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**IN THE UNITED STATES COPYRIGHT CLAIMS BOARD**

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| BRAUN IP LAW, LLC<br>*CLAIMANT*<br><br>v.<br><br>JESSICA VAZQUES &<br>LILY MARSTON<br>*RESPONDENTS* | Case No: 23-CCB-0404 |

**REPLY PARTY STATEMENT FOR CLAIMANT BRAUN IP LAW, LLC**

Braun IP Law, LLC ("Braun IP Law" or "Claimant"), by and through its attorney, John J. Mariane, hereby presents its Reply Party Statement and swears and asserts, under penalty of perjury, that all facts stated herein are true and correct to the best of Claimant's and the undersigned's personal knowledge.

In consideration of the following facts and arguments, Claimant respectfully requests the Board find in favor of Claimant and hold that Respondents have infringed Claimant's copyright in the Work and that Claimant is entitled to damages in an amount no less than $12,962.85 USD and any other such remedies the Board finds just and fair.

Respectfully submitted,

Date: January 2, 2025

/s/John J. Mariane/
John J. Mariane
jmarianeiv@gmail.com
*Attorney for the Claimant*

**Respondent's Burden of Proof Was Not Met**

1. Claimant reasserts that Respondents do not dispute that Claimant owns a valid copyright in the Work (previously submitted Exhibit A). In addition, Claimant further reasserts that Respondents have waived any argument disputing the claim that Respondents used the work without authorization from Claimant and that, absent of a finding of fair use, Respondents are liable for infringement.

2. To that end, Claimant asserts that Respondents have failed to meet their burden in showing that their use was fair. Claimant also respectfully requests the Board to disregard Respondents' arguments regarding YouTube and its determinations of fair use, as per Respondents' own admission, "YouTube is not a judicial body and cannot definitively determine fair use." As a private platform, YouTube operates under the DMCA, which allows it to retain "afe harbor" protections by responding to copyright takedown notices. YouTube's refusal to remove content does not reflect a legal finding; it merely waives YouTube's ability to invoke the safe harbor for that specific content. *See Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1151 (9th Cir. 2016). Only courts or the Copyright Claims Board can adjudicate fair use disputes.

**Fair Use Analysis**

**Applicable Standards**

3. There is no presumption of fair use. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 581 (1994). Rather, fair use is an affirmative defense that must be raised and argued by a defendant. *See Harper & Row v. Nation Enterprises*, 471 U.S. 539, 561 (1985). As an affirmative defense, the burden of proving fair use falls on the defendant. *See Monge v. Maya Magazines, Inc.*, 688 F.3d 1164, 1170 (9th Cir. 2012). To meet their burden, Respondents are to provide "affidavits or other evidence" demonstrating that a particular factor weighed in their favor. *See*

*Whyte Monkee Productions, LLC v. Netflix, Inc.*, 97 F.4th 699, 706 (10th Cir. 2024). However, Respondents have provided no such evidence for any of the factors except the fourth factor, and the evidence provided does not tip that factor in Respondents' favor.

4. Regarding fair use, it is important to note that the "four statutory factors [may not] be treated in isolation, one from another." *Campbell*, 510 U.S. at 578 (1994). Additionally, because the application of fair use is case-specific, "a given factor may be more or less important in determining whether a particular use should be considered fair under the specific circumstances of the case." *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1260 (11th Cir. 2014). Thus, because the fair use factors are not a proverbial check list, "a party need not 'shut-out' her opponent on the four factor tally to prevail." *Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir.1991). That said, if the Respondents do not meet their burden on any of the factors, or if the factors weigh toward the Claimant, then Respondents' use of the Work was not fair and is infringement.

**Factor 1: Purpose and Character of Use – Transformative Use is Not Dispositive**

5. Respondents have failed to meet their burden to show that the first factor weighs in their favor.

6. Instead of providing any supporting evidence, Respondents merely make conclusory statements that their use is "transformative" or that they provided "commentary and critique" without providing any specifics. Indeed, without particulars, the Board has no reason to believe that the use was remotely transformative, let alone so transformative that this factor weighs in Respondents' favor.

7. In fact, one particular line of Respondents' Response Party Statement suggests the opposite: "Respondents' podcast episode in question, (Exhibit B) provided commentary and critique on the broader implications of Claimant's actions, *including the allegations that prompted*

*the Claimant's creation of the work being discussed in this case*." *See* Response Party Statement of Lily Marston and Jessica Vazquez at para. 9 (emphasis added). By Respondents' own admission, one of the talking points Respondents' podcast is just the substantive content of the Work. Beyond discussing the "allegations" surrounding the Work—which Claimant notes are also in the Work itself—Respondents provide no explanation as to what their "commentary" or "critique" entail. Additionally, Respondents have submitted no supporting evidence that supports their claim that the use of the Work is transformative or that their use involves "commentary" or "critique."

8. Therefore, Respondents have failed to meet their burden in showing that the first fair use factor weighs in their favor. Assuming *arguendo* Respondents have met their burden, Claimant reasserts its arguments put forth in its Opening Party Statement to show that the first fair use factor weighs in Claimant's favor.

**Factor 2: Nature of the Copyrighted Work – Claimant's Work is Creative**

9. Respondents have failed to present any supporting evidence that this factor weighs in their favor. As such, Respondents have failed to meet their burden regarding this factor.

10. Respondents argue that the Work is not a "creative work" under this factor because it "lacks hallmarks of highly creative works, such as storytelling, artistic cinematography, or professional production." *See* Response Party Statement of Lily Marston and Jessica Vazquez at para. 41. However, this is not the standard of a "creative work" for this factor.

11. As explained in *Blanch v. Koons*, the Court noted that "expressive elements" copied from the Work are "better considered as part of the third fair-use factor..." *Blanch v. Koons*, 467 F.3d 244, fn. 7 (2d Cir. 2006). Rather, a work is expressive or creative with regards to the second factor, if the work is more fictional than factual in nature "with a greater leeway being allowed to a

claim of fair use where the work is factual…" *Id.* at 256 (citing Howard B. Abrams, *The Law of Copy-right*, § 15:52 (2006)."

12. To that end, Claimant argues that the Work is creative as it is not purely factual. Because Jeanette Braun is providing her side of a story in a dispute with another content creator, her personal opinions and perspectives are stated throughout the Work, and Courts have long held that pure opinions—*i.e.*, opinions not expressing a fact or couched as a fact—are distinct from facts. *See Flamm v. American Association of University Women*, 201 F.3d 144 (2d Cir. 2000).

13. Absent Respondents' unsupported conclusion that the Work is uncreative, Respondents have not provided any evidence showing that this factor weighs in their favor. Therefore, Respondents have failed to meet their burden in showing that the second fair use factor weighs in their favor. Assuming *arguendo* Respondents have met their burden, Claimant reasserts its arguments put forth in its Opening Party Statement to show that the second fair use factor weighs in Claimant's favor.

**Factor 3: Amount and Substantiality of the Use – Respondents Did Not Minimally Use the Work**

14. Respondents have failed to meet their burden to show that the third factor weighs in their favor.

15. Respondents argue that the third factor weighs in their favor because only 1 minute and 1 second of the Work (or 11.78%) was displayed during their podcast. However, this could not be further from the truth. "If the amount copied is very slight in relation to the work as a whole, the third factor might strongly favor the alleged infringer, but that will not always be the case." *Ringgold v. Black Entertainment Television, Inc.*, 126 F.3d 70, 76 (2d Cir. 1997) (citing *Iowa State University Research Foundation, Inc. v. American Broadcasting Companies, Inc.*, 621 F.2d 57, 59, 61-62 (2d Cir.1980).

16. As Claimant has previously asserted, Respondents did not use a minimum amount of the Work (*e.g.*, still shots and selective quotes). But even if they had, as stated in *Ringgold*, this does not necessarily mean Respondents' use was fair or even that the third fair use factor weighed in their favor.

17. In addition, Claimant maintains that Respondents used the "heart of the work" in their copying by showcasing an entire unmodified 1 minute and 1 second of footage that retains its distinctive elements (which, notably, also include substantive moments from the Work). *See Brownmark Films, LLC v. Partners*, 682 F.3d 687, 693 (7th Cir. 2012) (Unlike the court in *Brownmark Films*, this is not a case of parody, and so this factor should weigh heavily in favor of Claimant on these grounds).

18. As with the previous factors, Respondents have not provided any evidence showing that this factor weighs in their favor. Therefore, Respondents have failed to meet their burden in showing that the third fair use factor weighs in their favor. Assuming *arguendo* Respondents have met their burden, Claimant reasserts its arguments put forth in its Opening Party Statement to show that the third fair use factor weighs in Claimant's favor.

**Factor 4: Effect on the Potential Market – Claimant and Respondents Share Markets**

19. Respondents have failed to meet their burden to show that the fourth factor weighs in their favor. While Respondents do present four pieces of evidence regarding this factor: Exhibits C, D, H, and I, one of their pieces of evidence, Exhibit H, heavily undermines their argument rather than supports it.

20. Respondents submitted Exhibits C and D to demonstrate that the Work is an outlier and that most, if not all, of Claimant's TikTok content is legal analysis and commentary. However, Exhibit H shows the thumbnails of several of Claimant's TikTok videos. The videos shown in

Exhibit H include a video with the thumbnail stating "correcting what non-attorneys have said about copyright infringement," a video with the thumbnail stating "When Wish versions of reports steal copyright protectable works," a video with the thumbnail stating "My Firm Did Not Submit 400 or 500 takedowns on IG Against a Single Creator," a video with the thumbnail stating "Lawsuit filed and public statement released," a video with the thumbnail stating "You are the hardest person to look at…" as well as several videos with a black background in the thumbnail with white text replying to a user comment. Each of these videos either contain elements not involving legal analysis or commentary or are entirely devoid of legal analysis and commentary as the subject matter of this content centers around Ms. Braun's dispute with other content creators. As this can be classified as "internet drama," this absolutely competes with Respondents who admit that their podcast "focus[es] on internet drama." *See* Response Party Statement of Lily Marston and Jessica Vazquez at para. 2. In other words, Exhibit H shows that Respondents and Claimant share the same market.

21. Respondents also submit Exhibits H and I in an effort to demonstrate that their use of the Work does not serve as a replacement for the work. *See Id.* at para. 18. Because Respondents failed to explain how these pieces of evidence serve this purpose, Claimant can only guess that the view count on the Work is an outlier, with higher views than any other video posted around that time, and this was due in whole to Respondents' posting of their podcast.

22. However, assuming this is Respondents' argument, Respondents have failed to consider several other explanations behind the Work's view count. For example, the user Ms. Braun is responding to has a large following, and the mention of her and tagging of her profile would draw in her followers. As another example, the TikTok algorithm could have arbitrarily decided to push this particular video to more users. As yet another example, this is one of Ms. Braun's initial

videos into the genre of "internet drama" so it is also possible that the video had a larger appeal than her other content. Some or all of these factors can explain the view count of the Work, and none of them have anything to do with Respondents' podcast.

23. Further, because the heart of the Work (*i.e.*, the substantive points Ms. Braun makes in her video) were selected and presented in Respondents' podcast, users are incentivized to not watch the Work because they would have no need to see the points already presented in the podcast.

24. Therefore, for the foregoing reasons, Respondents have failed to meet their burden in showing that the fourth fair use factor weighs in their favor. Assuming *arguendo* Respondents have met their burden, Claimant reasserts its arguments put forth in its Opening Party Statement to show that the fourth fair use factor weighs in Claimant's favor.

**Claimant's Suffered Damages Properly Supported by Evidence**

25. Respondents state that Claimant's alleged damages are "speculative, unsupported by credible evidence, and grossly inflated." Respondents further attempt to undermine the evidence Claimant previously presented by suggesting that Claimant's licensing agreement fails to substantiate her claims. *See* Response Party Statement of Lily Marston and Jessica Vazquez at para. 25. However, Respondents have waived any such arguments, including arguments of foundation, relevance, and authenticity, once discovery closed. Despite Respondents wishing to the contrary, the previously presented licensing agreement supports Claimant's claims of damages.

26. As to Respondents' objections to Claimant's references and supporting evidence of TikTok "in-kind compensation," Claimant maintains that this information is necessary to establish the monetary value of the work and, thus, the approximate calculation of damages sustained as a result of Respondents' actions.

# Proof of Delivery

I hereby certify that on Thursday, January 02, 2025, I provided a true and correct copy of the Claimant Reply Party Statement to the following:

Lily Marston, represented by Lily Marston, served via MANUALEEMAIL

Jessica Vazquez, represented by Jessica Vazquez, served via MANUALEEMAIL

Signed: /s/ John J Mariane, IV