



Ms. Enid J.H. Karpeh
Executive Counsel, Legal & Business Affairs
ABC, Inc.
77 West 66th Street
New York, NY 10023

January 25, 2007

Via fax, e-mail, and US Mail

Re. Spocko's fair use of audio clips to criticize the ABC/KSFO content

Dear Ms. Karpeh:

The Electronic Frontier Foundation serves as legal counsel to anonymous blogger "Spocko" in the above-referenced matter.

As you know, on his blog (www.spockosbrain.com), Spocko has engaged in criticism of KSFO-AM talk show hosts for language the *New York Times* recently described as "racially insensitive, religiously intolerant or containing violent imagery."¹ In order to support his claims, and to allow his readers to consider the remarks themselves, Spocko posted short audio clips from the KSFO programs he was criticizing.

We write today to respond to your letter of December 21, 2006, sent on behalf of ABC, Inc., and KSFO to internet hosting company 1&1 Internet, Inc., regarding Spocko's blog. In your letter, you allege that Spocko's "flagrant use of KSFO's material is a clear violation of KSFO's copyright" and you "demand that [1&1 Internet] direct the owner of the site to remove the content immediately." Your letter resulted in 1&1 Internet pulling down Spocko's blog, forcing him to quickly find a new hosting service at a higher price.

Your characterization of Spocko's criticisms as copyright infringement is false. Spocko's use of these audio clips was clearly protected "fair use" under copyright law. While this conclusion should have been obvious to you and your attorneys before you sent the letter to Spocko's hosting service, we lay out the analysis here so that there can be no misunderstanding.

As you know, the fair use of copyrighted works for purposes such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. See 17 USC § 107: "Limitations on Exclusive Rights: Fair Use." The fair use doctrine is a necessary limitation to the exclusive rights granted to copyright holders and "is intended to preserve the values enshrined in the First Amendment." *Elvis Presley Enterprises v. Passport Video*, 357 F.3d 896, 898 (9th Cir. 2003). See also *Eldred v. Ashcroft*, 537 U.S. 186, 219-20 (2003). As one prominent commentator put it, "[f]air use should not be considered a bizarre, occasionally tolerated departure from the grand

¹ See Noam Cohen, *Bloggers Take on Talk Radio Hosts*, N.Y. TIMES, January 15, 2007, at <http://www.nytimes.com/2007/01/15/technology/15radio.html>.

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conception of the copyright monopoly. To the contrary, it is a necessary part of the overall design.” Pierre Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990).

Fair use status is determined by balancing four factors: the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use upon the potential market of the copyrighted work. *See, e.g., Hustler Magazine Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986). Taking these considerations into account, there is no doubt that Spocko’s use of the KSFO audio clips qualifies as noninfringing fair use.

Factor #1: The purpose and character of the use.

The use of copyrighted works for criticism and commentary is explicitly permitted under copyright law. As the Seventh Circuit Court of Appeals has stated, “one office of the fair use defense is to facilitate criticism of copyrighted works by enabling the critic to quote enough of the criticized work to make his criticism intelligible. Copyright should not be a means by which criticism is stifled with the backing of the courts.” *Chicago Board of Educ. v. Substance, Inc.*, 354 F.3d 624, 628 (7th Cir. 2003).

On his blog, Spocko posted audio excerpts of KSFO radio broadcasts in order to criticize its content and to provide context for his commentary about talk radio in the San Francisco Bay Area. This purpose falls squarely within the protections afforded by the fair use doctrine.

Factor #2: The nature of the copyrighted work.

The second fair use factor considers the nature of the copyrighted work at issue. Traditionally, this factor distinguishes “informational” and “functional” works from “entertainment” works, considering creative works as falling “closer to the core of intended copyright protection.” *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 586 (1994); *Wall Data Inc. v. Los Angeles County Sheriff’s Dept.*, 447 F.3d 769, 780 (9th Cir. 2006). Against this backdrop, courts have found that newspapers, television news reporting broadcasts, and indeed talk show material may be subject to liberal appropriation for fair use purposes. *Patry on Copyright*, 10:138 at 10-346 (2006). *See also, e.g., Nat’l Ass’n of Gov’t Employees v. BUCI Television, Inc.*, 118 F. Supp. 2d 126, 129 (D. Mass. 2000) (newspaper reporter’s acquisition, alteration, and distribution of videotape of copyrighted talk show program constituted fair use).

This second fair use factor also favors Spocko. The KSFO audio clips that he used to facilitate his criticism and commentary were taken from radio talk show broadcasts, which we presume KSFO considers fundamentally informational in nature.

Factor #3: The amount and substantiality of the portion used.

The third fair use factor considers “the amount and substantiality of the portion used in relation to the copyrighted work as a whole.” 17 USC § 107(3). From both a quantitative standpoint as well as a qualitative one, this factor weighs in Spocko’s favor. The clips Spocko posted on his blog were taken from programs that broadcast for hours each day and hundreds of hours per year. Yet none of these clips amounted to more than a small percentage of that show’s daily broadcast. In addition, none of the clips were qualitatively substantial. The KSFO hosts themselves have repeatedly asserted that the clips amounted to anomalies or understandable slip-ups that occasionally occurred in the hundreds of hours per year that they collectively appeared on the air.² Thus under the hosts’ own analysis, the clips cannot be said to be the “heart” of the copyrighted works.

Factor #4: The effect of the use upon the potential market for or value of the copyrighted work.

The fourth and final fair use factor considers “the effect of the use upon the potential market for or value of the copyrighted work.” 17 USC § 107(4). For this factor, it is important to note that the fact that the substance of the criticism may have led to financial harm to KSFO due to the withdrawal of advertisers is irrelevant. As the Supreme Court noted in *Campbell v. Acuff-Rose Music*, “when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because ‘parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically,’ ... the role of the courts is to distinguish between ‘[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it.’” *Campbell*, 510 U.S. at 591-92 (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)) (internal citations omitted).

As the Supreme Court has long recognized, there is no protectible market for criticism. *Id.* KSFO and ABC do not sell licenses to critics, nor does Spocko need to wait for such permission to be granted. Accordingly, any loss of ad revenue that results from Spocko’s discussion of KSFO broadcasts is irrelevant to a fair use analysis. With that removed, KSFO has no claim of any market harm due to the copying of the clips themselves. The fourth fair use factor, as do the other three, weigh in Spocko’s favor.

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² See, e.g., Martin Kasindorf, *Media Outlets Battle It Out Over Free-Speech Rights*, USA TODAY, January 24, 2007, at http://www.usatoday.com/news/nation/2007-01-23-free-speech-battles_x.htm (“Sussman repeated an apology for his Obama remark and said he sometimes went over the line in talking 20 hours a week.”).

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Far from being grounded in law, ABC/KSFO's complaints amount to nothing more than an attempt to silence an effective critic. Because those threats are legally baseless, they should not have been made in the first place. They have, however, caused Spocko harm and may continue to do so should they remain. In order to prevent any further harm to Spocko, we demand that you retract them immediately and do so in the same way the original claim was made: in a letter to 1&1 Internet, Inc., with a copy to us. Moreover, please be aware that further misrepresentation aimed at silencing Spocko's protected speech online³ may subject KSFO and ABC to liability under 17 USC § 512(f) (misrepresentation of liability under the Digital Millennium Copyright Act) and California's Business & Professions Code § 17200 (prohibiting unlawful, unfair or fraudulent business practices). EFF has successfully litigated cases against entities that misuse intellectual property law in order to silence critics⁴ and will vigorously defend Spocko against misguided efforts to limit his First Amendment rights.

Please direct all future communications regarding Spocko to me at the address below. may also be reached at 415-436-9333 x127 or mattz@eff.org to discuss this matter.

Sincerely,



Matt Zimmerman, Esq.
Electronic Frontier Foundation
454 Shotwell St.
San Francisco, CA 94110

cc Andreas Gauger, 1&1 Internet

³ While 1&1 Internet, Spocko's previous host, complied with your groundless legal threats, they were not in any way obligated to do so. 17 USC § 512(c) exempts online hosting providers from liability for any copyright infringement of their customers unless they receive a valid notification of such conduct, notification that you did not provide. See 17 USC § 512(c)(3) for the requirements of a valid notification.

⁴ See, e.g., *Online Policy Group v. Diebold*, 337 F. Supp. 2d 1195 (N.D. Cal. 2004) (finding that e-voting vendor "knowingly materially misrepresented" that publication of an email archive with "embarrassing content" constituted copyright infringement as its publication was clearly fair use, resulting in defendant's liability for damages and attorneys fees pursuant to 17 U.S.C. § 512(f)).