



April 10, 2019

Michael A. Cheah
General Counsel

By Email: nhiguera@tylerbursch.com

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25026 Las Brisas Road
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Re: Church United's Vimeo Account

Dear Ms. Higuera:

On behalf of Vimeo, Inc. (“Vimeo”), I am responding to your letter dated March 18, 2019 seeking restoration of Church United’s Vimeo account. Vimeo denies that it terminated Church United’s Vimeo account based upon any animus towards its religion or the sexual orientation (or former sexual orientation) of its head, Pastor Jim Domen. Instead, Vimeo terminated Church United’s account based upon a longstanding policy against content espousing sexual orientation change efforts (“SOCE”). This act of editorial discretion does not subject Vimeo to any liability under any applicable law. Vimeo is willing to permit Church United to create a new Vimeo account, but only if it agrees to refrain from uploading SOCE content.

I. BACKGROUND

A. Vimeo’s Prohibition on SOCE Content

Vimeo terminated Church United’s account for refusing to remove videos that promote SOCE in violation of Vimeo’s acceptable content policy. When Church United created a Vimeo account two years ago, it accepted Vimeo’s Terms of Service Agreement, <https://vimeo.com/terms>. In doing so, it agreed not to submit content that is “hateful, defamatory, or *discriminatory* or incites hatred against any individual or group.” Terms of Service § 5.2 (emphasis added). Vimeo’s Guidelines, which form part of the Terms of Service, expressly state that Vimeo has interpreted the prohibition on “discriminatory” content to “forbid content that displays a demeaning attitude toward specific groups, including . . . [v]ideos that promote Sexual Orientation Change Efforts (SOCE).” <https://help.vimeo.com/hc/en-us/articles/224978328-How-does-Vimeo-define-hateful-harassing-defamatory-and-discriminatory-content->. Vimeo adopted this guidance in 2014 after determining that SOCE-related videos disseminate irrational and stereotypical messages that may be harmful to people in the LGBT community. Specifically, pro-SOCE content posits that homosexuality as a mental disease or disorder can and should be treated.

B. Vimeo's Removal of Church United's Account

On November 23, 2018, Vimeo warned Church United that its content was violating Vimeo's Terms of Service. That day, Pastor Domen replied, asking what videos had been "marked." On November 26, 2018, Vimeo replied as follows:

Videos that promote sexual conversion therapy are not allowed per Vimeo Guidelines:

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

You have a number of videos that espouse this theory, which include but are not limited to:

<https://vimeo.com/301090562>
<https://vimeo.com/298070143/17292a8ae1>
<https://vimeo.com/285971208>
<https://vimeo.com/274175269>
<https://vimeo.com/273077603>

This kind of content is not allowed on the Vimeo platform. Please download your videos within the next 24 hours, as this will assure that you will be able to keep them upon closure of your account.

Thereafter, Vimeo received no indication from Church United that it was disputing Vimeo's moderation decision (until your letter of March 18, 2019). Church United did not attempt to conform to Vimeo's guidelines. Therefore, on December 6, 2018, Vimeo terminated the account.

Due to the time that has passed since the removal of Church United's account, we are no longer able to restore the account or any of its videos, even if we were inclined to do so. Thus, as a practical matter, Vimeo cannot comply with your client's request to restore its account. And as set forth below, Vimeo will not agree to host SOCE content uploaded by your client.

II. VIMEO'S DECISION IS NOT UNLAWFUL

Vimeo has not discriminated against Church United or Pastor Domen based upon religion or sexual orientation. Vimeo provides a video platform to a multitude of users, ranging from faith-based organizations to LGBT groups and individuals, and is committed to providing a space on the Internet that is free from discrimination based upon any protected personal characteristic. Vimeo has determined not to allow SOCE content on its platform based upon its potential to cause harm to LGBT persons. This is a neutral policy that was not adopted out of animus towards religion or sexual orientation. Vimeo applied this policy to Church United's

account because the account had uploaded SOCE content. Your letter does not dispute this.¹ Consequently, Vimeo is not liable to Church United under any legal theory.

A. Vimeo's Decision Is Consistent with its Terms of Service Agreement

Contrary to your letter, Vimeo did not act in bad faith or use SOCE as pretext for discrimination. Vimeo publishes clear guidance about SOCE content violating its Terms of Service and has done so for years. Given Vimeo's longstanding prohibition on this content, Vimeo's moderation decision was grounded in its Terms of Service and was not based upon an intent to discriminate upon any protected ground.

Further, Vimeo's decision to ban SOCE based upon the potential for harm is a principled one supported by evidence. Vimeo's determination to ban SOCE is supported by the same evidence that led to California's ban on providing SOCE-based therapy to minors. *See* Cal. Bus. & Prof. Code § 865.1 ("Under no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age."). The California legislature recognized that "[b]eing lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming." SB 1172, 2012 Cal. Legis. Serv. ch. 835, § 1(a). "The major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years." *Id.* California further found that efforts to change sexual orientation are not just ineffective, they may also be harmful:

[S]exual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, including confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.

Id. § 1(b) (citing 2009 report of American Psychological Association's Task Force on Appropriate Therapeutic Responses to Sexual Orientation); *see also id.* § 1(n); *Pickup v. Brown*, 740 F.3d 1208, 1232 (9th Cir. 2014) (California legislature acted rationally based upon "overwhelming consensus was that SOCE was harmful and ineffective"), *abrogated on other grounds by Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

B. Vimeo's Decision Does Not Violate the Unruh Act

The Unruh Act, California Civil Code §§ 51 *et seq.*, does not grant your client license to post what it wishes on Vimeo without regard to Vimeo's content guidelines. The Unruh Act was enacted to "create and preserve a nondiscriminatory environment in California business establishments by 'banishing' or 'eradicating' arbitrary, invidious discrimination by such

¹ In addition, Church United's YouTube account is rife with pro-SOCE content. *See* https://www.youtube.com/channel/UC411u_QWbDZ1IpzfPbKUFaA.

establishments.” *Munson v. Del Taco, Inc.*, 46 Cal. 4th 661, 688 (2009) (citation and quotation marks omitted).

Vimeo’s moderation decision—or its anti-SOCE policy—does not discriminate against anyone’s religion or sexual orientation. Instead, it merely bans a specific message that may be espoused by people of various (or no) religion and people of any sexual orientation, current or former. It is therefore a neutral rule of general applicability that is not discriminatory. *Cf. Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 876-90 (1990) (neutral law of general applicability does not violate free exercise clause even if it incidentally burdens religious practices).

Moreover, there is nothing “arbitrary” or “invidious” about Vimeo’s decision. An action is “arbitrary” when it was “not planned or chosen for a particular reason” or “not based on reason or evidence.” (Merriam-Webster.com, <http://www.merriam-webster.com/dictionary/arbitrary>). That is clearly not the case here, where Vimeo published specific guidance on this issue years ago based upon its finding that SOCE content may be harmful to LGBT persons.

Nor was Vimeo’s editorial decision “invidious.” Invidious discrimination perpetuates irrational stereotypes. *See Cohn v. Corinthian Colleges, Inc.*, 169 Cal. App. 4th 523, 528 (2008); *Pizarro v. Lamb’s Players Theatre*, 135 Cal. App. 4th 1171, 1175 (2006). Vimeo’s removal of your client’s content does not perpetuate any stereotype about anyone. Instead, it seeks to remove content that perpetuates irrational stereotypes based upon sexual orientation. Thus, far from violating the Unruh Act, Vimeo’s actions further the public policy goals that inform it.

C. Vimeo’s Decision Does Not Violate the California Constitution

The California Constitution, like U.S. Constitution, requires state action. *See Golden Gateway Ctr. v. Golden Gateway Tenants Assn.*, 26 Cal. 4th 1013, 1031 (2011). Although the California Supreme Court has ascribed a broader meaning to “state action” than the U.S. Supreme Court, it has only applied California’s version of the free speech clause to private actors who effectively provide an open and unrestricted forum for the public to, as your letter puts it, “use at will” (p. 2). *See id.* at 1032-33 (discussing cases). Vimeo provides no such forum. To upload content to Vimeo’s service, one must create an account and accept Vimeo’s Terms of Service, which place numerous restrictions on what content one may upload. For this reason, sharing videos on Vimeo is not the same as speaking in the proverbial town square or even distributing leaflets at a shopping mall.

Moreover, as discussed in more detail below in Part II.E, Vimeo has a countervailing—and indeed, far more compelling—free speech interest that is protected by California’s constitution: the right to make editorial decisions and not be forced to carry content that it considers harmful and discriminatory.

D. Vimeo’s Decision Is Protected by the Communications Decency Act

Section 230 of the Communications Decency Act immunizes service providers like Vimeo from “any action voluntarily taken *in good faith* to restrict access to or availability of material that the provider or user *considers to be* obscene, lewd, lascivious, filthy, excessively violent, harassing, or *otherwise objectionable*, whether or not such material is constitutionally

protected.” 47 U.S.C. § 230(c)(2)(A) (emphasis added). This broad federal immunity preempts any state law to the contrary. *Id.* § 230(e)(3). Thus, to the extent a claim could be stated under the Unruh Act or California Constitution based upon Vimeo’s removal of discriminatory content as, it would be preempted by Section 230.

Content that discriminates against or demeans a group of people based upon their sexual orientation undoubtedly qualifies as harmful content that a service provider may in good faith consider to be “harassing” or “otherwise objectionable.” *See Holomaxx Tech. v. Microsoft Corp.*, 783 F. Supp. 2d 1097, 1104-05 (C.D. Cal. 2011) (giving service provider benefit of the doubt with respect to its moderation of spam emails); *cf. also Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 (9th Cir. 2008) (under the CDA, “close cases, we believe, must be resolved in favor of immunity”). Accordingly, Vimeo cannot be held liable for removing your client’s videos or account.

E. Vimeo’s Decision is Protected by the First Amendment

The First Amendment of the U.S. Constitution protects Vimeo’s right to decide what content to include and not include on its platform. The Supreme Court has long held that an editorial decision by a publisher *not* to include content is itself protected by the free speech clause. *See Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“The choice of material to go into a newspaper and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.”). Courts have applied this principle to websites like Vimeo’s. *See, e.g., Publius v. Boyer-Vine*, 237 F. Supp. 3d 997, 1008, 2017 WL 772145, at *5 (E.D. Cal. 2017) (owner of a website has a “First Amendment right to distribute and facilitate protected speech”); *Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2014) (online publishers have a First Amendment right to distribute others’ speech and exercise editorial control on their platforms).

In this case, Vimeo has adopted an editorial position against SOCE content and has removed your client’s videos based upon that stance. Any law that attempts to impose liability on Vimeo for doing so would be guilty of impermissible viewpoint discrimination. And because Vimeo cannot possibly be considered a state actor under the U.S. Constitution, your client has no countervailing First Amendment interests. *See Prager Univ. v. Google LLC*, 2018 WL 1471939, at *6-8 (N.D. Cal. Mar. 26, 2018) (YouTube not a state actor for First Amendment purposes).

III. CONCLUSION

We reject any assertion that Vimeo committed discrimination. As a good faith gesture, we are willing to permit your client to open a new Vimeo account so long as it complies with Vimeo’s Terms of Service, including its prohibition on SOCE content.²

² Vimeo will vigorously defend any suit and will seek all appropriate remedies. Any claim must be brought in the state or federal courts located in New York County, New York, as required by Section 11 of Vimeo’s Terms of Service.

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Should you have any questions, please contact me directly.

Vimeo reserves all rights.

Yours very truly,

/s/ Michael A. Cheah

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