September 29, 2020

Via Email

Tynia Watson
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Dear Ms. Watson:

We write on behalf of Lindsay Ellis ("Ms. Ellis"), creator of the video titled, "Into the Omegaverse: How a Fanfic Trope Landed in Federal Court" ("Work"), in response to your email of September 3, 2020.

Ms. Ellis is a New York Times best-selling author and media critic. The Work is one of many videos Ms. Ellis has created to convey her critical analysis and social commentary in a way that is accessible and engaging to viewers, including the more than 1 million subscribers to her YouTube channel. The Work consists overwhelmingly of Ms. Ellis's original audiovisual content, accompanied by a relatively small number still images to corroborate and illustrate her views. To the extent any protected material is included in the Work in the form of still images, they are self-evident fair uses as a matter of law.

Your email states that the Work "use[s your] client's copyrighted content," but does not say what any of those uses are. Nor does your email indicate whether you believe any uses qualify as infringement. As you are presumably aware, "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, [or] teaching . . . is not an infringement," 17 U.S.C. § 107, and therefore is "wholly authorized by the law." *Lenz v. Universal Music Corp*., 815 F.3d 1145, 1151 (9th Cir. 2016).

It should be evident from the Work itself Ms. Ellis's uses of copyrighted content are lawful fair uses.

First, the Work is highly transformative. Ms. Ellis juxtaposed still images with her own original audio commentary, creating a new work consisting overwhelmingly of content she independently created. The Work contains a relatively small number of still images, including images of text excerpted from both *Born to Be Bound* by Addison Cain and *Crave to Conquer* by Zoey Ellis in order to illustrate to the viewer the works being discussed and Ms. Ellis's opinions regarding their literary genre, originality, and quality. While Ms. Ellis's purpose was partially commercial, the highly transformative nature of

the Work nonetheless tilts this factor firmly toward fair use. *See Nunez v. Caribbean Intern. News Corp.*, 235 F.3d 18 (2000) ("The more 'transformative' the new work, the less the significance of factors that weigh against fair use, such as use of a commercial nature.") (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

Second, the Work uses still images to illustrate historical facts. Courts have made clear that when the "use of the copyrighted work is not related to its mode of expression but rather to its historical facts, then the creative nature of the work matters much less than it otherwise would." *Bouchat v. Baltimore Ravens Ltd. P'ship*, 737 F.3d 932, 943 (4th Cir. 2013), *as amended* (Jan. 14, 2014) (internal quotation marks and citation omitted).

Third, the Work uses no more than necessary to effect Ms. Ellis's creative and transformative purpose. The video runs over an hour, and includes a comparatively small number of still images to reference relevant events, individuals, and publications (the majority of which are not of, by, or about your client), each displayed for short time periods. Under these circumstances, "the third factor will almost always weigh against the [plaintiff]," and in favor of fair use. *Sony Computer Entm't Am., Inc. v. Bleem, LLC*, 214 F.3d 1022, 1028–29 (9th Cir. 2000), *amended on denial of reh'g* (July 10, 2000) (Still image from video game was "an insignificant portion of the complex copyrighted work as a whole.").

As for the fourth factor, the Work's fleeting uses of portions of copyrighted content could not and did not cause any cognizable copyright harm. *See Nunez*, 235 F.3d at 24 (explaining that the fourth fair use factor is "concerned with secondary uses that, by offering a substitute for the original, usurp a market that properly belongs to the copyright holder") (internal quotations marks and citation omitted). Moreover, the critical nature of Ms. Ellis's commentary means "the law recognizes no derivative market" that could be affected. *Campbell*, 510 U.S. at 592. Given "the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions," the law "removes such uses from the very notion of a potential licensing market." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994).

All of these facts are apparent from the Work. Indeed, at least one online platform has received, and rejected, a DMCA takedown notices submitted on your client's behalf alleging infringement by the Work. Their inaction is further evidence of the non-infringing nature of the Work.

As you are aware, a copyright holder is required to consider fair use before sending a DMCA takedown notice. *Lenz*, 801 F.3d at 1135. And it must take that requirement seriously, or risk liability under Section 512(f) of the DMCA. *Id.* at 1154. Your client's failed attempt to take down the Work evinces a failure to meet this obligation.

Issues unrelated to copyright law have no place in a DMCA takedown notice. Yet the DMCA takedown notice of which we are aware, like your September 3 email, also

includes allegations of defamation. These allegations are irrelevant to copyright. *See Does 1-4 v. Arnett*, No. SACV 12-96-JST ANX, 2012 WL 3150934, at *4 (C.D. Cal. Aug. 1, 2012) (refusing to exercise supplemental jurisdiction because copyright and defamation claims "do not involve overlapping questions of law or fact").

They are also meritless.

The Work is not defamatory. It consists overwhelmingly of Ms. Ellis's opinions and views, which are not actionable. "Statements of opinion, however pernicious, are immunized by the First Amendment in order to insure that their correction [depends] not on the conscience of judges and juries but on the competition of other ideas." *Blatty v. New York Times Co.*, 42 Cal. 3d 1033, 1044 (1986) (internal quotation marks and citation omitted).

To the extent it includes factual assertions, those assertions are true. They are supported by and consistent with evidence, much of which the Work displays or references itself. Notably, Ms. Cain, is a best-selling author with a sizable and devoted online following. In other words, she is a public figure who must meet an especially high bar to prove defamation – which she cannot do here.

Accordingly, you must immediately cease sending takedown notices for the Work or any other of Ms. Ellis's videos. Please conirm your agreement to do so by October 14, 2020. Until then, please contact me at alex@eff.org or (415) 436-9333 x160 before submitting or authorizing the submission of any DMCA takedown notices with respect to my client's content.

Regards,

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