir. 2003). No court will have difficulty discerning the criticism of the Exodus billboard in Mr. Watt's parody.

Second, Exodus's allegedly copyrighted work is not the type of creative work that is at the core of intended copyright protection. Rather, the original billboard is an advertisement for Exodus and its "Christian referral and information network services." The parody, by contrast, serves no purpose *other than* to comment upon and ridicule the original. This is the rare case in which the parody falls closer to the core of intended copyright protection than the original, and where the second fair use factor therefore favors the parodist.

Third, the extent of Mr. Watt's copying was justified in light of his parodic purpose and the medium used. "Copyright infringement actions generally involve songs, videos, or written works. Because parts of these works are naturally severable, the new work can easily choose portions of the original work and add to it." Id. at 804 (citations omitted). Here, the allegedly copyrighted material is a billboard. Mr. Watt altered a photograph of the billboard so as to imbue it with a different character. Indeed, Mr. Watt altered all but one

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word from the original billboard. "Gay" became "Straight," and "www.exodus.to" became "www.gay.com." The amount of Mr. Watt's copying was justified in light of the parodic, non-commercial purpose of his work. *Id.*

Fourth, neither Mr. Watt's creation nor Mr. Airhart's posting of the parody has caused or will cause any *cognizable* harm to Exodus. Because of the parodic nature of Mr. Watt's work, it is highly improbable that it will serve as a substitute for Exodus's Christian referral and information network services. It is conceivable, of course, that Mr. Watt's biting criticism of the original billboard may damage Exodus by ridiculing its message, but this harm is not cognizable under the Copyright Act. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994). "Because 'parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically,' the role of the courts is to distinguish between '[b]iting criticism [that merely] suppresses demand [and] copyright infringement, [which] usurps it.'" *Id.* (citations omitted). Mr. Watt's parody can do only the former.

Exodus's attempt to quell free speech fares no better under trademark law. Even assuming that Exodus has trademark rights in the slanted "e" that is barely visible in the parody, there has been no infringement of those rights. "[T]he sweep of a trademark owner's rights extends only to injurious, unauthorized *commercial uses* of the mark by another. Trademark rights do not entitle the owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view." *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811 F.2d 26, 29 (1st Cir. 1987). The federal and state trademark laws do not permit a trademark owner "to enjoin the use of its mark in a noncommercial context found to be negative or offensive," and thus to "shield itself from criticism by forbidding the use of its [mark] in commentaries critical of its conduct." *Id.* at 33. Mr. Watt's and Mr. Airhart's blogs provide a non-commercial forum for discussion, debate, commentary, and criticism, including with respect to the very ideas that Exodus extols. Indeed, Mr. Airhart's blog and the transformative message of the parody are so overtly antithetical to Exodus's mission that no one could be misled by the barely visible "e" into believing that the parody or the blogs on which it appears are somehow sponsored or authorized by your client.

This is not a close case. Just as the ex-gay movement often uses weak science in support of its agenda, so Exodus is attempting to use weak law to curtail Mr. Airhart's freedom of speech. It is unfortunate that many of Exodus's targets have no choice but to turn to "Wikipedia" to resist Exodus's bullying tactics. Yet, this is one instance in which "Wikipedia" appears to have a better understanding of First Amendment principles than Exodus's own counsel. The particular parody at which your letter is directed no longer appears at Ex-Gay Watch. However, Mr. Airhart does not and will not agree to refrain from making any lawful use of Exodus's images or trademarks in the future exercise of his freedom of speech.

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Nothing herein is intended as a complete statement of Mr. Airhart's rights, remedies, or defenses, or of the facts supporting Mr. Airhart's position. Nothing herein shall constitute a waiver of any rights or remedies that Mr. Airhart has or may have at law or in equity, all of which are expressly reserved.

Sincerely yours,



Robert N. Klieger

cc: Michael Airhart