



ELECTRONIC FRONTIER FOUNDATION

Protecting Rights and Promoting Freedom on the Electronic Frontier

March 12, 2018

Kathryn Starshak
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BY EMAIL

Dear Ms. Starshak:

I write on behalf of the Southeast Alaska Conservation Council (SEACC) in response to your letter of February 28, 2018. In your letter, you claimed that SEACC's film *Irreparable Harm* infringes the copyright in a short promotional video owned by Hecla Mining Company ("Hecla"). You demanded that SEACC cease any reproductions or showings of its film. Please be advised that our client will not comply, and has no obligation to do so. Your client's demand has no basis in law and plainly seeks to interfere with protected expression.

SEACC's use of short clips in a critical documentary is a paradigmatic case of fair use under the Copyright Act. The documentary film uses only 28 seconds of footage from Hecla's promotional video, *Greens Creek - A Day in the Life*. This footage is displayed while a voice-over comments on Hecla's mining practices. In this context, all four statutory fair use factors strongly support a finding of fair use. *See* 17 U.S.C. § 107(1)-(4). We address each of these factors below.

Factor one, the purpose and character of the use, supports a finding of fair use because SEACC's use was for the classic fair use purpose of commentary and criticism. *See Los Angeles News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 940, as amended, 313 F.3d 1093 (9th Cir. 2002). Courts have repeatedly found similar uses to be highly transformative. *See City of Inglewood v. Teixeira*, No. CV-15-01815, 2015 WL 5025839, at *8 (C.D. Cal. Aug. 20, 2015); *Savage v. Council on Am.-Islamic Relations, Inc.*, No. C 07-6076 SI, 2008 WL 2951281, at *6 (N.D. Cal. July 25, 2008); *Lennon v. Premise Media Corp.*, 556 F. Supp. 2d 310, 325 (S.D.N.Y. 2008); *Video-Cinema Films, Inc. v. Cable News Network, Inc.*, No. 98-CIV-7128, 2001 WL 1518264, at *6 (S.D.N.Y. Nov. 28, 2001).

Factor two, the nature of the copyrighted work, also favors fair use. Hecla's promotional video has been published, and can be viewed free of charge, on YouTube. *See Video-Cinema Films, Inc.*, 2001 WL 1518264, at *7 (fact that work is published weighs in favor of fair use); *City of Inglewood*, 2015 WL 5025839, at *10 ("informational purpose" of video weighed in favor of fair use). In any event, the second statutory factor "may be of limited usefulness where the creative work of art is being used for a transformative purpose." *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 612 (2d Cir. 2006).

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The third factor, the amount and substantiality of the portion used, favors fair use because SEACC's documentary film uses less than 30 seconds of footage (out of the original's 3:39 running length) from Hecla's promotional video. *See City of Inglewood*, 2015 WL 5025839, at *11; *Savage*, 2008 WL 2951281, at *8. Moreover, *Irreparable Harm* does not use any of the audio from Hecla's video. Rather, consistent with the documentary's transformative purpose, the original audio is replaced by critical commentary. *See Lennon*, 556 F. Supp. 2d at 326-27.

Finally, the fourth factor, the effect of the use upon the potential market for or value of the copyrighted work, plainly favors fair use. Hecla's video was published for promotional purposes and is available for free. There is simply no market to harm. Even if Hecla did intend to generate revenue from its promotional video, SEACC's critical documentary is not a substitute for the original video. *See City of Inglewood*, 2015 WL 5025839, at *12. And if SEACC's commentary somehow harms the (nonexistent) market for Hecla's video through its criticism of Hecla's mining practices, that is not a recognizable copyright injury. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 593 (1994) (the fact that a work "may impair the market for derivative uses by the very effectiveness of its critical commentary" has no relevance under copyright).

Your letter did not even address fair use. Instead, you argued that Hecla did not lose its copyright by publishing on YouTube and that it retains its rights under 17 U.S.C. § 106. SEACC does not contend that Hecla's promotional video is in the public domain. Rather, for all the reasons given above, SEACC has made fair use of a short clip from the promotional video. *See Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1152 (9th Cir. 2016) (a fair use is not an infringement of copyright).

We sincerely hope you have the good sense not to trouble a court with your client's baseless copyright claim. Courts routinely award fees in cases where copyright owners make unreasonable assertions in an attempt to shut down critical speech. *See Katz v. Chevaldina*, 127 F. Supp. 3d 1285 (S.D. Fla. 2015); *City of Inglewood v. Teixeira*, No. CV-15-01815, 2015 WL 6146269 (C.D. Cal. Oct. 8, 2015); *Kanongataa v. Am. Broad. Companies, Inc.*, No. 16-CV-7382, 2017 WL 4776981 (S.D.N.Y. Oct. 4, 2017). Moreover, the practical consequence of persisting with your demand would be to draw attention to SEACC's documentary while making your own client appear to be unwilling to accept criticism. The correct course is for you to immediately withdraw your unfounded demand. Please let me know your response.

Very truly yours,



Daniel K. Nazer
Senior Staff Attorney