



Hermitage Capital Management

Attention: Legal Department
Vimeo LLC
555 West 18th Street New York
New York 10011

By Email: support@vimeo.com

Urgent
Not For Publication
Strictly Private and Confidential

9 August 2018

Dear Sir

Re: Notice of Data Protection Infringement under EU GDPR and Request for Removal Due to Infringement

<https://vimeo.com/ondemand/themagnitskyact>

We write on behalf of William F. Browder, the CEO of Hermitage Capital, the head of the worldwide justice campaign for Sergei Magnitsky, and author of "Red Notice: How I Became Putin's No 1 Enemy". Mr Browder is being defamed by content in the above referenced Film on www.vimeo.com which was uploaded by "Piraya Film AS".

We have previously written to you on 25 July 2018 regarding the same defamatory Film which has previously been uploaded to your website (and which you have removed). We enclose a copy of that letter for ease of reference and so as to dispense with the need to repeat the grounds for removal that were set out in that letter (although those grounds continue to apply).

Please be advised that the Film posted is not only defamatory but also violates the EU General Data Protection Regulation (GDPR), in force as of 25 May 2018. The principle subject of the video, Mr William F. Browder, expressly refused consent to the use of footage containing his image, voice, and other uniquely identifiable information prior to its posting, and so notified those responsible for posting it.

Given Mr. Browder's lack of consent to the use of this footage, there is no lawful authorization for its dissemination under the GDPR, which applies throughout the European Union. Accordingly, the video should be removed from your website due to its infringement of the GDPR. We note that it also breaches your privacy guidelines, which generally require consent for the use of a person's image and voice, and which permit Vimeo to remove content in which this consent has been withheld.

We therefore request that you remove the infringing (as well as defamatory) content.

1. *Infringing Content*

The Film includes footage of Mr Browder that was used without his consent. Based on misrepresentations from the filmmaker, Mr Browder provisionally agreed to sit with the filmmaker

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and be taped. As the footage appearing in the video was being filmed, he realized that the filmmaker was not acting in good faith, and had procured his consent through deception. Mr Browder then ended the filming, promptly and expressly revoking his consent for the use of his personally identifiable information in writing, to the filmmaker. Prior to the film being completed, and its dissemination anywhere, the producers of the Film, Piraya Films AS and the director Mr Nekrasov, were notified by a letter from Mr Browder's lawyers, Brown Rudnick, dated 11 May 2015 that no consent was given for permission to use footage of him, his office or his staff (copy enclosed).

We understand that for content to be considered for removal an individual must be uniquely identifiable by image, voice and full name. It is clear from even the few examples that we provide below that Mr Browder is uniquely identifiable to those users accessing the Film.

Extensive footage of Mr Browder is used throughout the Film without his consent:

- (i) He is identified by name on several occasions [2:01; 2:15; 2:26; 3:55; 4:09; 4:12; 1:14:10 – 1:14:13], including the name of his company [1:18:36; 1:29:18];
- (ii) Mr Browder's image is used throughout the Film [2:01; 4:09; 4:16; 4:57; 7:35 -7:51; 8:00 – 8:07; 8:16 – 8:23; 10:36 – 10:45; 12:00 – 12:23; 14:20 – 14:30; 14:43 – 15:08; 17:28 – 17:38; 19:25 – 19:39; 23:14 – 23:36; 27:47 – 27:53; 28:23 – 28:33; 31:14 – 31:40; 44:34; 53:57 – 54:00; 1:07:32 – 1:08:15; 1:08:22 – 1:09:02; 1:14:09 -1:14:13; 1:18:46 - 1:24:17; 1:29:20 – 1:29:29; 1:38:49 – 1:39:03; 1:41:36 – 1:41:44; 1:42:59 – 1:43:47; 1:49:28 – 1:51:35; 1:59:24 – 2:00:17]; and
- (iii) Mr Browder's voice is also used throughout the Film, including the use of his voice as a "voice-over" so as to falsely mislead the viewer that Mr Browder has been a willing participant in the Film [6:23 – 6:46; 6:53 – 7:10; 7:28 – 7:51; 7:56 – 8:00; 8:23; 9:01 – 9:23; 10:28 – 10:36; 11:54 – 12:00; 14:01 – 14:19; 14:32 – 14:42; 16:51 – 17:18; 17:25 – 17:27; 20:09 – 20:24; 21:31 – 23:13; 28:00 – 28:22; 28:38 – 29:07; 29:28 – 29:41; 30:08 – 31:12; 44:34; 1:07:30 – 01:08:09].

The content includes extensive, false, statements that Mr Browder and his associates were engaged in criminal activities, including fraud and tax evasion, of the type that would cause Mr Browder unwarranted harm. The legal implications of disseminating this type of content using personally identifiable information without the data subject's consent under the EU GDPR are discussed below.

2. *Violation of EU Law*

Article 6(1) of the GDPR states in pertinent part that data processing is only lawful if a data subject has given consent to the processing of his or her personal data with limited exceptions. These consist of processing that is "necessary" to carry out a contract; to comply with a legal obligation; to protect the vital interests of the data subject or another natural person; to perform a task carried out in the public interest; or "for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data."

No Consent. Article 7 of the GDPR states that a data subject has the right to withdraw his or her consent at any time, and once the consent has been withdrawn, it applies to any processing taking place after that withdrawal (in this case, 11 May 2015, years before its posting on Vimeo). Mr. Browder withdrew his consent to the use of his image, voice, and other personally identifiable information, and



so notified the persons who then engaged in the infringement of his privacy, prior to the dissemination of the defamatory video on Vimeo.

Exceptions to Consent Do Not Apply. The processing by Vimeo of Mr. Browder's personally identifiable information in the defamatory video is not "necessary" to carry out a contract or to comply with a legal obligation or to protect the vital interests of Mr. Browder or any other person. Nor is it necessary to perform a task carried out "in the public interest." As the UK Data Protection Authority, the Information Commissioner's Office, explains, this ground for processing only applies to processing of personal data in the exercise of official authority by government agencies for public functions, to carry out a legal requirement,¹ which is not applicable here. Finally, the content in the video does not meet the catch-all test of being "necessary for the purposes of legitimate interests pursued" by Vimeo or the producers of the defamatory film. As the UK Data Protection Authority explains, when a data subject would not reasonably expect you to use data in a particular way *or it would cause them unwarranted harm*, their interests are likely to override any justification for disseminating it.²

The video falsely charges that Mr Browder has engaged in criminal activity, including fraud and tax evasion. These statements are per se defamatory under common law. Regardless of whether Vimeo is willing to make an assessment of defamation under common law, they are obviously the type of statements which if believed would cause unwarranted harm to the data subject. And they take place in a video which includes as a substantial part of its content personally identifiable information of Mr Browder, including his voice and image, taken in a private setting, not a public one, through deception, and then used without his consent.

Obviously, it can never be "necessary" for any person to disseminate defamatory content which includes personally identifiable information of a data subject without their consent; nor can it be "necessary" for a person to disseminate false allegations of criminal conduct, that would cause them unwarranted harm, by using their personally identifiable information without their consent. If the contrary rule were to be accepted, the EU GDPR consent provision would be without meaning, as anyone could post any information about anyone without their consent, regardless of its truth, and regardless of the harm to the non-consenting data subject.

3. *Violation of Vimeo's Guidelines*

Vimeo states that it will generally remove videos that includes someone's image or voice without their consent.³

In the infringing and defamatory video, the content used without Mr Browder's consent includes his image, his voice, his full name, financial (business) information, and contact information. The content thus meets the test for Vimeo having the discretion to remove the content.

¹ UK Information Commissioners Office, discussion of law basis for processing public interest exception, <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/public-task/>

² UK Information Commissioners Office, discussion of "Legitimate Interest," at <https://ico.org.uk/for-organisations/guide-to-the-general-data-protection-regulation-gdpr/lawful-basis-for-processing/legitimate-interests/>

³ <https://help.vimeo.com/hc/en-us/articles/224978328-How-does-Vimeo-define-hateful-harassing-defamatory-and-discriminatory-content->



As discussed above, the content in which this personally identifiable information is provided contains statements that Mr Browder has engaged in criminal conduct, which are obviously of the type that cause him unwarranted harm. Accordingly, the content violates Vimeo's guidelines and should be removed.

4. *Request for Removal and Intention to Notify EU Data Protection Authorities*

For the reasons set forth above, we request that the content be removed as a violation of Mr Browder's data protection rights under the EU GDPR and of Vimeo's own guidelines.

Should Vimeo decide not to remove the content, we will file a formal complaint with the UK Information Commissioner's Office notifying them of the breach of UK Data Protection laws by all those involved with its dissemination, and take such other legal recourse as proper to the circumstances. We also continue to reserve our rights concerning the dissemination of the content on the previously asserted grounds (in our letter of 25 July 2018) that it is defamatory.

We would appreciate an urgent response and remain available to discuss this issue.

Yours faithfully



Laura Lewis

General Counsel for and on behalf of
Hermitage Capital Management