

December 6, 2013

By First Class Mail and Electronic Mail

Chaplain Gordon James Klingenschmitt, Ph.D.
Pray In Jesus Name Ministries
PO Box 77077
Colorado Springs, CO 80970

Re: Improper Use of the YouTube DMCA Process to Block Access To People for the American Way's Right Wing Watch YouTube Channel

Dear Dr. Klingenschmitt:

We represent People For the American Way (PFAW), the organization that sponsors the Right Wing Watch (RWW) blog and associated YouTube channel (RWWBlog). The YouTube videos are embedded in articles published on PFAW's RWW blog and posted on RWW's YouTube account in order to both educate the public and to facilitate public commentary. RWW's YouTube account has over 2,000 video clips with a combined 20 million views.

Over the past several weeks, you have filed a series of Digital Millennium Copyright Act ("DMCA") takedown notices with YouTube targeting video clips taken from your video program, PIJN News. DMCA takedown notices only should be lodged when a copyright owner has a legitimate belief that the challenged material is infringing their copyrighted works. You have no legitimate basis to hold such a belief and, therefore, should not have lodged the notices with YouTube. The videos you have challenged are protected by the fair use doctrine and therefore are non-infringing. 17 U.S.C. § 107 ("the fair use of a copyrighted work . . . for purposes such as criticism [and] comment . . . is not an infringement of copyright.).

First, the clips are noncommercial and transformative. PFAW is a nonprofit organization, and its RWW program is entirely noncommercial. RWW reports on statements made by religious and political public figures, including yourself, by extracting and publishing short and specific excerpts of those statements. Thus, these excerpts are placed in an entirely distinct news and editorial context, for entirely different purposes from those motivating the original work. As such, RWW's work is precisely the type of use the fair use doctrine was designed to protect. See generally Campbell v. Acuff-Rose, 510 U.S. 569, 579 (1994) (secondary use is transformative when it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."); see also Bill Graham Archives v. Dorling Kindersley, 448 F.3d 605 (2nd Cir. 2006) (secondary use was transformative where it was separate and distinct from the purpose for which the work was originally created); A.V. ex rel. Vanderhuy v. iParadigm, 562 F.3d 630 (4th Cir. 2009) ("copying and archiving of student papers" that "was completely unrelated to expressive content and instead aimed at detecting and discouraging plagiarism" was transformative because it served a distinct purpose."). Second, the original work, your show, is only minimally creative and therefore

merits only the thinnest copyright protection. Third, RWW uses only short clips, no more than necessary for the purpose of facilitating public commentary. Fourth, the RWW excerpts do not harm any market for your works. The RWW excerpts are plainly not a substitute for the original, nor do they invade any licensing market for your copyrighted works. Moreover, critical transformative uses rarely if ever supplant markets for the original material. Campbell, 510 U.S. at 591-92; see also Harper & Row v. Nation Enters., 471 U.S. 539, 567-69 (1985).

More broadly, the RWW blog and YouTube channel serve the public interest by advancing political criticism and debate. Nimmer on Copyright, § 13.05[B][4] (“the public interest is also a factor that continually informs the fair use analysis.”); see also Sony v. Universal, 464 U.S. 417, 431-32 (1984) (“courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest.”); Mattel v. Walking Mountain Prods., 353 F.3d, 792, 806 (9th Cir. 2003) (“the public benefit in allowing . . . social criticism to flourish is great.”).

Based on this legal analysis, your conduct and public statements, it appears to PFAW that you have lodged the DMCA notices not out of any genuine concerns for your copyrights, but rather for the purpose of causing YouTube to take down the RWW YouTube channel. You have publicized your campaign, and made clear that your efforts are motivated by your political disagreements with both RWW and some of the independent comments posted on the RWW’s YouTube account. RWW has challenged every takedown notice pursuant to YouTube’s counter-notification process, and every video has been restored following the statutory waiting period without any legal action for copyright infringement having been initiated by you. Nonetheless, you continued to submit separate notices, for multiple videos which appears to PFAW to be calculated to rapidly take down the account and disrupt PFAW’s business. Because YouTube has a publicly-stated policy of taking an account offline after three DMCA notices, your unfounded copyright allegations have caused YouTube to take down the RWW account entirely – twice. Based on your public statements, there is little doubt that this was your intended goal.

Your conduct with respect to the RWW YouTube channel must cease immediately. You are on notice that PFAW’s use of your videos constitutes fair use and that the DMCA provides that misuse of its procedures to shut down lawful speech can result in liability for “any damages, including attorneys’ fees and costs” that result. A number of other legal remedies also are available.

Sincerely yours,


Robert B. Wolinsky
Partner
robert.wolinsky@hoganlovells.com
D 202-637-8895


Corynne McSherry
Co-Counsel to People for the American Way
Intellectual Property Director
Electronic Frontier Foundation

cc: copyright@youtube.com