



October 26, 2020

VIA EMAIL

Tynia.watson@crowedunlevy.com

Tynia Watson
324 North Robinson Ave. Ste. 100
Oklahoma City, OK 73102

RE: Improper DMCA claims against Lindsay Ellis

Dear Ms. Watson:

I write in response to your letter of October 14, 2020 which, unfortunately, misstates both the facts and the law.

First, your suggestion that the Electronic Frontier Foundation and the Organization for Transformative Works have somehow colluded to undermine your client is ludicrous. EFF is legal counsel to Lindsay Ellis, on a pro bono basis, in connection with improper allegations made by you and your client. That representation is the full extent of EFF's involvement in this matter.

Second, as we explained in our September 29, 2020 letter, Ms. Ellis' video violates neither copyright nor defamation laws.

With respect to your defamation claim, none of your theories hold water. Ms. Ellis' video describes and comments on the developments in a lawsuit, sharing her conclusions but also explaining their basis. As I explained in my earlier letter, statements of opinion are protected by the First Amendment. Moreover, within the context of a video full of hyperbole and sarcasm, no reasonable viewer would view Ms. Ellis' comments as impartial reporting. Finally, as you concede, Ms. Cain is a public figure. To prove defamation, she must show that the "statements were made with knowledge of their false implications or with reckless disregard of their truth." *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990). Nothing in your letter suggests that standard could be satisfied with respect to the statements actually made in the video.

Third, your letter fails to address the main issue: defamation allegations are an improper basis for a DMCA complaint, and including such allegations in a DMCA takedown notice strongly indicates the sender is abusing the DMCA process. Ms. Cain has the right

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to use the DMCA to request the takedown of online material that she believes in good faith infringes her copyright. But “[i]f an entity abuses the DMCA, it may be subject to liability under § 512(f).” *Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2016). Relatedly, your claim that the use is not fair seems to rest entirely on Ms. Ellis’ inclusion of a small portion of Ms. Cain’s work in the video. But as you can see from the video itself, the portion used is a tiny fraction of the original work, and is transformed in two ways: 1) it is altered to obscure some words and highlight others; and (2) it is placed in a new and critical context, as needed to illustrate the subject matter of the video. And any harm to Ms. Cain’s market as a result of that criticism is not a harm copyright is intended to remedy.

Fourth, Ms. Ellis has never condoned or encouraged any kind of harassing behavior toward your client. Nonetheless, in recognition of the pervasive problem of online bullying, she has donated to the Kind Campaign the small amount of revenue the Work earned before being demonetized (as it remains).

In light of the foregoing, we decline to meet your demands. In particular, EFF will not apologize for its commitment to protecting content creators like Ms. Ellis. Nor will Ms. Ellis apologize for exercising her right to speak critically about public figures and their work.

Sincerely,



Alex H. Moss
Staff Attorney
Electronic Frontier Foundation