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UNITED STATES
COPYRIGHT CLAIMS BOARD

BRAUN IP LAW, LLC, CLAIMANT, V. JESSICA VAZQUEZ & LILY MARSTON RESPONDENTS.	CASE NO.: 23-CCB-0404

CLAIMANT'S REQUEST FOR RECONSIDERATION

Braun IP Law, LLC ("Braun IP Law" or Claimant"), by and through its undersigned attorney, hereby respectfully submits this Request for Reconsideration to the Copyright Claims Board's (CCB) Final Determination dated January 31, 2025 (the "Final Determination"). In support of its Request for Reconsideration, Claimant submits the following:

ARGUMENT

In its Final Determination, the CCB ruled in favor of Respondents Jessica Vazquez and Lily Marston (the "Respondents"), finding Respondents' secondary use of Claimant's copyrighted work (the "Work") to be fair under 17 U.S.C. § 107. Docket No. 86 at 12. In support of its ruling, the CCB found that (1) the first fair use factor, "at the very least, [] strongly tilt[ed]" towards Respondents; (2) the second fair use factor was "neutral…, or at best, slightly weigh[ed] against fair use;" (3) the third fair use factor weighed "somewhat in favor of fair use;" and the fourth factor weighed in favor of Respondents as "there [was] no meaningful evidence that the use of the Work affected the market or value of the Work." *Id.* at 8, 10-11. Claimant respectfully argues that the CCB materially erred in its findings regarding the first, third, and fourth fair use factors.

I. The First Fair Use Factor

There are three distinct steps to analyzing the first fair use factor: first, the court must determine if the secondary use was transformative and the degree to which it was transformative; second, the court must determine whether the use was commercial or non-profit in nature; and third, the court must weigh the commerciality of the secondary use against its transformative expressions. *See Cambridge Univ. Press, Oxford Univ. Press, Inc. v. Patton*, 769 F.3d 1232, 1262-67 (11th Cir. 2014); *See also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-85 (1994).

Here, the CCB focused extensively on the alleged transformative aspects of Respondents' secondary use of the Work while giving little to no consideration to the use's commercial nature. Docket No. 86 at 8-9. (The only reference to the commercial nature of Respondents' use of the work is that it is a "commercial podcast"). As such, Claimant respectfully contends that the CCB did not sufficiently account for the commercial nature of Respondents' secondary use nor properly weigh that commercial nature against the transformative elements of the secondary use. *Id.*

1. Respondents' secondary use, though featuring commentary and critique, recreates the creative expression of the original Work.

As mentioned above, the "initial inquiry under the first factor asks whether [d]efendants' use is transformative, *i.e.*, 'whether the new work merely supersede[s] the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message.'" *Cambridge Univ. Press*, 769 F.3d at 1262 (citing *Campbell*, 510 U.S. at 579).

Even if Respondents' secondary use features commentary and critique on the contents of the Work, Claimant disagrees that this finding "qualifies for the fair use defense" or "at the very least,… strongly tilts… towards" Respondents. *See* Docket No. 86 at 8.

"In *Hofheinz v. A & E Television Networks*… the court considered whether A & E's use of copyrighted film clips for a biography of actor Peter Graves was fair use. The court found that the biography was transformative because use of a movie trailer clip for a 'B' movie 'was not shown to recreate the creative expression reposing in plaintiff's film.'… The biography narrator introduced the movie clip as outdated and 'campy.'… Its purpose was to 'enabl[e] the viewer to understand the actor's modest beginnings in the film business.'" *Elvis Presley Enterprises, Inc. v. Passport Video*, 349 F.3d 622, 630 (9th Cir. 2003)[1] (citing *Hofheinz v. A & E Television Networks*,146 F.Supp.2d 442, 444-47 (S.D.N.Y. 2001).

So, while a court may identify that a secondary use features commentary and critique, the court must then determine whether that commentary and critique recreates the creative expression of the original Work. Only if the secondary use does not recreate the original expression of the work is the secondary use considered transformative.

[1] While *Elvis v. Passport Video* was overruled in *Flexible Lifeline Sys. Inc. v. Precision Lift Inc.*, 654 F.3d 989, 998 (9th Cir. 2011), it was only overruled on grounds not related to copyright law or fair use, and the 9th Circuit has reaffirmed its copyright rulings in *McGucken v. Pub Ocean Ltd.*, 42 F.4th 1149 (9th Cir. 2022).

Here, the CCB was correct in noting that commentary and critique does not *normally* recreate the creative expression of an original work. See Docket No. 86 at 8-9 ("when… [a] second video uses [a first video] to criticize that position, the use is 'fundamentally at odds with [the] original purpose' of the first work and, therefore, inherently transformative") (citing *In re DMCA Section 512(b) Subpoena to YouTube (Google, Inc.)*, 581 F. Supp. 3d 509, 519-20 (S.D.N.Y. 2022)). However, the secondary use at issue is a notable exception to this rule and does recreate the creative expression of Claimant's Work because the Work is, itself, a commentary and critique.

In the Work, Jeanette Braun comments on and critiques the accusations made by Tik Tok influencer Bekah Day. Bekah Day had previously asserted that Ms. Braun filed false copyright strikes against other content creators on Tik Tok. In the Work, Ms. Braun recites the accusations made by Day and, as the CCB characterizes it, argues against Ms. Day's positions. *See* Docket No. 86 at 3 and 8. Similarly, as the CCB found, Respondents used the Work to recite the positions made by Ms. Braun and then proceeded to argue against her. *Id.* at 8.

Because the creative expression of Respondents' secondary use, as identified by the CCB, is not dissimilar to that of the original Work, Claimant argues that the secondary use is significantly less transformative than other instances of commentary and critique. And so, this aspect of the secondary use should weigh far less in Respondents' favor than characterized by the CCB.

2. Respondents' secondary use is commercial in nature.

In addition to transformative expression, courts "must also consider under the first factor whether [d]efendants' use is for a nonprofit educational purpose, as opposed to a commercial purpose." *Cambridge Univ. Press*, 769 F.3d at 1263. "The Supreme Court has explained that '[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.'" *Id.* at 1265 (citing *Harper Row, Publishers Inc v. Nation Enterprises*, 471

U.S. 539, 562 (1985)). As such, secondary uses that are "commercial as opposed to nonprofit… tend[] to weigh against a finding of fair use." *Harper Row*, 471 U.S. at 562.

There is no dispute that Respondent's use was commercial in nature, and the CCB has found that the secondary use was commercial. *See* Docket No. 86 at 8. However, the CCB did not account for the commerciality of the secondary use in its analysis of the first factor. *Id.* (There is no discussion in the Final Determination that commercial uses of copyrighted works weigh against a finding of fair use or a weighing of Respondents' "commercial podcast" against the transformative expressions of their use).

3. After weighing the commercial nature of Respondents' secondary use against its transformative expression, the CCB should modify its finding regarding the first fair use factor.

"[T]he commercial or non-transformative uses of a work are to be regarded as 'separate factor[s]…." *Peter Letterese & Assoc. v. World Inst. of Scient.*, 533 F.3d 1287, 1309 (11th Cir. 2008) (alteration in original) (citing *Campbell*, 510 U.S. at 585). And it is the weighing of these two factors that determines how the first factor should be ultimately weighed.

For example, "the Supreme Court has recognized… that nonprofit educational use may weigh in favor of a finding of fair use under the first factor, even when nontransformative." *Cambridge Univ. Press*, 769 F.3d at 1263 (citing *Campbell*, 510 U.S. at 579 n. 11). Conversely, the Supreme Court has also held that "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use." *Campbell*, 510 U.S. at 579.

However, the Supreme Court has recently held that "[a]lthough new expression[s], meaning[s], or message[s] may be relevant to whether a copying use has a sufficiently distinct purpose or character, it is not, without more, dispositive of the first factor." *Andy Warhol Found. for Visual Arts v. Goldsmith*, 143 S.Ct. 1258, 1262 (2023). In fact, *Andy Warhol* is instructive here

and cannot be understated as the Supreme Court found the first factor weighed against a finding of fair use despite the secondary use "add[ing] new expression" to the original work. *Id.* In other words, though the secondary use was transformative to some extent, the Supreme Court held that the first factor as a whole weighed against a finding of fair use because its transformative elements were outweighed by other factors, such as the use's commercial nature. *Id.* at 1262-65.

Here, the CCB found that Respondents argue against the points made by Ms. Braun in the Work and, thus, put forth commentary and critique not found in the original. However, Claimant respectfully asserts that the secondary use's transformative elements were grossly overstated in the Final Determination and that Respondents' use was only somewhat transformative, at the most. Claimant further argues that any transformative elements that exist were balanced out by—if not outright outweighed by—the commercial nature of the use.

As such, Claimant respectfully asserts that the first fair use factor weighs, at the very least, slightly against a finding of fair use.

II. The Third Fair Use Factor

In analyzing the third fair use factor, courts must examine "both the quantitative and *qualitative* aspects of the portion of the copyrighted material taken." *Monge v. Maya Magazines*, Inc., 688 F.3d 1164, 1178 (9th Cir. 2012) (emphasis added) (citing *Campbell*, 510 U.S. at 586).

However, as with the first fair use factor, the CCB focused extensively on the quantitative amount of the Work taken by Respondents and made little to no findings as to the qualitative amount of the Work taken. Docket No. 86 at 10-11. In fact, the only reference to the qualitative amount of the Work taken is "[w]hile Claimant objects that what was taken was the "heart" of the Work, there is no evidence to support this position" which seems to imply that it was Claimant's burden to show that the amount that was taken was qualitative. *See Id.* at 10. However, it is

Respondent's burden to show that each fair use factor falls in their favor. *See Monge*, 688 F.3d at 1170 ("As with all affirmative defenses,… the defendant bears the burden of proof").

Had the CCB properly considered the qualitative amount taken by Respondents, Claimant respectfully asserts that the CCB would have found this factor weigh against a finding of fair use.

1. Qualitatively, Respondents took a substantial amount of the original Work.

In determining whether, qualitatively, a substantial amount of the original work was taken, courts often look to see if defendants use the "heart" of the original work. *See Elvis Presley*, 349 F.3d at 630 ("Regarding the qualitative nature of the work used, we look to see whether 'the heart' of the copyrighted work is taken—in other words, whether the portion taken is the 'most likely to be newsworthy and important in licensing serialization."). While plaintiffs can submit supplemental evidence showing that what was taken was the heart of the work, this is primarily a ruling issued on the courts based on the original copyrighted work and the secondary use alone. *See Monge*, 688 F.3d at 1170 (The court determined, based on the original work and the secondary use alone, that the "heart" of the copyrighted material was used).

Courts have found that selected use of unedited video clips often get at the heart of the work. *See Los Angeles News Service v. KCAL-TV Channel 9, KCAL-TV*, 108 F.3d 1119, 1122 (9th Cir. 1997) (The court found that a 30 second clip of 4 minute and 30 second video footage got at the heart of the work despite being only a "small part of the raw footage."); *Los Angeles News Service v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992) ("Although AVRS copied only a small part of the raw footage shot by LANS, it was the most valuable part of that footage… Thus the news programs AVRS copied included what LANS's customers thought was the best of the LANS footage--its 'heart.'").

Here, Claimant contends that Respondents have taken the heart of the Work in their copying. The clips used get to the core points and arguments made by Ms. Braun in her original

video. Further, the fact that Respondents specifically selected these clips from the original to argue against in the first place provides *prima facie* evidence that these clips were the most important moments of the work (*i.e.*, its "heart"). *See* Docket 80 at ¶ 44 (Respondents admit that what was taken was the introduction of the Work where Ms. Braun "refute[s]… the allegations against her; and while Respondents say they do not include any of the "subsequent reasoning," the clip they feature does in fact include Ms. Braun's primary argument in that she is "incapable of issuing a false copyright strike" in which Respondents, in turn, touch on).[2]

2. After weighing the qualitative aspects of the Work against the quantitative aspects of the Work taken, the CCB should modify its finding regarding the third fair use factor.

The courts in *L.A. v. KCAL-TV* and *L.A. v. Tullo* ultimately found the third factor weighed against a finding of fair use despite also finding that only a small portion of the video footages had been taken. Because what was taken contained the heart of the work, the qualitative taking far outweighed the quantitative taking.

Here, as mentioned above, Respondents copied the heart of the Work to discuss Ms. Braun's central arguments. And while Claimant does not dispute that only a relatively small portion of the Work was taken, this is outweighed by the fact that what was taken was the heart of the work. *See Bridgeport Music, Inc. v. Dimension Films,* 410 F.3d 792 (6th Cir. 2005) (noting that taking even 2 seconds of a work can be copyright infringement).

As such, Claimant respectfully asserts that the third fair use factor weighs against a finding of fair use.

[2] It should also be noted that what was taken was the introduction of the Work. Short-form content, especially Tik Tok videos, rely on presenting viewers with summaries and other eye-catching material upfront to encourage users to keep watching (and allow for those who scroll past to still see the most critical points of the video). The fact that the clips used by Respondents was the introduction to the Work is itself *prima facie* evidence that Respondents used the "heart of the work."

III. The Fourth Fair Use Factor

The fourth fair use factor is often the most important fair use factor. *See FameFlynet, Inc. v. Jasmine Enters., Inc.*, 344 F.Supp.3d 906, 913 (N.D. Ill. 2018) (citing *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014)) ("The Seventh Circuit has said that this factor is 'usually' 'the most important.'"); *See* also *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381, 1385 (6th Cir. 1996) (citing *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 566 (1985) ("[T]he Supreme Court has said that the most important factor is the fourth… (But see *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 926 (2d Cir.1994), cert. dismissed… suggesting that the Supreme Court may now have abandoned the idea that the fourth factor is of paramount importance)").

"The fourth fair use factor is 'the effect of the use upon the potential market for or value of the copyrighted work.'" *Campbell*, 510 U.S. at 590. "It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original." *Id.* (citing Nimmer § 13.05[A][4], p. 13-102.61 (footnote omitted); *Harper & Row*, 471 U.S., at 569). "The enquiry 'must take account not only of harm to the original but also of harm to the market for derivative works.'" *Id.* (citing *Harper & Row*, 471 U.S., at 568).

The Second Circuit provided additional clarity on this factor by "[making] clear that '[the court's] concern is not whether the secondary use suppresses or even destroys the market for the original work or its potential derivatives, but whether the secondary use *usurps* the market of the original work.'" *N.J. Media Grp. Inc. v. Pirro*, 74 F.Supp.3d 605, 622-23 (S.D. N.Y. 2015) (citing *Cariou v. Prince*, 714 F.3d 694, 708-09 (2d Cir.2013), cert. denied (emphasis original)). "The Second Circuit has concluded that an alleged infringer has usurped the market for copyrighted

works, including the derivative market, where the infringer's target audience and the nature of the infringing content is the same as the original." *Id.*

"In cases where courts have found the fourth factor to weigh in favor of the defendant, it was undisputed that Plaintiff had no intention of entering the market, or was unable to take advantage of use in that manner." *Otto v. Hearst Commc'ns, Inc.*, 345 F.Supp.3d 412, 432 (S.D. N.Y. 2018); *See Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 91 (2d Cir. 2014) (The fourth factor weighed in favor of fair use because the plaintiff conceded that it had no interest in exploiting the protected aspects of the work); *See also Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1496 (11th Cir. 1984) (The fourth factor weighed in favor of fair use when the secondary user "profits from an activity that the owner could not possibly take advantage of").

Here, Claimant respectfully asserts that the CCB erred on this factor in 3 ways: (1) the CCB mischaracterized Claimant's positions and arguments regarding this factor; (2) the CCB erred in finding that "there is no rational argument here that Claimant and Respondents were competitors or that use… acted 'as a substitute for the original;'" (3) the CCB erred in determining the transformative value of the secondary use, as discussed *supra*.

1. The CCB mischaracterized Claimant's position in the Final Determination.

In the Final Determination, the CCB stated that "Claimant even appears to argue that because other Braun IP videos discuss legal issues on the Internet, including issues related to her firm, Braun IP's typical videos can also 'be classified as "internet drama."'" Docket No. 86 at 11. This could not be further from Claimant's position. Claimant argued that Braun IP Law's typical videos are in the genre of "legal analysis and commentary" and that the Work is "an outlier." Docket No. 85 at ¶ 20. The Work is unlike Claimant's typical content in that it does not feature legal analysis or commentary. Rather, the Work is the result of Ms. Braun's disputes with other content creators and, thus, it is the Work, specifically, that is in the genre of "internet drama." *Id.*

The Final Determination goes on to say that "there is no evidence that Claimant's typical genre is internet drama or that the Work did not greatly deviate from Braun's typical posts, which are legal in nature to promote Braun IP's Business." Docket No. 86 at 11. Again, this mischaracterizes the positions of Claimant. Claimant does not dispute that the Work "greatly deviated" from Claimant's typical videos. In fact, Claimant argues this very point. *See* Docket No. 85 at ¶ 20. Furthermore, Claimant respectfully notes that, at the end of the day, the genre of Claimant's typical videos is irrelevant for this factor, as the inquiry is "whether the secondary use *usurps* the market of the *original work*," not other works typically made by Claimant. *See N.J. Media*, 74 F.Supp.3d at 622-23.

Claimant cannot understate the importance of this error, as it provides context for this entire factor of the fair use analysis. Because the Work is in the same genre as Respondents' secondary use, Respondents were in a position to usurp the market of the Work. Further, as discussed *supra*, the transformative value of the secondary use was grossly overstated in the Final Determination, meaning that commerciality plays a bigger role in determining market usurpation in this case than previously held (which, in turn, also distinguishes this case from the cases cited in the Final Determination, such as *Brown*, *Bill Graham*, etc.). Finally, because the Work is in the same genre as the secondary use, it cannot be argued that Claimant had no intention of exploiting that market or was incapable of doing so, as Claimant was already exploiting that particular market via the Work itself.

2. Respondents' secondary use usurps the market of the original Work.

As noted above, "an alleged infringer has usurped the market for copyrighted works, including the derivative market, where the infringer's target audience and the nature of the infringing content is the same as the original." *N.J. Media*, 74 F.Supp.3d at 622-23 (citing *Cariou*, 714 F.3d at 708-09).

Here, the target audience of the Work and the secondary use are the same. As the CCB found, the Work, "greatly deviate[d] from Braun's typical posts" because the Work is in the realm of "internet drama." *See* Docket 86 at 11 and Docket 85 at ¶ 20. Further, the CCB recognized the similarity in target audiences between the Work and the secondary use when it noted that audiences for both are "here for the tea and… drama." Docket 86 at 3.

To further stress this point, the target audience of the Work are individuals interested in the internet drama surrounding Ms. Braun. *See* Docket 86 at 2 ("[Braun] specifically says that viewers of the Work are likely 'here for the tea and here for the drama.'"). Similarly, the target audience of the secondary use are also individuals interested in the internet dispute between Ms. Braun and Ms. Day. *See Id.* at 4 ("Respondents had… been monitoring drama related to Braun when they filed the allegedly infringing episode…. Respondents' main story is dedicated to Braun.").

While this would be enough to show market usurpation under the Second Circuit's analysis, we can go further by intersecting the third factor's discussion into this factor's analysis. *See Cambridge Univ. Press*, 769 F.3d at 1260 (citing *Campbell*, 510 U.S. at 578) ("[T]he four statutory factors [may not] be treated in isolation, one from another"). As discussed above, qualitatively, Respondents used the heart of the Work in their copying. *See supra* at II. Respondents effectively substituted the original Work by taking the most critical portion of it. As such, viewers would have no incentive to watch the original and, thus, the number of views of the original Work (*i.e.*, its share of the market) is diminished.

3. Because the secondary use is not very transformative, its commercial nature presumes market harm.

However, market usurpation is not the end of the story, as the CCB correctly recognizes that "[t]he more transformative the secondary use, the less likelihood that the secondary use substitutes for the original." *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 382

F.Supp.3d 312, 330 (S.D. N.Y. 2019) (citing *Castle Rock Entertainment, Inc. v. Carol Pub. Group, Inc.*, 150 F.3d 132, 145 (2d Cir. 1998) and *Campbell*, 510 U.S. at 591. But, as discussed above with the first factor, Claimant has shown that the secondary use in this case is not especially transformative despite being a form of commentary and criticism. *See supra* at I.1.

In non-transformative and low transformative cases, we return to the question of commerciality: "[i]f the intended use [by defendants] is for commercial gain, that likelihood [of market harm] may be presumed." *Video Pipeline v. Buena Vista Home Entertainment*, 275 F.Supp.2d 543, 565 (D. N.J. 2003) (citing *A & M Records v. Napster*, 239 F.3d 1004, 1016 (9th Cir. 2001)).

Here, there is no dispute that the secondary use is commercial in nature. And so, following the rationale of the Ninth Circuit, the likelihood of market harm should be presumed in this case.

4. After accounting for all of the foregoing, the CCB should modify its finding regarding the fourth fair use factor.

Taking all of Claimant's foregoing arguments together, Claimant respectfully argues that the CCB should modify its findings to weigh this factor in Claimant's favor. Furthermore, because this factor is of such importance in this case, as with most cases, Claimant notes that this factor should weigh heavier than any of other factors.

Therefore, because Claimant has demonstrated that the fair use factors ultimately weigh against a finding of fair use, Claimant respectfully asserts that the above identified errors are material such that the Final Determination would have been vastly different but for those errors.

CONCLUSION

Based on the foregoing, Claimant respectfully requests the CCB grant this Request for Reconsideration and reverse its Final Determination and rule in favor of Claimant.

Dated: March 2, 2025

Respectfully submitted,

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Proof of Delivery

I hereby certify that on Sunday, March 02, 2025, I provided a true and correct copy of the Claimant's Request for Reconsideration 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