

LAW OFFICES OF CYRUS & CYRUS

----- A PROFESSIONAL LAW CORPORATION -----

9935 South Santa Monica Boulevard
Beverly Hills, California 90212

Tel: (310)623-1676

Fax: (310)271-6893

Website: www.cyrusandcyrus.com

SENIOR ATTORNEY
CYRUS JOHN NOWNEJAD.

OF COUNSEL
CYRUS S. NOWNEJAD
BEVERLY SWANSON
CHARLES SNEATHERN
STEVEN M. SOKOLOFF
SCOTT BRODY
VICKI S. DALVA
SOHEILA JONUBI
GREG BURKE
RODERICK LINDBLOM
JOEL D. JOSEPH *Licensed in MD
DAVID BRANDON
SERGIO MANNINI * Licensed in N.J. and PA

November 25, 2009

PRIVILEGED – EVIDENCE CODE §§1152(a), 1154

www.4tube.com

Re: Cease and Desist Use of Tila Nguyen's (aka Tila Tequila) Video or
Notice of Intent to Sue www.4tube.com and Related Companies and Individuals

To whom it may concern:

This firm represents Tila Nguyen aka Tila Tequila ("Ms. Tequila") as her litigation counsel in connection with her claim for misappropriation arising from the unauthorized use of her personal and private video obtained from her stolen laptop by your company website, www.4tube.com ("4tube.com") (See <http://www.4tube.com/videos/59512/tila-tequila-sex-tape-leaked-blowjob-scene>).

The purpose of this letter is to inform you of the nature of Ms. Tequila's claims, to describe the level of your company's exposure represented by those claims, to explain how a swift resolution of this matter would greatly limit that liability, and to propose such a resolution.

A. FACTS GIVING RISE TO LIABILITY

Ms. Tequila is a highly successful actress and Playboy model, whose image appears on numerous magazines. She has appeared on the cover of major men's magazines published in this country, and as to the top publications, has done so multiple times. In addition, Ms. Tequila is an actress and has appeared in numerous productions as a host and/or actress, including, but not limited to, "I Now Pronounce You Chuck & Larry," "A Shot at Love with Tila Tequila," "A Shot at Love 2 with Tila Tequila," "MTV Video Music Awards 2008," "MTV Spring Break: Tila Tequila's Spring Break Fantasy Couple," "Tila Tequila's New Year's Eve Masquerade 2008," and "Pants-Off Dance-Off." We invite you to visit Ms. Tequila's website at www.tilashotspot.buzznet.com for a more complete review of her accomplishments in movies, television and print.

Ms. Tequila never authorized the use of her personal and private video to anyone, including but not limited to your company. Ms. Tequila's private video was saved in a file on her laptop, which was stolen from her. Although Ms. Tequila filed a police report regarding the stolen laptop, it was never found. Your company website is now showing the personal and private video obtained from Ms.

CYRUS & CYRUS

----- A PROFESSIONAL LAW CORPORATION -----

Tequila's stolen laptop. Accordingly, the unauthorized use of her video exposes you and each Defendant to considerable liability.

B. CEASE AND DESIST

A purpose of this letter is to demand that you, your company and anyone acting on your behalf (collectively, "You") immediately cease and desist any further unauthorized use or exploitation of Ms. Tequila's name, image or likeness, as well as any further sale, transfer, internet use, advertisements, or display of any photograph, picture, image, or video footage, of Ms. Tequila that depicts Ms. Tequila in any way. Please be advised, failure to immediately cease and desist with the unauthorized activity of using Ms. Tequila's name and likeness, *inter alia* will constitute an infringement on Ms. Tequila's legal rights under Federal and California State law. Continued use shall only enhance our punitive damage claim against you as stated below and perhaps subject your company to an injunction. Ms. Tequila is demanding that you cease and desist any and all illegal activity that you may have been or are engaged in against her.

Accordingly, we demand that you immediately comply with the following:

- (1) E-mail to me a written acknowledgment that you have ceased and permanently desisted from using, publishing, distributing, selling, licensing or otherwise exploiting the photos and video in any manner, including any other websites that you are affiliated with;
- (2) Inform every identifiable person and entity who viewed, purchased, copied and/or downloaded a copy of the photos and/or video from one of your websites of the following:
 - (a) You never had valid rights to use, distribute, publish or otherwise exploit the Photos or video, and therefore they never had valid rights to download or view any portions of it, and they still do not have any such rights; and
 - (b) Those who copied or downloaded the photos or video must cease and desist from any further distribution, publishing or exploitation of the photos or video in any manner, or face liability and damages based thereon.
- (3) Provide to me a detailed accounting of any and all monies that you and any affiliated websites have received from the use, publishing, distribution and any other exploitation of the photos and/or video;
- (4) Provide me with all copies of the photos and/or video in any media, whatsoever, including but not limited to any and all videotape, film, compact discs, DVD's, computer floppy discs, electronic mail, and provide to me a written confirmation of same; and
- (5) Provide to me a list of websites that you are affiliated with, a list of names, e-mail addresses, and other contact information of those persons and other entities who copied or downloaded the photos and/or video from your website(s) and/or have published, distributed or otherwise exploited the photos and/or video.

Please comply with the aforementioned within two weeks of the date on this letter. Absent compromise and compliance with the aforementioned, a lawsuit shall be filed against you.

C. LEGAL GROUNDS FOR LIABILITY

1. Violation of Common Law Right of Publicity

Under California common law, the unauthorized use of a person's image constitutes a violation of that person's right to the **exclusive** commercial exploitation of her name, image and celebrity. A misappropriation of that right of publicity gives rise to a claim for damages. Those damages include:

- The **commercial value** of the plaintiff's image;
- Any **lost income** the plaintiff suffered as a result of the unauthorized use (such as a loss due to the diminution in the market value of the plaintiff's image); and
- Any **emotional injury** the plaintiff may have suffered as a result of the unauthorized use.

2. Statutory Misappropriation of Image

In addition to her common law claim for invasion of privacy, a person who has suffered the misappropriation of her image also has a claim under California Civil Code section 3344. That section provides in part:

Any person who knowingly uses another's name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or his as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in computing the actual damages.

Thus, under Section 3344, Ms. Tequila is entitled to recover not only her actual damages, but is also entitled to recover the following from www.4tube.com:

- The **profit** each Defendant realized as a result of their unauthorized use of Ms. Tequila's image.
- A minimum award of **\$750.00** from each Defendant for **each** unauthorized use of Ms. Tequila's image made by each Defendant.
- A **mandatory** award of the **attorney's fees** incurred by the prevailing party in the action. Thus, even if Ms. Tequila only recovers the statutory minimum damages of \$750.00 per use, she is still entitled to recover **all of her attorney's fees**.

3. Federal False Advertising Claim

The Federal Lanham Act provides a cause of action to anyone harmed by false or misleading advertising. That act provides, in relevant part (15 U.S.C. §1125(a)):

CYRUS & CYRUS

----- A PROFESSIONAL LAW CORPORATION -----

a) Civil action

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or

any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which –

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

Thus, a claim under the Act arises where an advertisement falsely suggests that a person is associated with or endorses the advertiser's product or service. The damages awardable for a violation of the false advertising provisions of the Lanham Act, as set forth in 15 U.S.C. section 1117, are as follows:

- *Three times* Ms. Tequila's actual damages;
- Recovery of **each Defendant's profits**. (In the case of U-Haul Intern., Inc. v. Jartran, Inc. (1986) 793 F.2d 1034, the Ninth Circuit Court of Appeals held that even where the defendant had made no profit from a false advertisement, a court could properly award to the plaintiff as "profit" the costs that the defendant had expended on the false advertising campaign on the assumption that the defendant had benefited by at least that amount from the advertising campaign.);
- The recovery of the *costs of the lawsuit*; and
- *Attorney's fees*.

D. YOUR COMPANY'S EXPOSURE FOR DAMAGES.

1. The Commercial Value of Ms. Tequila's Image

Since 2003, Ms. Tequila has appeared on numerous television shows and national magazine covers. Consequently, her public recognition has increased as has the market value of her image.

2. Profits

As is discussed above, under Civil Code section 3344 and the Lanham Act, in addition to Ms. Tequila's damages, she will also be entitled to recover from your company all **profits attributable to the unauthorized** use it made of her image.

Of course, at present we do not know what profit each Defendant has collected, or will collect, from the present into the future. However, we anticipate that upon the completion of discovery, we will be able to establish Defendants' profits for this period are likely very substantial. Therefore, in considering our settlement proposal, it is important for each Defendant to be aware that in order to

establish the amount of recoverable profit, we will be entitled to conduct discovery regarding the gross income received by each Defendant over an extended period of time.

3. Attorney's Fees

As I noted above, Ms. Tequila's attorney's fees are recoverable under both Civil Code Section 3344 and the Lanham Act. Attorney fee awards are **mandatory** under Section 3344, and our attorneys charge a minimum of **\$375 per hour**. I estimate that our attorney's fee will well exceed **\$250,000** if this case is litigated to trial. You must also pay your attorney to defend you in this matter, which may be an additional **\$250,000** that you will have to pay.

4. Punitive Damages

In addition to actual damages and profits, punitive damages are also recoverable under both Section 3344 and under the common law right of privacy causes of action. Malice justifying the award of punitive damages may be established upon a showing that a defendant acted with willful or reckless disregard for the rights of others.

5. Treble Damages

As indicated above, under the Lanham Act, Ms. Tequila is entitled to three times her actual damages.

E. SETTLEMENT CONSIDERATIONS

1. Our Experience in Misappropriation Cases

This firm probably handles more misappropriation of image and likeness claims than any other firm in California. We regularly bring lawsuits against both closely held corporations and against some of the largest corporations in the publishing and entertainment industries and consequently we have unparalleled experience in the prosecution of these claims. We are prepared for, and regularly undertake, protracted litigation in this field. We are very knowledgeable of the economic forensic and marketing expertise of witnesses necessary to achieve substantial profit awards, and we have carefully cultivated relationships with the most competent experts in the field.

2. Your Attorney's Experience

Although we regularly litigate against some of the largest firms in the country, we rarely encounter opposing counsel who have a level of experience in these causes of action commensurate with our own. Repeatedly, we encounter attorneys who are otherwise very experienced in related practice fields (i.e. intellectual property specialists, copyright attorneys, etc.) but who, as a result of their inexperience with these misappropriation and false advertising claims, make very unsound predictions and recommendations to their clients regarding the level of exposure to liability faced by the client.

The end result is often that rather than having sought an early resolution of the claim, the defendant-client finds himself, after months of litigation, on the verge of a judgment against him not only for the profits and the plaintiff's damages, but also for the plaintiff's very substantial accrued attorney's fees. At that point even settlement is a much more costly affair than it would have been earlier in the case. In fact, in several such cases, **the attorney's fee awards have well exceeded the total damage and profits awards.**

In a trial that I won for my client, Heidi Nelson v. Excalibur Entertainment, Inc. (Case No. LC068431), we represented our client against one of the largest distributors of pornographic material in the country. From the outset of that case, it was clear that the defendant had made multiple unauthorized uses of the plaintiff's name on the defendant's website selling video tapes. As in your case, liability in Nelson was never truly at issue. The defendant, having chosen to forego our settlement proposals, the case proceeded through discovery and to trial. The court awarded only **\$35,250** for the unauthorized use of the plaintiff's name (47 uses at the statutory minimum of \$750 per use), the court nonetheless also made the *mandatory* award under Section 3344 of attorney's fees and costs in the amount of **\$193,023.48**. We also heard that in the course of the litigation, the defendant was charged more than **\$250,000** by its own counsel. **This means that the defendant's cost to defend this case was close to \$500,000 for a case where the actual award for the unauthorized use of the image itself was only \$35,250.**

Based on the foregoing, we strongly suggest that in the event you do seek the advice of counsel, ask your attorneys how many misappropriation cases (not copyrights, or trademarks) the attorney has either prosecuted or defended. Otherwise, you may find your company in a situation where your attorney is making excuses to bill you for his or her attorney fees to learn the law, in addition to which you will have to pay our attorney fees along with a huge claim to Ms. Tequila comprised of your net profits and her actual and punitive damages.

3. Early Settlement is in Our Clients' and Your Company's Best Interest.

As I stated at the beginning of this letter, the purpose of my discussions of the law applicable to this case is to give your company the *benefit* of this information and hopefully avoid what we feel is the unnecessary accrual of additional attorney's fees and costs both by your own counsel and by us. The reality is that Defendants' liability for the unauthorized use of our client's image is not in question. As such, the eventual award of our client's attorney's fees is a *certainty* if we proceed to trial. The only issues remaining will be: (i) what is the **amount** of our client's actual damages, and (ii) what **profit** has each Defendant made on Ms. Tequila's image.

We strongly believe that it is in the best interests of all parties to pursue a settlement of those issues and to make every effort to resolve this case without litigation. Once resort to litigation is made and Ms. Tequila's recoverable attorney's fees and costs begin to accrue, her incentive to settle will begin to decrease, and the cost of settlement will conversely increase as we approach trial.

4. Discovery Under Section 3344 and the Lanham Act is Very Intrusive.

As is discussed above, Civil Code §3344 and the Lanham Act allows Ms. Tequila to recover the profits your company made while advertising Ms. Tequila's image. Consequently, information regarding your company's operations and finances will be subject to our examination and review in the course of discovery. This includes extensive inquiry into the nature and cost of your advertising campaigns, as well as an extensive forensic accounting/audit of your entire company to determine the profits derived from the advertising campaign generally, and the use of the misappropriated image specifically. We also invariably request from the defendant their additional financial reports, such as profit and loss statements, and other necessary financial information.

Often, the scope of our right to conduct this inherently intrusive discovery comes as a very unpleasant surprise to defendants and often even to opposing counsel, resulting in resistance to compliance with our discovery requests. However, given the direct relevance of this information to the computation of damages and profits recoverable under these causes of action, we have been very

successful in compelling compliance by court order. Once faced with the prospect of being required to essentially lay bare their company's finances and operations to examination, the defendants often become eager to settle. However, once again, to the extent we have usually at that point accrued substantial attorney's fees, the cost of settlement will have likewise increased.

5. Jury and Court awards are surprisingly large in misappropriation cases.

The general lack of public knowledge regarding misappropriation claims under Civil Code §3344 often leads even attorneys to fail to appreciate the potential impact of the profits provision of that section. A fairly recent case involving Nestlé therefore caught the attention of both the public and the legal profession and highlighted the fact that even what appeared to be a minor use of a person's image could result in a very substantial award under Section 3344.

In that case a Glendale teacher who had worked as a model earlier in his life was awarded \$15.3 million of Nestlé's profits for the unauthorized use of a small image of his face on containers of Taster's Choice brand coffee. It should be noted that had Nestlé purchased the rights to this image prior to using it, they could have done so for probably less than \$3,000.

In addition, we have also researched jury verdicts and cases similar to Ms. Tequila's case to determine the means by which the courts assess damages and the amount of damages. In the leading California misappropriation of image case, *Lugosi v. Universal Pictures* 25 Cal.3d 81 (1979), plaintiff's estate sought damages from defendant's unauthorized use of plaintiff's image. Although the issue of the case was whether the plaintiff's estate could recover damages for defendant's unauthorized use of plaintiff's image after his death (which the Court denied), the Court stated, "[Plaintiff] in his lifetime had a right to create in her name and/or likeness... a right of value, which could have been transmuted into things of value or [Plaintiff] could, if he elected not to exercise such right, protect it from invasion by others by a suit for injunction and/or damages." *Id.* at 819. On the question of damages, the Court stated:

Because the use of [Plaintiff's] likeness in this context resembles a copyright or patent infringement, the well developed principles for determining damages in those contexts provide a useful guide. Plaintiff has the initial burden of proving the extent of the profits reaped by defendant through its misappropriation. However, where a portion of defendant's profits derives from other than the unauthorized use but defendant had commingled the sources of income, the defendant carries the burden of disentangling the contributions of the several factors which he has confused... Mathematical exactness in the apportionment is not required. However, the resulting allocation must favor the plaintiff (Emphasis added). *Id.* at 855-856 (Dissent of Bird, C.J.); *Sheldon v. Metro-Goldwyn Pictures Corporation*, 106 F.2d 45 at 48 (1939), *affd.* 309 U.S. 390.

Cases involving considerably smaller unauthorized usages have netted large amounts at trial. *Comedy III Productions Inc. v. Saderup* (Ca. Super. Ct. 1997) ended in a verdict of \$225,000 in 1997, despite the fact that the misappropriated images were not used for the purposes of advertisement, and were used only for some merchandising. In *Kardashian v. Sharma, M.D.* (Ca. Super. Ct. 1997) the jury verdict was \$412,000 dollars, \$300,000 dollars of which was in punitive damages. The actual unauthorized usage was only for a limited audience. The misappropriated image of the *Kardashian* case was also of a non-celebrity. The case at hand, which uses celebrity

CYRUS & CYRUS

----- A PROFESSIONAL LAW CORPORATION -----

image for the purposes of advertisement over a prolonged amount of time, for a huge audience, and across a large geographical area, would undoubtedly net a larger amount at trial. We have enclosed cases and jury verdicts so that you will have a frame of reference in evaluating the value of this case.

To the extent that a settlement could be reached upon an informal provision of the information necessary for us to obtain some indication of the actual sums recoverable by our clients, this intrusion into the operations of your company, and the accompanying cost and fees, could be avoided.

E. CONCLUSION

Because your company's liability in this case is not an issue, immediate initiation of suit in this case presents absolutely no risk to Ms. Tequila. However, our client also believes that a settlement short of litigation is in her best interest and consequently we wanted to provide all parties with the opportunity to reach a resolution informally before resorting to litigation. Accordingly, please consider the following:

1. Our Demand

It is hereby demanded that you immediately cease and desist from using Ms. Tequila's image in violation of Civil Code §3344 and the Lanham Act. Your company has a strong incentive to comply with this demand in that the damages from the continued unauthorized use of the image(s) will not only increase your company's liability for damages, but will also place all of its profits at risk for forfeiture.

2. Proposal

In this case the options are as follows:

a. Settlement

We can begin immediate settlement overtures and settle for a reasonable amount to dispose of this claim. If this claim does not settle on the basis of the settlement offer made at the end of this letter, further settlement negotiations may nonetheless be fruitful if you were to informally provide us with some basic product sales information for us to arrive at a "range" of the value of the claim. Following this brief exchange of information, we could settle the case by telephone.

b. Mediation

We can also hire the services of a private mediator (an experienced attorney or retired judge) to assist us in settling the case. This is useful in that the opinion of a third party can frequently educate a defendant such as your company and lead to a speedy resolution of the claim.

c. Litigation

If this case does not settle, we will proceed with litigation and the attorney's fees will begin to accumulate. Because of your company's liability in this case is not an issue, and Ms. Tequila's recovery of her attorney's fees assured, immediate resort to aggressive litigation presents no risk to our client. In our experience, by the time the court schedules the first mediation or settlement conference we will have accrued attorney's fees in the neighborhood of **\$250,000** and *your*

CYRUS & CYRUS

----- A PROFESSIONAL LAW CORPORATION -----

attorneys will have charged you over **\$250,000** (these cases present a larger workload for defendants). At settlement at that point would therefore be substantially more expensive.

d. Trial

As stated herein, our experience shows that if this case were to proceed to trial, your liability for attorney's fees alone would likely be in excess of \$500,000. Add to that your company's likely exposure for actual damages of a much as \$180,000, likely imposition of punitive damages and an augmented award of profits and it is clear that your company and its managers face an exposure for liability well in excess of \$1,000,000.

My client has authorized me to make an opening settlement offer of **\$280,000**. This offer will remain open for two weeks from the date of this letter.

I invite you to respond promptly. If within two weeks of the date of this correspondence I have not received from your client a counter offer, I will presume that you are not interested in pursuing informal avenues and I will begin aggressively litigating this case.

Please be advised, this offer, all statements herein, and attachments hereto, are privileged under *Evidence Code §§1152(a), 1154*, as part of a settlement negotiation.

Thank you for your prompt attention to this matter.

Sincerely,

Cyrus J. Nownejad
Law Offices of Cyrus & Cyrus, PLC
Attorney for Tila Tequila
cc: Tila Tequila